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# God is Great, Garvey is Good: Making Sense of Religious Freedom

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BOOK REVIEW

# GOD IS GREAT, GARVEY IS GOOD: MAKING SENSE OF RELIGIOUS FREEDOM

*Michael Stokes Paulsen**

*What Are Freedoms For?* is a thoughtful, elegant, warm, and thoroughly enjoyable book.[1] The question it poses is an important one and Professor John Garvey's answer is a wonderful challenge to prevailing orthodoxy: freedoms exist not to protect *choices* but to protect certain *values* that our society has deemed especially important. Not all choices, and not all values, are equally important. The point is not "freedom" as a value in its own right, but particular freedoms that are important each for its own reasons. The reason each freedom exists is to allow us to do something the law believes to be good. We must understand the values a particular freedom seeks to serve in order to have a proper understanding of its scope and meaning. We cannot start with a theory of "freedom" writ large if we hope to understand and apply the freedoms we have in the U.S. Constitution.

Garvey develops this thesis with his characteristic humble charm. His writing is gracious and lighthearted, of the sort that puts a permanent grin on the reader's face, gently persuading him to accept Garvey's sophisticated analysis as if it were obvious common sense. Every lawyer and law student should be required to read Garvey, in order to learn how to write clearly and persuasively. Dazzling insights waft up unassumingly from the pages, as Garvey carries on the conversation through a succession of interesting constitutional law topics that illustrate, perfectly, his general point: religious liberty, commercial speech (and freedom of speech more generally), freedom of association, sexual intimacy, group freedoms, children and the law, unconstitutional conditions.

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1 JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996).

Garvey's style is such that *What Are Freedoms For?* does not have obvious doctrinal opponents (or at least none in particular; Garvey does not name names). Yet his analysis has powerful, even radical, implications for how we think about important areas of constitutional law, and about rights in general. One almost might not be conscious of the way in which Garvey so effectively demolishes his opposition on some of the most controversial issues of the day.

At the risk of losing the overall sense of the book, or of creating a misleading sense of narrowness, I will focus in this review on only one of Garvey's subject matter areas, which I choose because it corresponds with one of my own interests: religious freedom. The treatment of religious liberty comprises just one small corner of this ambitious and broad-gauged book, but it is representative of the way in which Garvey's overall thesis challenges legal convention, in a delightfully counterintuitive (and, at a different level, refreshingly intuitive) way.

Garvey's claim is that we protect religious freedom for the sake of *religion*, not for the sake of "freedom" in its own right—an observation so sensible it is a wonder that so few legal scholars subscribe to it. Garvey argues that the religion clauses reflect a religious premise, exist for the sake of protecting religion, and ought to be read in that light. In Part I, I will argue, building on Garvey, that the standard justifications offered for religious liberty by liberal political theory are not sufficient to explain the Free Exercise Clause of the First Amendment. The Free Exercise Clause only makes sense on the assumption that God exists; that God makes claims on the loyalty of human beings; and that these claims are prior to and superior in obligation to the claims of the State. The Clause thus embodies an essentially religious premise. It may no longer be the case (if it ever was) that "[w]e are a religious people whose institutions presuppose a Supreme Being,"[2] but it remains the case that we are a people *whose Constitution* presupposes a Supreme Being.

In Part II, I argue that the decline and fall of the Free Exercise Clause in the Supreme Court's jurisprudence is attributable in large part to the abandonment of the original religious perspective underlying the Free Exercise Clause and the substitution of the liberal conception of religion and religious freedom in its place.[3] That conception treats religion as a species of personal preference and

2 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

3 *Cf.* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991) (arguing that religious freedom cannot be understood apart from its original religious justification).

taste, non-rational at best and irrational at worst. It is accorded constitutional immunity from government power only grudgingly (if at all), out of deference to the embarrassing but unavoidable fact that the Free Exercise Clause is in the Constitution. Under the liberal view, religion is presumptively entitled to no greater protection than secular-rationalist claims to individual autonomy, and probably deserving of less, because of its intrinsically irrational or anti-rational nature.[4] Religious liberty is not, on this view, a pre-constitutional inalienable right that exists because religion is recognized as valuable; it is, rather, an instrumental freedom, granted only because not granting it would create larger social costs. Thus, freedom of religion is not a preferred freedom, but an anomaly to be hemmed in on all sides, in order to mitigate its perceived anarchic tendencies.[5]

In Part III, I argue (again building on Garvey) that recognizing that the Free Exercise Clause is about protecting religion, not personal autonomy, has important implications for today's doctrinal debates over the proper interpretation of the Clause. It favors the pro-exemptions reading of free exercise rejected by the Supreme Court in 1990 in *Employment Division v. Smith*.[6] It favors broad deference to a religious adherent's sincere understanding of what constitutes a burden on his religious free exercise (usually accepted by the Court[7]). It favors a narrow view of what may constitute a compelling state interest overriding claims to religious liberty (contrary to the pattern of Supreme Court decisions for the last twenty years[8]). And, pointing in somewhat the other direction, it favors a narrow, perhaps even theistic understanding of "religion," an understanding the Court rejected in the draft exemption cases of the 1960s and has implicitly rejected ever since.[9]

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4 This uncongenial, anti-religious, "liberal" perspective on religious liberty is exemplified by the writing of my colleague, Suzanna Sherry. Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996) [hereinafter Sherry, *Enlightening*]; *see also* Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123 [hereinafter Sherry, *Paradox*]; *cf.* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

5 *See* Employment Div. v. Smith, 494 U.S. 872, 886–87 (1990) (characterizing a broad Free Exercise Clause right as a "private right to ignore generally applicable laws" and labeling this "a constitutional anomaly"); *id.* at 888 (arguing that recognizing so broad a Free Exercise Clause right would be "courting anarchy").

6 494 U.S. 872 (1990).

7 *See* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

8 *See generally* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

9 *See infra* text accompanying notes 44–56.

## I. WHAT IS RELIGIOUS FREEDOM FOR? THE INSUFFICIENCY OF THE LIBERAL ARGUMENT

Garvey, remembering his childhood prayers, entitles Chapter 3 "God is Good." The short of his argument, in keeping with the book's overall thesis, is that we protect religious liberty for religion's sake, because religion is important and valuable. We do not protect religious liberty for secular society's sake. At least that is not the purpose of the freedom. That secular society may benefit incidentally from protecting folks' free exercise of religion is all well and good, but the point is to protect folks' free exercise of religion, not (except by happy coincidence) to produce the secondary benefits to society. We should interpret the First Amendment with this in mind; and doing so will have significant consequences in terms of how we approach religious freedom questions and, sometimes, in the results we reach.

A prior incarnation of Chapter 3, published as an article, was entitled *An Anti-Liberal Argument for Religious Freedom.*[10] Garvey's argument is anti-liberal in the sense that he rejects as insufficient the standard justifications advanced for religious liberty within liberal political theory. Responding in part to Garvey's ideas, and as part of the same symposium, Professor Douglas Laycock has set forth the liberal arguments as well as anyone: (1) We protect religious liberty because religion is extremely important to many people—whether justifiably or unjustifiably so is irrelevant—and history shows it to be a bad thing for government to impose suffering by attempting "to suppress disfavored religious views."[11] (2) We protect religious liberty because people historically have viewed (and many continue to view) their religious beliefs as sufficiently important to fight for, die for, suffer for, and impose suffering on others for. We protect religious liberty for all as a kind of grand truce to preserve public peace.[12] (3) Finally, we protect religious liberty because the state interest in suppression of dissent, or in enforcing its view of orthodoxy, is small. "[B]eliefs about theology, liturgy, and church governance . . . are of little importance to the civil government."[13]

What is striking about these sensible-sounding and well-accepted justifications is how weakly they support the Constitution's unique protection of *religious* liberty, and how very weakly they support (if

10 John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996).

11 Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

12 *Id.*

13 *Id.*

they do not in fact undermine) the argument for the "strong" reading of the Free Exercise Clause as generally providing for exemptions of religious believers from formally neutral government rules (Professor Laycock's own view).[14] Garvey's chapter does serious damage to the first two liberal justifications for religious liberty, and the third appears to be a makeweight.[15]

### A. *Religious Liberty as Autonomy in Matters of Conduct Informed by Religious or Irreligious Conscience?*

Consider Professor Laycock's first liberal justification for religious liberty. We protect religious liberty because it is important to people (that is, it is subjectively important to some people; religious belief and exercise is not objectively an important thing). It is mean and gratuitously nasty—in a word, illiberal—to suppress that which so many view as so important. This corresponds exactly to what Garvey calls the "autonomy" theory. And it is subject to Garvey's two straightforward, related critiques.

First, this justification fails to explain why *religious* beliefs and actions are singled out for special constitutional protection. Many things are subjectively important to people and not all of them are given a constitutional trump status, so as to defeat (certain) claims of government power to regulate.

This is a specific application of Garvey's general thesis. We have particular freedoms; we do not have freedom in general. The reasons why we have some and not others must have something to do with the substance and importance (at least in the minds of those who adopted them) of the freedoms we have.

The argument that we should protect religious liberty because autonomy is important to people does not explain very much about why we have (and should have) a constitutional freedom of religious exercise but not a constitutional freedom to be a supporter of the Green

14 *Id.* at 347; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

15 The fact that government does not have much reason to care about religious matters, one way or the other, even if accurate as a description about government attitudes at the time of the founding (which I doubt), is hardly an affirmative argument for religious liberty, or at least not for a free exercise clause. It is, at best, an argument against vesting in government an affirmative grant of power to legislate concerning matters of religious doctrine, theology, and practice: there is no reason to make such a grant, because nobody thinks such a power is important. That is not a theory of religious liberty, however. It is a theory of enumerated powers. A theory of religious liberty under the Constitution's religion clauses requires a justification for *disempowering* governments of their usual enumerated or general powers, in the circumstances marked out by the text of the religion clauses.

Bay Packers. Both, as I will attest, can be intense personal commitments. Both may be, subjectively, very important to the persons involved. Both might involve claims of personal autonomy; it might be mean and nasty to suppress people's freedom of action in either case. But we have a Free Exercise Clause and we do not have a Green Bay Packers clause. Without something more—without an argument why *religious* autonomy is more important than, or different in kind from, other human desires for autonomy and freedom of action—we do not have a theory justifying religious freedom under the Constitution.

That brings us to Garvey's second point. The autonomy justification implies that all stances with respect to religion give rise to the same constitutional rights. But such a conclusion, Garvey writes, is

> hard to square with the language of the first amendment, which protects only the free exercise 'of religion.' Rejecting religion is an exercise of freedom, but it is not an exercise of religion. (Amputation is not a way of exercising my foot.) The free exercise clause by its terms seems inconsistent with the idea of autonomy. It seems to favor choices *for* religion over choices *against* religion.[16]

The autonomy argument also tends to justify only an extremely narrow protection of religious liberty—narrower than most liberal theorists (like Laycock) think correct. The dominant question of Free Exercise Clause interpretation is whether the clause only applies to government action that on its face is directed or targeted at (or discriminates against) religious exercise; or whether it applies also to government action, neutral on its face, that has the effect of prohibiting or preventing religious exercise. If the clause has the latter meaning, it may require religion-specific exemptions from the application of facially neutral rules where application of such a rule would have the effect of forbidding or preventing religious exercise.[17]

An important difficulty with the broader, pro-exemptions view is that the autonomy justification for religious liberty makes it hard to confine exemptions to *religious* conduct only. The autonomy justification suggests that other important personal reasons for objecting to

16 GARVEY, *supra* note 1, at 43.

17 This is Professor Laycock's view. Laycock, *supra* note 11, at 337; Laycock, *supra* note 14. I agree with Laycock's conclusion, which I think accords best with the text of the amendment and historical evidence of its originally intended meaning, original understanding, and contemporaneous practice. *See* Paulsen, *supra* note 8, at 250 & n.7. *See generally* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*]; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter *Revisionism*].

the application of a neutral government law should be recognized as a basis for exemption from the law, too. Moreover, a preference for religious exercise presents a difficulty under the Establishment Clause. The autonomy justification thus plays into the hands of those who fear that permitting free exercise accommodations or exemptions from laws of general applicability will tend to permit every person "to become a law unto himself" (to borrow the memorable parade-of-horribles phrase of the Supreme Court's polygamy decision in *Reynolds v. United States*,[18] echoed more than a hundred years later in Justice Scalia's opinion for the Court in *Employment Division v. Smith*[19]).

Professor Laycock himself slides a good way down this slippery slope when he adopts an autonomy-driven definition of religion for purposes of the Free Exercise Clause. Laycock defines religion as "any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists."[20]

As noted above, Garvey politely points out that such a truly liberal (in the sense of broad-minded and tolerant) construction tends to make hash of the constitutional text. The point can be pressed even further. If the Free Exercise Clause protects the *exercise* of such beliefs about religion (pro and con), as Laycock vigorously and persuasively argues,[21] so as to confer a sphere of immunity from facially neutral government regulation, then the "exercise" of atheism, agnosticism, skepticism, rationalism, humanism, and secularism indeed confers a huge area of exemption from government laws. And it is a zone of exemption having, really, nothing much to do with religion. It is secular freedom—autonomy in general—treated as on par with religion, because it is religion's complement, secular analog, or even *opposite*.[22]

This is generous indeed. Too generous. Such a broad conception of freedom of "religion" becomes, as a practical matter, something of a poison pill for the pro-exemptions view. It loads up the pro-exemptions reading of the Clause with liabilities so severe and costs so great that judges no longer will buy it.

That may be what happened in *Employment Division v. Smith*. The liberal ideal of autonomy became too heavy a load for the Free Exercise Clause to bear, textually and practically. The Court chose, in part out of fear of sanctioning a Hobbesian every-man-for-himself lawless-

18 98 U.S. 145, 167 (1878).

19 494 U.S. 872, 885 (1990).

20 Laycock, *supra* note 11, at 326.

21 *Id.* at 337.

22 *Id.* at 329 ("[I]t is no anomaly that the clause applies to opposites.").

ness, to give the freedom a narrow, grudging reading rather than to limit the domain of that freedom to truly religious claims (in the commonplace and original constitutional understanding of that term). Laycock regrets that outcome and correctly observes that "[t]he neutrality of universal suppression is not the constitutional vision."[23] But put to the choice of universal autonomy or universal suppression (or, to be more accurate, reducing the Free Exercise Clause to a bare nondiscrimination provision, with accommodations to be provided only by the legislature), the Court's choice in *Smith* is not at all surprising. Too broad a conception of what a freedom is for, ironically, may result in a narrowing of the freedom.

I will argue below that the road back to the broader interpretation of the Free Exercise Clause must start with a narrower—the original—understanding of religion under the First Amendment.[24] For now, it is sufficient to note that the autonomy argument is an insufficient justification for the religion clauses. It simultaneously proves too little (it does not support the text we have) and too much (it argues for *freedom*, not freedom *of religion*). And in so doing, it sows the seeds of its own destruction.

### *B. Preserving the Peace by Keeping the Faith(s)?*

The second liberal justification for freedom of religion is public peace: religious liberty as the terms of a truce. Professor Laycock's position is stronger here, yet Garvey chips away, with measurable success, at what he dubs the "political argument."

The standard argument is that, since people view religion as so important, they will fight for religious dominance, or at least for their own freedom. They will fight with each other and they will fight with the state. There is much to this argument, and Garvey concedes some merit in it. His chief response is that the political argument is true, but incomplete, as an account of religious liberty. It does not, he argues, justify according religious freedom to those who either will not fight if you oppress them (like the Amish or Quakers) or those who cannot win such a fight, such as minority faiths or (if the state is big, powerful, and mean enough) even widely-held beliefs: "If a group is sufficiently small the government can simply stamp it out without running the risk of civil war."[25]

Garvey's critique at this point (which he is careful not to overstate) strikes me as a bit strained. Once the need to preserve public

23 Laycock, *supra* note 11, at 337.

24 *See infra* Part III.

25 GARVEY, *supra* note 1, at 48.

peace from religious strife is conceded to be an important goal, and once one has chosen to pursue the general route of freedom and accommodation rather than suppression, it is not at all surprising that the general rule written to accomplish these goals might incidentally sweep within its scope some persons or groups that need not have been included in order to accomplish the goal. There is no "narrow tailoring" requirement for drafting a constitutional *freedom* (as opposed to governmental action that restricts a freedom in the name of some overriding justification). Unless one is afraid that a broad freedom will produce affirmative harms to a significant degree, overbreadth of freedom is not a problem. Indeed, underbreadth might generate equal-protection-like constitutional difficulties that the freedom drafter might well wish to avoid. Once it is decided to preserve religious peace between Protestants and Catholics of all varieties by enacting a general religious liberty provision, it seems a waste of effort to seek to carve out groups you might as easily have suppressed, unless of course you *really* want to suppress them. And even then, it is hard to write an exception to the rule—unless you single out certain disfavored religions by name (which is politically risky)—that will accomplish that result without accidentally sweeping into the exception some groups that really ought to be protected. At some point, precision of suppression is not worth the drafting effort or the political cost.[26]

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26 I have encountered the argument (I do not recall exactly where) that family-formation, in the sense of the begetting and rearing of children, cannot be a significant part of the legal justification for marriage (and thus cannot justify society's restriction of marriage to male-female couples), because we permit male-female marriage even of couples incapable of having children and do not require married couples to have children as a condition of permitting them to marry. This argument seems to suffer from the same problem I have noted in the text. It is difficult to draft one's marriage rule in such a way as to accord special status only to relationships out of which offspring *may* be produced (that is, male-female marriage) without sweeping within the rule some relationships where this cannot or will not be the case. It takes special effort—extraordinary and intrusive effort—to exclude from the benefits of this rule male-female marriages that cannot or do not result in children. Such effort also seems gratuitously nasty. One need not exclude such a sub-category of male-female marriages in order to accomplish the goal of protecting these types of marriages for the sake of the childbearing and childrearing purposes served by male-female marriages in general. And it takes very hard work to sort out in advance, or to enforce thereafter, a more restrictive rule on male-female marriage.

Same sex marriage, however, cannot produce offspring from such a union. If a significant part of the justification (it need not be the only justification) for granting marriage special legal status is that it is perceived to be important (in general and wherever possible, and subject to being overridden by compelling need or special circumstances) to link the biological capacity of procreation with the social structure

Even under Garvey's justification for religious liberty, some measure of overbreadth in constitutional freedom-drafting is necessary to account for the religion clauses of the Constitution. If Garvey is correct that we protect religious liberty because religion is important—or, as I would refine it, because God exists and His claims are of prior and greater obligation than those of the state—we should protect only those religions whose beliefs and commands we understand to fall within the acceptable range of having a plausible claim to be True Beliefs. In fact, however, we protect much more, including a considerable amount of what even religious people view as religious rubbish. We do so because we do not trust political majorities, and we certainly do not trust government agents, to distinguish Truth from Rubbish and because it is exceedingly difficult (and dangerous) to try to draft a religious freedom rule that successfully draws such a line. In short, we protect the core freedom because we believe it consists of something objectively important and true, and we adopt an overbroad prophylactic rule for the sake of protecting the core freedom. At least, that was probably the original purpose of protecting religious freedom. (It is also, I suspect, the consensus view of Americans today, except among elites. That, however, is an empirical question that may be difficult to answer.)

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for childrearing, homosexual marriage can never fit such a justification. It is, therefore, neither irrational nor gratuitously nasty to draft a marriage rule intended in part to fulfill such a justification to include male-female unions in general but not same sex unions.

The arguments for same sex marriage, as I understand them, include other points: they may challenge the importance of the traditional biological-social link in the begetting and rearing of children; they may note the increasing ease with which that link is dispensed with in practice, for good and bad reasons (that is, they may note the underinclusiveness of the rule); they may emphasize different social justifications for according special status to marriage. I do not intend to enter that debate, which would take me far afield from my objectives in this review. My simple point here, of which the gay marriage issue is an illustration, is that it makes sense for freedoms to be written in terms broader than their underlying justification. The fact of overbreadth in some degree does not itself negate what the freedom is about at its core. Nor does the fact of overbreadth in some degree imply that the freedom must be made broader yet, so as to protect conduct unrelated to the underlying values giving rise to the freedom.

(The gay marriage discussion is not far afield from Garvey's book, however. For those interested in this specific issue, Garvey offers a fascinating, original and surprising perspective: the argument for a constitutional right of homosexual sodomy is frivolous, but the argument for recognizing homosexual marriages is strong, at least if one views the primary justification for marriage as protecting (and constraining) freedom to love. *See* GARVEY, *supra* note 1, at 36–41.)

The mistake of the liberal political theory argument is in thinking that there is no core of valuable religious exercise (or that it is not necessary to concede the existence of such a core) around which to draw a broader, prophylactic circle of freedom. One *could* seek to justify religious liberty on a theory of preserving the peace, despite the overinclusive scope of the religion clauses for purposes of accomplishing such a goal. But some further points can be added to reinforce Garvey's intuition that this is at best an incomplete account.

For starters, much of the work of preserving public peace by enforcing a religious truce is accomplished by the Establishment Clause alone. The government may not declare one religion, or group of religions, to be the winner and compel people, through means direct or indirect, to engage in religious worship, exercise, or conduct in accordance with the government-established faith.[27] To the extent that the political argument is concerned with forestalling religious conflict arising from the desire of competing sects to capture the support and coercive power of government, it goes far to explain the existence of the Establishment Clause. (There is no point in fighting if you cannot win.) Indeed, the original meaning of the provision seems to have been to keep the new national government out of the disestablishment debate raging in the states. The national government could neither establish a national church (which would preempt state prerogatives in this area) nor disestablish state churches.[28] There were to be no absolute winners of political-religious battles at the national level.[29]

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27 For a fuller view of the Establishment Clause, embracing the view that the Clause's core is a prohibition of government coercion (in strong and weak forms) with respect to religious exercise, see Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

28 *See* Michael Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 321–24 (1986).

29 This strikes me as an insufficient explanation of the Establishment Clause as well. That clause is best understood as a complementary protection of religious liberty, along with the Free Exercise Clause. As I have written elsewhere, the two clauses protect a single central value, religious liberty, from two different angles. The Establishment Clause forbids government *prescription* in matters of religious exercise. The Free Exercise Clause forbids government *proscription* in matters of religious exercise. *See* Paulsen, *supra* note 27, at 798; Paulsen, *supra* note 28, at 313. But even viewing the Establishment Clause as a "public peace" provision, it is still a restriction on government power, not on religion. My narrow point here (which I address presently in the text) is that at most the public peace rationale can justify the Establishment Clause; it does not come anywhere near justifying the Free Exercise Clause.

But what explains the Free Exercise Clause within such a regime? What does it add to public peace that the Establishment Clause does not already provide? Perhaps people will rebel against government interferences with their personal religious autonomy, if the interferences are frequent or severe enough. But people might, if sufficiently provoked, rebel against government for lots of secular reasons too, such as high taxes, an unpopular war (especially if accompanied by conscription), or other perceived injustices. The "political" justification does little to support *religious* free exercise as a special right. What makes religion so special, if the goal is to preserve political calm? Why not indulge all kinds of analogous or similar claims for freedom and autonomy? Conversely, the Free Exercise Clause protects lots of socially disruptive, annoying, or disturbing behavior. If calm is your goal, free exercise of religion is not a good means to the end—especially not free exercise in the sense of exemption from generally applicable laws.

At the same time, protecting personal (and group) free exercise from suppression might well not be *sufficient* to keep religious persons from getting upset. Intensely-held religious beliefs might lead the believer to be angry with the existing regime for failure to establish the One True Faith, or for insufficiently accommodating its free exercise. Government suppression of religion is probably not a magic threshold for determining when serious social and political strife flowing from religious differences will ensue. The present culture wars suggest a far lower threshold.

Finally, nothing in the religion clauses is either sufficient or necessary to prevent religious factions from making (culture) war on *each other*. Strife between religious sects may exist where both are granted free exercise and none is established; in fact, allowing competing views to survive and thrive virtually guarantees continued strife. Moreover, the injury to public peace from such religious conflict can be checked by punishing breaches of the peace regardless of their motivation. One need not have an Establishment Clause or a Free Exercise Clause for this purpose, simply laws against breach of the peace or other conduct that injures others.

In short, if political peace is the goal, the religion clauses are not at all well tailored to achieve it. They are radically underinclusive in the subjects of possible divisiveness that they cover. And the Free Exercise Clause has much content that seems thoroughly unnecessary to such a purpose. It is possible that political peace is part of the objective of the religion clauses, but this rationale is plainly insufficient to account for the full measure of liberty they confer.

That is all the opening Garvey needs for his affirmative theory of what religious freedom is all about, at its core. The obvious advantage of freedom as a means to preserve peace, Garvey writes, "is that it respects piety as well as peace. But we need an argument that will tell us why it is good to respect piety."[30] The huge gaps left by the political justification make it extremely unlikely that the founding generation would have adopted the Free Exercise Clause for this reason and this reason alone. Garvey quotes Mark DeWolfe Howe on this point, to good effect:

> Though it would be possible . . . that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers.[31]

The point is intuitive and sensible. A premise of even the political argument is that religion is very important to people. Isn't it more plausible that the founding generation chose to protect religious freedom primarily because of its perceived importance, and not merely to forestall the secondary effects, as it were, of the fact that people viewed it as important?[32]

Common sense suggests that we apply Ockham's razor to slice through the complicated, secondary explanation of political peace and go straight to the core reason for religious liberty: the founding generation singled out religion for special protection because of broad agreement as to its intrinsic importance and broad agreement that government could not be trusted not to interfere with something so substantively important.

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30 GARVEY, *supra* note 1, at 49.

31 *Id.* (quoting MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 15 (1965)).

32 The point is also historically sound. *See* McConnell, *Origins*, *supra* note 17, at 1410 (detailing religious origins of the movement for religious liberty in early America, and noting the greater social relevance of the Great Awakening than of the Enlightenment in contributing to this movement); Laycock, *supra* note 11, at 342–46. Professor Sherry is again to the contrary, see Sherry, *Enlightening*, *supra* note 4, at 483–89, but if there were a Rule 11 for law review articles, her outlandish assertion that "[i]t is historically uncontroversial that the Enlightenment, with its emphasis on rationalism and empiricism and its rejection of religious faith and mysticism, was the primary epistemology of the founding generation," *id.* at 483, would be a prime candidate for sanctions. *See* Laycock, *supra* note 11, at 343 (characterizing Sherry's historical assertion as "preposterous" and "as absurd and inconsistent with the evidence as any belief held by people she accuses of irrationally relying on faith alone. . . . [N]o responsible historian would support [Sherry's] claim.").

Why, then, do we protect the freedom of religion? I submit (building on Garvey) that the answer is as follows. We protect freedom of religion because knowledge and worship of God, and obedience to God's will, are of the first importance. These things must take precedence over the contrary commands of all mere human authority. We protect religious liberty because we recognize that, as a matter of first principle, *true* religious beliefs necessarily take precedence over the commands of the state and because we recognize, as a matter of widely-shared faith, the possibility of religious truth. We also recognize the reality of human error, and especially of governmental error, in matters of religion, and so we do not trust the state to tell us the proper way to know, worship, or obey God. And even if the state did know the right way in such things, we with good reason would still doubt (on theological as well as practical grounds) the efficacy of coercion in leading to true religion.

Accordingly, the Free Exercise Clause confers an area of substantive immunity from government regulation that interferes with religious belief and exercise. We prefer the sincere individual's claim of religious conscience to the government's claim of secular authority, absent an extraordinary showing of insincere religion or of a threat to state interests of the highest order. The Establishment Clause imposes a disability on the exercise of government power in such a manner as to compel religious belief or exercise or to punish failure to adhere to a state-prescribed religious orthodoxy. This is not because religion is not valuable, but because government is untrustworthy in matters of religion. But all of this—the Free Exercise Clause and the Establishment Clause, working together—is for the sake of religion, which is presumed to be valuable and good.

## II. The Embarrassing Free Exercise Clause: The Unavoidably Religious Argument for Religious Freedom

Does society still hold this view today? Do we think of religious liberty as existing for the sake of permitting people to exercise true beliefs about God? To most secular, liberal legal academics (including both religious and nonreligious people), the answer is no. More than that, a yes answer is *unacceptable.* Objectively true beliefs about God do not exist, and it is an inadmissible premise that the religion clauses begin with the assumption that God exists. The liberal view does not quite assume that God is dead (or never existed), but it does insist that any theory of religious liberty must be able to justify that liberty *even if there is no God.* Professor Laycock's position is again representative: any account of religious liberty under our Constitution,

he says, must "make sense of the ratified text without entailing commitments to any proposition about religious belief."[33] In other words, the religion clauses must be viewed from the perspective of a secular agnostic.

Why should this be so? If the arguments in the preceding section are sound, then the religion clauses do entail a series of essentially religious premises:[34] God exists; God makes claims on the loyalty of human beings; these claims sometimes require action that may conflict with government regulation; the claims of God are, for the individual believer, prior to and superior in obligation to the claims of the state; and—this is the crucial point—even from the state's perspective, the claims of the state ordinarily should yield to the claims of God as sincerely articulated by the religious believer, because the claims of God rightfully have a stronger claim on human loyalty than do the claims of the state. In short, the religion clauses are God-fearing clauses. *The law* thinks that God exists and that He makes demands (rules, duties, prohibitions) on men, and that this reality requires the state to yield.

Except on this reasoning, I submit, the Free Exercise Clause makes no sense. If God does not exist, or if God makes no claim on human conduct, there is no legitimate justification for special accommodation of religion. Accommodating religion, on this view, is indulging foolishness and, worse, granting it special treatment. Even if the Free Exercise Clause is given its narrowest reading as a mere nondiscrimination principle, why *shouldn't* government be able to discriminate against religious conduct that a deliberative political majority finds sufficiently harmful or offensive? It's not as if protecting such religious conduct is protecting anything important; and the liberal arguments for religious liberty, as shown above, are an insufficient substitute for a finding that there is something substantively important here worth protecting.

This argument is, of course, anathema to the modern, secular mind. Consider again Professor Laycock's position as representative of liberal political theory and a rationalist world view. From the outset, Laycock seeks to exclude the possibility that the ratified text might itself entail some proposition about religious belief—that it is a good

33 Laycock, *supra* note 11, at 316.

34 Professor Steven Smith has made a different argument suggesting a similar conclusion, see Smith, *supra* note 3, but apparently would not insist on returning to the original religious premises of the religion clauses as a touchstone for informing present-day constitutional interpretation. *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996); *cf.* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

thing; that it is worth protecting for its own sake; or that some religious beliefs might be objectively true. For Laycock, these possibilities are off the table, because they would be unacceptable to many nonreligious persons today. Religious liberty, he claims, requires a justification that even nonbelievers will accept.[35] But this kind of dogmatic *ipse dixit* about the postulated "acceptable" range of meanings of a historical text would seem badly to prejudge the meaning of the provision to be interpreted. Moreover, it prejudges the text according to an external (to the text) and anachronistic standard: what claims about the purposes and meaning of this particular constitutional text would a secular liberal (even one, like Laycock, sympathetic to religious freedom claims) find unacceptable because they do not reflect a secular, modernist view of the world?

I think of this problem as that of "The Embarrassing Free Exercise Clause." I take this label from Professor Sandy Levinson's insightful little article a few years back, *The Embarrassing Second Amendment.*[36] Professor Levinson's argument, in a nutshell, is "Look, I don't think there ought to be a federal constitutional right for individuals to keep and bear arms, but there it is in black and white. We can't pretend it isn't there just because we don't like it or because it may reflect a world view that few legal academics find attractive, or even relevant, anymore."

For many folks today, the Free Exercise Clause of the First Amendment presents the same problem. It is embarrassing, to the skeptical, rationalist, nonreligious or irreligious mind, to think that the Constitution might single out religion for special protection, and perhaps even preferred treatment—and not provide comparable protection for skepticism, agnosticism, rationalism, humanism, or atheism—and do so because the Framers believed in God. It would be like learning that the Constitution contained a provision providing for the protection of ghosts.[37]

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35 *See* Laycock, *supra* note 11, at 316; *see also id.* at 327 ("Any interpretation is wrong if it amounts to a claim that the Religion Clauses award victory to one side or the other."). By this last statement, Laycock apparently means that it is unacceptable to interpret the religion clauses in a manner that provides special protection to acts of religious conscience but not to conduct motivated by explicitly nonreligious or antireligious principles.

36 Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Professor Laycock apparently recognizes the force of this analogy. *See* Laycock, *supra* note 11, at 314 & n.8 (noting that "[b]ecause the Constitution says so" should be, but often is not, a sufficient argument and using the Second Amendment as an example).

37 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 38–39 (1980). Ely uses the "ghost clause" analogy as a way of criticizing some interpretivists' dismissive attitude toward the Ninth Amendment:

Over ten years ago, John Garvey suggested an analogy intended to help the secular mind understand the position of the religious individual who claims—incomprehensibly, to the agnostic or secularist—that God has directed the individual to engage in conduct contrary to the usual norms prescribed by the law of the state. Garvey suggested that we think of the religious individual as if he were insane, and thus by reason of mental condition (and through no fault or even volition of his own) unable to conform his conduct to the law.[38]

The analogy is an arresting one, at several levels. Religious adherents might very well bristle at the comparison. Yet the analogy is a very good one for attempting to explain to the secularist, nonreligious mind, in terms capable of being understood within that paradigm, the situation within the secular world of the deeply committed, sincere religious believer. The analogy is helpful precisely because some secularists in fact do believe that religious faith is crazy (or, if they put it more gently, "irrational") and its adherents are the functional equivalent of lunatics. Indeed, if one is a committed and convinced atheist, one almost must think that religious people are, well, nuts.[39]

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> The first [argument], which I've never heard, would go something like this. Suppose there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions? The "ghost" here is natural law, and the argument would be that because natural law is the source from which the open-ended clauses of the Ninth and Fourteenth Amendments were expected to derive their content, we are justified, now that our society no longer believes in natural law, in ignoring the clauses altogether.

*Id.* (Ely then goes on to offer a rebuttal, emphasizing the Framers' understanding of the distinction between natural law and positive law).

The most prominent example of a scholar who views the Free Exercise Clause as if it provided for special protection for ghosts—for superstitious, primitive, anti-rational beliefs that no enlightened, reasoning person today would accept—is my colleague Suzanna Sherry. *See* Sherry, *Enlightening*, *supra* note 4; Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996); *cf.* Sherry, *Paradox*, *supra* note 4. *See generally* Laycock, *supra* note *11*, at 337 (characterizing Professor Sherry's position as that "believers are a dangerous, superstitious faction whose epistemology is rejected in our founding documents, but whose liberty must unfortunately be protected to prevent their becoming angry and resentful.") Ironically, Professor Sherry is a believer in Ely's ghost: natural law. *See generally* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992).

38 John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798–801 (1986).

39 Professor Sherry comes as close as anyone to accepting this view. *See* sources cited *supra* note 37. Professor Lupu has made passing comments that could be construed as being in a similar vein. *See* Ira C. Lupu, *To Control Faction and Protect Liberty:*

Or else, they are faking religious belief to gain some perceived social advantage, or a government benefit available only because they cast their personal preferences in religious terms. (If they are faking it because they were brought up in a religious home and have been psychologically unable to cast off their childhood beliefs, that is a species of mental impairment, too.)

If religion were insanity (that is, if Garvey's analogy were taken as a true statement about religious belief), it would be crazy to accord it special constitutional protection. It does not matter in this respect that the insanity is widespread among the populace. Why would anyone in his right mind protect the free exercise of lunacy (especially if a lot of people are lunatics)?

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*A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996) ("Fanaticism is an unfortunate byproduct of the individual suppression of doubt upon which religious faith depends.").

Professor Sherry's position on the religion clauses is that the Free Exercise Clause and the Establishment Clause state contradictory principles of indulging or promoting religion and restricting or excluding religion, respectively, and that the contradiction should be resolved in favor of the Establishment Clause because we should, whenever possible, prefer Enlightenment reason (the view reflected by the Establishment Clause) over religious irrationality (protected, regrettably, by the Free Exercise Clause).

Professor Sherry's view is vulnerable on a number of scores, the most obvious of which is that it makes little sense to read the religion clauses as a self-contradiction, and still less to read the Establishment Clause as an anti-religion principle (as opposed to another principle for the protection of religious liberty, different from and complementary to the Free Exercise Clause). I have made these points elsewhere and so will not develop them here. *See* Paulsen, *supra* note 27, at 801–02.

My point here is different: Professor Sherry's position aptly illustrates, in an especially striking manner, the difficulties that intelligent, but thoroughly secular, irreligious postmoderns have in making sense of the Religion Clauses *from a secularist, irreligious perspective.*

Professor Laycock's project is to find an interpretation of the Religion Clauses that overcomes this difficulty. His premise is that a successful interpretation needs to be able to persuade secularists (like Sherry and himself) as well as religionists (like Garvey and me) that religious liberty is a good thing, and that this cannot be done if such an interpretation presupposes either "that religion is a good thing [or] that faith is bad or subordinate to reason." Laycock, *supra* note 11, at 313 & nn.2 & 3 (contraposing his position to those of Garvey and Sherry, respectively). My premise is that an interpretation does not have to be "successful" in this sense; it need only be sound as a matter of straightforward, non-result driven, textual interpretation in accordance with the ordinary, common public meaning of the language employed at the time it was adopted and contemporaneous evidence of the original understanding and purpose of the provision. The political task should be to persuade those who find the resulting interpretation unacceptable as a policy matter nonetheless to accept it as a matter of constitutional law, not to contrive an interpretation to suit those who may dislike a provision's natural and intended meaning.

The fact that we have a Free Exercise Clause in our Constitution which, however read, accords some measure of unique protection to religion, indicates that the framers did not share the view that religious faith is a species of irrationality. The Clause presupposes that religious belief and action is not insane. It corresponds, or can, to something real.

If that is indeed the supposition underlying the religion clauses, we should (Garvey argues) read them from the perspectives of believers—not atheists or agnostics—and interpret their language accordingly. Garvey's approach might well make a tremendous difference, in at least two ways. First, it suggests that *Employment Division v. Smith* is wrongly decided. There are many arguments against *Smith* and I will not rehearse all of them here.[40] I will instead focus on the most plausible argument in favor of *Smith.* That argument is that the Free Exercise Clause is fairly susceptible of being read either (i) as forbidding only the enactment of measures that on their face involve regulation of religious practice or (ii) as forbidding, in addition, measures that have the effect of regulating religious practice. Under this view, the judiciary would not be justified in imposing by itself the reading that is more restrictive of state governmental power. Accordingly, the Court chose the narrower reading in *Smith.*

If the religion clauses are viewed from the agnostic perspective, the "facially neutral rule of general applicability" default approach of *Smith* makes a certain amount of sense. Read from the perspective of indifference toward religion—or from the perspective of an indifferent government bureaucrat—the Free Exercise Clause is a rule about rules.[41] It states a rule about the formal content of the rules government enacts for regulating private conduct; namely, that government may not adopt a rule that, *as a rule,* prohibits religious exercise. This is consistent with the view of religion as an unpreferred freedom—a "constitutional anomaly" not to be let loose to run at large.[42]

But if the religion clauses are viewed from the believer's perspective, the Free Exercise Clause is violated whenever the consequence of a government action is to prevent or penalize acts of sincere religious conscience, because preventing such consequences is exactly the reason the freedom exists. This makes a world of difference. Viewed from the perspective of the believer, government action that operates

40 The best ones, in my view, are collected in Laycock, *supra* note 14, and McConnell, *Revisionism, supra* note 17. In addition, the historical arguments are presented in McConnell, *Origins, supra* note 17.

41 John Harrison, *The Free Exercise Clause as a Rule About Rules,* 15 HARV. J.L. & PUB. POL'Y 169 (1992).

42 *Cf. Smith,* 494 U.S. 872, 886 (1990).

so as to prevent or penalize religious exercise is a law "prohibiting the free exercise thereof," just as surely as a building without wheelchair access operates to proscribe access on the basis of an individual's disability.

The second way in which adopting the standpoint of the believer affects religion clause interpretation concerns the question of *non*-religious "religious" claims for exemption. Viewed from the perspective of an agnostic or atheist, the differential treatment of religious and non- or irreligious claims and claimants is just plain irrational discrimination; worse, it is irrational discrimination in favor of irrational believers at the expense of sensible nonbelievers who have worked out their own ethical systems and rules of personal conduct. Viewed from the perspective of the believer, however, the differential treatment makes sense. It is not illiberal, narrow-minded, or unfair to exclude nonreligious claims from the ambit of the Free Exercise Clause (that is, to adopt a commonplace understanding of "religion" for purposes of religion clause interpretation). It is a simple recognition that religious commands and duties are different in kind from nonreligious ethical claims.[43]

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43 *Cf.* Michael W. McConnell, *Accomodation of Religion*, 1985 SUP. CT. REV. 1, 15. Professor Laycock thinks this view is wrong because it would equally permit the government to *promote* humanism, secularism, rationalism, skepticism, and even atheism in the public schools. Laycock writes:

> If atheism is just a secular idea, government would be free to promote atheism to the same extent that it has ever promoted any other secular idea . . . . Government could teach atheism in the schools . . . . The only sensible interpretation is that this would be an establishment of religion—an establishment of a certain set of views about religion, of a certain set of answers to the fundamental religious questions.

Laycock, *supra* note 11, at 330. There are three good answers to this charge. First, government *plainly does* promote, in public schools and otherwise, "atheism," if by that is meant a belief system that excludes the possibility of God. Challenges to such programs of instruction on Establishment Clause grounds have been consistently rejected. *See* Smith v. Alabama, 827 F.2d 684 (11th Cir. 1987). Laycock's expansive definition of "religion," if pursued rigorously on the Establishment Clause side of the ledger, would have enormous consequences that I find it hard to believe he wishes to embrace. Second, it is not clear what makes promotion of atheism "an Establishment of *Religion*," instead of the promotion of *anti*-religion. To be sure, the Framers, living in a more pervasively religious society, may not have expected a problem like this to arise. But the content of the rule they wrote is limited to a prohibition on establishments of religion, and the historical evidence abundantly indicates that they understood religion in terms of a system of beliefs and duties flowing from the notion of a God or gods, and that this understanding did not include atheism. *See generally* McConnell, *Origins*, *supra* note 17, at 1488–1500. I see no stronger textual or historical argument for expanding the meaning of "religion" to include anti-religion, irreligion, or non-religion, on the establishment side than exists on the free exercise side. Third,

The Supreme Court, unfortunately, has been beguiled by the Sirens' Song of autonomy and political truce-making as the touchstones of the religion clauses. Over the past forty years or so, as claims of personal autonomy outside of religious exercise have grown more vigorous, and as the number of belief systems wishing to be included within the terms of the treaty of truce has grown larger and more diverse, the Court has drifted away, gradually but steadily, from a focus on *religious* freedom. Crucial steps in this process occurred at the height of the Vietnam War, when the Court decided the draft exemption cases in *United States v. Seeger*,[44] *Welsh v. United States*,[45] and *Gillette v. United States*.[46] Indeed, one can pretty well map the eventual and inevitable downward trajectory of the Free Exercise Clause toward *Employment Division v. Smith*, by thinking about *Seeger*, *Welsh*, and *Gillette* (a point Garvey makes in passing[47]).

Both *Seeger* and *Welsh* involved, at the threshold, questions of statutory interpretation, not constitutional law. Section 6(j) of the Universal Military Training and Service Act of 1940 accorded conscientious objector status to persons who by virtue of "religious training and belief" are conscientiously opposed to war in any form. The Act defined religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[48]

Mr. Seeger and Mr. Welsh did not neatly fit within the definition. Seeger did not base his objection to military service on a belief in God or a Supreme Being, but instead on his self-defined "religious" belief in "goodness and virtue for their own sakes, and a religious faith in a

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this result is not as absurd as Laycock seems to assume, if one also assumes a vigorous Free Exercise Clause, which would exempt religious persons from compelled anti-religious indoctrination by public school officials. As I have written elsewhere:

> The Free Exercise Clause, properly understood, limits the power of government to engage in "secular" indoctrination to the extent that such indoctrination contradicts or undermines a believer's religious principles. If the idea of "compulsion" in the Establishment Clause context is broad enough to include compelled exposure to government speech (as I believe it is), government compulsion in the free exercise context must be understood as broadly.

Paulsen, *supra* note 27, at 855.

44 380 U.S. 163 (1965).

45 398 U.S. 333 (1970).

46 401 U.S. 437 (1971).

47 GARVEY *supra* note 1, at 43.

48 *Seeger*, 380 U.S. at 165 (quoting 50 U.S.C. app. § 456(j) (1958)).

purely ethical creed."[49] The Court stretched the statute in order to cover this creed, because Seeger himself characterized it as "religious."[50]

That was in 1965, arising out of Seeger's appeals from a dispute arising pre-Vietnam. By the time Welsh's case came before the Supreme Court in 1970, the nation was at the height of the Vietnam War and draft evasion and war protests were very much on the public mind. Nonetheless, the Court stretched "religion" a good bit further. While Seeger had characterized his claim as "religious" (putting those words in quotation marks in the registration form), Welsh struck them out entirely and explicitly denied that his claim for conscientious objection was in any way religious. A plurality of four justices stretched the statute to cover Welsh anyway, and Justice Harlan concurred, disagreeing with the plurality's statutory interpretation but arguing that extension of conscientious objector status to nonreligious claimants was necessary to avoid an Establishment Clause violation.

While *Seeger* and *Welsh* were statutory decisions (except for Harlan's concurrence in the judgment, which was necessary to the result in *Welsh*), their one-two punch has cast a long shadow over the Court's religion clause jurisprudence. The combination holding is that "religion" is to be construed broadly, so as to avoid disparate treatment of personal belief systems, and that such a broad construction is necessary—perhaps required as a matter of constitutional law—in order to avoid a violation of the Establishment Clause. Transposed to constitutional jurisprudence, the implication is that claims for exemption made pursuant to the Free Exercise Clause must, if granted, be extended to those asserting analogous semi-religious, quasi-religious, or explicitly non-religious personal ethical belief systems, regardless of their provenance.

*Gillette v. United States*[51] completes the circle. Before the Court were claims for selective conscientious objection by two individuals. One claimant was a clearly religious Roman Catholic who adhered to the traditional Catholic "just war" doctrine, defining when it is and is not permissible to bear arms in support of a national policy of war. The other was a Welsh-like ethical objector to the Vietnam War, on similar (albeit fairly plainly nonreligious) grounds. Neither claimant fell within the terms of the statutory exemption. The only claims they had, therefore, were that a rule providing for conscientious objection to those who opposed *all* wars but not for those who opposed *some*

49 *Id.* at 166.

50 *Id.* at 187.

51 401 U.S. 437 (1971).

wars (unjust ones) was discriminatory and unconstitutional; and that, even if there were no statutory exemption, failure to provide one interfered with religious liberty (and secular conscience) under the First Amendment.

The Court overwhelmingly rejected both claims. But what is of most interest is that the majority treated the two claimants as indistinguishable, both subject to the same constitutional analysis. The point is barely discussed. Such was the legacy of *Seeger* and *Welsh*. By the time the Court decided *Gillette* in 1971—and, as a practical matter, ever since—it has been unthinkable to treat the religious-based objector more favorably than the secular-reasons-based objector, if the form of their arguments is similar and they both seek an identical result: exemption from an otherwise generally applicable rule or command.

This is the poison pill I referred to earlier. Surely the Catholic claimant in *Gillette* was handicapped by the attachment of his case to that of the purely secular ethical claimant. Given the year (1971) and the context (Vietnam), there was almost no chance that the latter claimant could be allowed to win. The slippery slope was too obvious, leading the Court to ratchet up the government's interest in not granting exemptions to the status of a "compelling" one.[52] But the silent additional holding of *Gillette* is that, in assessing the government's interest in refusing to grant a religious accommodation, it is appropriate—imperative—to take into account the full range of claims by "similarly situated" claimants, including *non-religious* claimants asking for the same relief. As Professor Chip Lupu has put it: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[53]

Professor Laycock accepts the spectral march. (Indeed, he is leading the parade!) It is not at all clear that Professor John Garvey would. He hints broadly that the *Seeger-Welsh* line of cases unjustifiably expands the notion of "religion."[54] However, he never links that doctrinal dissatisfaction with a strong call for a halt. That, however, is where the logic of his argument leads.

The spectral march pulling nonreligious claims into the ranks with religious ones is now entrenched, and one byproduct appears to

52 For an argument that, in general, courts have been too eager to embrace the government's assertion of a "compelling" interest, see generally Paulsen, *supra* note 8.

53 Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

54 GARVEY, *supra* note 1, at 43.

be that all claims of conscience get less protection than they otherwise would. By the time we reach *Employment Division v. Smith*, for example, we no longer have anything resembling a religiously homogeneous society (a là the Court's 1952 world in which "we are a religious people whose institutions presuppose a Supreme Being"[55]), and we have abandoned attempts to limit the Free Exercise Clause to the exercise of religion, as we did before *Seeger* and *Welsh*. Hear Justice Scalia, for the Court:

> Any society adopting such a system [requiring a compelling interest to justify an infringement of religious liberty] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[56]

Scalia then proceeds to list, beginning with draft exemptions (and citing *Gillette*), a wide array of situations in which claims for religion-based exemption have been raised. The point of the argument is clear. The spectral march is, to a significant portion of the judiciary, a parade of horribles, and rather than engage in the difficult work of sorting out genuinely religious from nonreligious claims, we should cancel the parade permit altogether.

## III. Fixing Free Exercise

Is the strong, pro-exemptions reading of the Free Exercise Clause sustainable? If John Garvey's conception of the reason for religious freedom is correct, it means that we should look at the religion clauses from the perspective of the believer. As discussed above, that suggests that exemptions for religious believers are constitutionally required, except in the most compelling circumstances out of the strictest necessity. But such a reading has become too strong to be accepted, especially if one accepts Professor Laycock's liberal view (shared by many others) that exemptions must extend to nonreligious conduct on the same terms as they are extended to religious conscience. Can a principled picture of the Free Exercise Clause, including religion-

55 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

56 *Smith*, 494 U.S. 872, 888 (1990) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

specific exemptions, be created that does not destroy judges' commitment to enforce it?

I believe the answer is yes, and that the first brush stroke in creating such a picture lies in John Garvey's basic thesis that religious liberty exists to protect religion, and that the reason religion is protected is because it was understood (by the founding generation, at least—and their understanding should control interpretation of the texts they wrote and enacted) to be something uniquely important and valuable in its own right, not merely one instantiation of personal autonomy. Religion was understood to be intrinsically important and valuable in a way distinct from mere secular claims to nonreligious personal ethics.

Constitutional law theorists have made a cottage industry out of trying to craft a constitutional definition of religion that would validate the liberal idea.[57] None has improved on the operational definition supplied by the Virginia Declaration of Rights (and borrowed by Madison in the *Memorial and Remonstrance Against Religious Assessments*): religion refers to "the duty which we owe to our Creator and the manner of discharging it."[58]

This definition has a good originalist claim to superiority over the various modern ones offered by legal scholars (and by the Supreme Court, as a matter of statutory construction, in *Seeger*). It is simple and straightforward. It makes sense. In all likelihood it closely mirrors the common understanding of religion at the time the First Amendment was adopted. Indeed, it probably mirrors the ordinary understanding of religion today. It includes more than just Christianity, Judaism, and Islam, but it is probably closely tied to theism of some sort (including deism). Most clearly, it involves some notion of an extra-human, transcendent being, entity, or force that is responsible for the world's existence and human existence, that created the world by conscious design, and that may impose duties and responsibilities on humankind. Religion, in the constitutional sense of the word (and in the ordinary sense of the word), is something more than just the projection of an individual's inner sense of self, value, ethics, or morals, or of a social, political, or moral philosophy that involves no such tran-

57 *See, e.g.*, Jesse H. Choper, *Defining "Religion" Under the First Amendment*, 1982 U. ILL. L. REV. 579; George C. Freeman, III, *The Search for a Constitutional Definition of Religion*, 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

58 Virginia Declaration of Rights, art. 16, *quoted in* Everson v. Board of Educ., 330 U.S. 1, 64 (1946) (in case appendix).

scendent reality or creative force. Religion, in short, involves some conception of God.

There is only one thing wrong with this definition: it is illiberal. It sacrifices progressive inclusivity for historical fidelity. The "just war" Roman Catholic has a prima facie claim to conscientious objector status, but the agnostic secular humanist does not get in the door. Welsh certainly loses, and Seeger probably loses too. Most Native American religious practices qualify and nearly all traditional Western religious traditions do as well, but Buddhism is a tough case. In this sense, the originalist definition may be (despite its other obvious advantages) too much for liberal society to bear.

There are three responses. The first is that religious obligation is qualitatively different from spiritual or philosophical systems that involve no conception of a transcendent Creator, God. For the believer, the nature of the obligation is stronger. At the risk of being reductionist: the personal ethical individual who objects to war but is forced to bear arms has not been true to his own principles; the religious believer who has been forbidden by God to bear arms against his fellow man, but does so anyway, risks eternal damnation and the fires of hell. That is a big difference. To the committed atheist or dogmatic relativist who then counters that the religious believer's convictions are "all in his head" (as if to imply either that they are made-up or evidence of psychological disease), the rejoinder is that that is exactly the sort of judgment the religion clauses forbid government to make. If government is to be truly neutral as between these two systems of belief, it must take each on its own terms. And taken on their own terms, religion is qualitatively different from secular conscience. Recall John Garvey's analogy to insanity: we must assume that this claim is every bit as real for the believer as it is crazy in the mind of the secularist. To deny that religion is qualitatively different, and that the burden on sincere religious adherents of being compelled to act contrary to their faith is different and more severe than that imposed on individuals compelled to act contrary to their personal, nonreligious conscience, is to stand the First Amendment on its head.

The above provides context for the second response to the liberal objection, which otherwise might seem wooden and harsh. That is, that the *text*, interpreted according to its original, common, public meaning, protects religion and not secular conscience. Historical evidence shows that this was either the product of a deliberate choice to exclude secular conscience or because of a general understanding that "conscience" meant an objection based upon religious doctrine

or discipline.[59] Text and historical evidence of original meaning should settle the matter. If this seems illiberal today, that is unfortunate, but irrelevant to the task of textual interpretation of the constitutional provision the framers wrote.

It is true that this approach does not allow for the meaning of the word "religion" in the First Amendment to "grow." But if the words of the Constitution are permitted to change with the circumstances, the word "religion" legitimately may shrink (as "free exercise" has) with the times. Once text and original meaning are abandoned as constraints on constitutional interpretation, all bets are off. *Employment Division v. Smith* is as good an interpretation as any other.

For many, textual arguments are never satisfactory. But there is a third rejoinder to the liberal objection, namely, the practical argument that "freedom" cannot sustain as its object all possible claims of human conscience. Claims of secular conscience only have the result of dragging down claims of religious conscience. That may indeed be the objective, when all is said and done. Loading up the Free Exercise Clause with the poison pill of equal accommodation of nonreligious claims may be designed to tear down genuine free exercise of religion claims, because nontheists find such claims an affront to their sensibilities.[60] But that should give away the game: the effort to append nonreligious conscience to religious claims is an effort (deliberate or not) to water down the Free Exercise Clause, not to enforce it.

Once it is granted that the religion clauses should be interpreted from the believer's perspective—that is, on the assumption that God exists—and that nonreligious claims do not fall within the domain of the clause, the argument for the strong, pro-exemptions reading of the clause becomes much easier, and the pre-*Smith* doctrinal formulation (aside from the byproducts of *Seeger* and *Welsh*) fits together in an altogether coherent way.

First, to whatever extent a government rule operates as a prohibition on sincere religious free exercise, the Free Exercise Clause forbids the government from imposing such a burden (absent a compelling justification, which I address presently). In short, if we view the clause from the perspective of the believer, government generally should be required to defer to the believer's statement of when

59 *See* McConnell, *Origins*, *supra* note 17, at 1488–1500.

60 *Cf.* Sherry, *Paradox*, *supra* note 4, at 149–50 (suggesting that nontheists' resentment toward religious claims constitutes an impairment of the nontheists' religious liberty).

government action has the effect of prohibiting his free exercise of religion.[61]

Second, the clause protects only *sincere* religious claims and requires deference only when the free exercise claim is predicated on interference with a sincere religious practice. If the religious adherent sincerely claims that the law operates to burden his religious exercise, that burden is substantial enough to justify restricting state power in imposing that burden on him. The religious claimant should bear the initial burden of coming forward to assert such a claim. But, consistent with the believer-oriented approach to free exercise, the government should then bear the heavy burden of disproving a claimant's sincerity. This is a thumb on the scales in favor of the religious claimant, but this seems justified (1) by the preference for religious liberty, because of the substantive importance of true religion; and (2) because the government should not easily prevail in a dispute over whether an individual is telling the truth in raising a claim based on religious doctrine.

A long line of cases, beginning with *United States v. Ballard*,[62] supports the latter proposition, and rightly so. Nothing would be a graver interference with religious liberty than for government to put someone's religious faith to a kind of litmus test (except perhaps to make an erroneous finding that the person was not being sincere). It is true that this means that some bogus claims of religious liberty will prevail. But what of it? In the free speech context, we view such slippery slope problems, and the attendant protection of low-value expression, as a cost of freedom—a cost of protecting the core. In the criminal defendant context, we view the slippery slope of letting lots of guilty people go free as a cost of protecting a core value. Why should not protection of religious free exercise, if we value it so highly, be worthy of similar indulgence?[63]

Third, the presumption in favor of religious liberty should be overcome only by an extremely narrow range of assertedly compelling

61 The Supreme Court's doctrine is not far from saying this, except to the extent *Employment Division v. Smith* renders irrelevant in many cases the question of whether government action "burdens" religious exercise. The approach of the Court in *Thomas v. Review Board*, 450 U.S. 707 (1981)—which was not overruled in *Smith*, and remains good law, albeit within a more limited domain—is consistent with the approach urged in the text.

62 322 U.S. 78 (1944).

63 I have made this argument before. *See* Paulsen, *supra* note 8, at 277 ("The sincerity standard operates much as the 'beyond a reasonable doubt' standard, the presumption of innocence, and other procedural protections function in criminal cases: Better that a goodly number of 'guilty' claims survive, than that any 'innocent' religious claims be wrongly rejected.").

state interests. This is so in part because the Free Exercise Clause does not contain such a limitation in the text (so that, if one is to be implied, it must follow from the strictest necessity) and in part because the premise of the Free Exercise Clause is that state authority must yield to God's authority and that sincere claims of religious free exercise have an intrinsically superior status to the ordinary policy claims of the state. This is consistent with pre-*Smith* Free Exercise Clause doctrine in theory, but in practice a wide array of state interests has been permitted to trump claims to religious free exercise.[64]

In short, if the claim is really religious (not just secular), if the claim is not shown to be insincere (in accordance with accepted standards of proof for propositions of like kind, such as that necessary to sustain a perjury conviction), if the claimant demonstrates that the law operates so as to prohibit his exercise of religion in some nontrivial relevant respect, and if accommodation of the claim neither imposes substantial burdens on the private rights of others nor impairs some other interest of paramount importance to the existence of the state, the religious claimant should win.

These, then, are the doctrinal implications that seem to follow from Garvey's conception of what religious freedom is for.

## IV. CONCLUSION

As I noted at the outset, Garvey's book is not just about religious freedom. It is about the reasons for the freedoms that we have under our Constitution—religious freedom among them. Garvey offers a similarly provocative and refreshing take on many other questions of constitutional freedom. If stars in the margin, dog-eared pages, and scrawled comments are any indicator, I will find myself frequently returning to different sections of this book for thoughts on a wide variety of such issues. Garvey repeats the magic with his discussion of freedom of speech, children's (diminished) freedoms, questions of parenthood and agency, questions of group freedoms, and many more, culminating in an elegant treatment of the cluster of problems surrounding the issues of baselines, unconstitutional conditions, state action, and motivations.

In the course of writing this review, I had occasion to ask Garvey how long it had taken him to write the book. "Eighteen years," he said, without missing a beat. He described how he had first conceived the idea before 1980 and, steadily, over the years, had written two chapters, discarded one, written another, revised an earlier one, writ-

64 *See generally* Paulsen, *supra* note 8.

ten three more, and discarded two old ones he no longer agreed with. *What Are Freedoms For?* is truly a life's work of scholarship, displaying rare thoughtfulness, patience, and maturity. It will have a ripple effect on the way thoughtful scholars think about specific freedoms, and about freedoms in general, for a generation or more.