

# GOOD GOD, GARVEY! THE INEVITABILITY AND IMPOSSIBILITY OF A RELIGIOUS JUSTIFICATION OF FREE EXERCISE EXEMPTIONS

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Is the Free Exercise Clause<sup>1</sup> a dead letter? Is it capable of being revived?

The answer to the first question is “yes.” That assumes, what I think is correct, that the Free Exercise Clause, reduced to a protection against intentional religious discrimination, has very little practical importance and is perhaps covered by other constitutional guarantees. It also assumes that the Free Speech Clause<sup>2</sup> adequately covers freedom of religious belief and expression. In other words, the heart of the Free Exercise Clause is the right to judicially-mandated exemptions from general laws for those whose religion mandates conduct contrary to such laws. And *Employment Division v. Smith*<sup>3</sup> cut the heart out of the Free Exercise Clause.

The answer to the second question is more complicated. It takes just five Supreme Court justices to revive the pre-*Smith* free exercise jurisprudence, and some appear ready to do so.<sup>4</sup> Congress attempted to help them out, but even justices hostile to *Smith* spurned that particular offer, appearing as it did to cut into the Court’s authority to have the final say on constitutional interpretation.<sup>5</sup>

Academics have also weighed in heavily, if not unanimously, against *Smith* and for free exercise exemptions. Most of these arguments have been couched in terms of the Framers’ intentions,<sup>6</sup> but they have generally attempted

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1. U.S. CONST. amend. I. (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

2. *Id.* (“Congress shall make no law . . . abridging the freedom of speech . . .”).

3. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

4. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-80 (1993) (opinions of Justice Souter and Justice Blackmun, the latter joined in by Justice O’Connor).

5. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (declaring the Religious Freedom Restoration Act unconstitutional).

6. See, e.g., Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 337-47 (1996); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116-19, 1151-52 (1990).

to justify what they claim the Framers intended by reference to liberal theory. That is, they have attempted to justify free exercise exemptions, and hence, the Framers' intention to provide for such exemptions, by reference to *neutral* values, values that all reasonable people must accept.<sup>7</sup> Autonomy is one such neutral value. Civil peace is another. These values, separately or together, undergird the necessity of free exercise exemptions, a necessity that will be apparent to reasonable persons regardless of their particular sectarian beliefs or their atheism or agnosticism.<sup>8</sup>

The problem with liberal, neutral justifications of free exercise exemptions is that they do not work. Indeed, in the current philosophical literature on liberalism, there is a virtual cottage industry attempting to rebut the claims of those like John Rawls<sup>9</sup> that liberalism can achieve neutrality among metaphysical views by rejecting a concern with Truth in favor of the "political" notion of Reasonableness.<sup>10</sup> Although liberalism as a nonpartisan position above the fray of battling sectarian creeds has its defenders, I side with those proclaiming that liberalism is as partisan and sectarian as those creeds that it wishes to embrace but not succumb to.<sup>11</sup>

I am thus squarely in John Garvey's camp when he rejects nonsectarian—liberal, neutral—justifications for a constitutional right to the free exercise of religion. In *An Anti-Liberal Argument for Religious Freedom*,<sup>12</sup> subsequently republished as chapter three in his book, *What Are Freedoms For?*<sup>13</sup> under the title of "God is Good,"<sup>14</sup> Garvey crisply and decisively reveals the untenability

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7. See Laycock, *supra* note 6, at 316-19; McConnell, *supra* note 6, at 1129-36.

8. See Laycock, *supra* note 6, at 317.

9. John Rawls's position is set forth in JOHN RAWLS, *POLITICAL LIBERALISM* (1993). A close cousin of Rawls's position on "reasonableness" is Thomas Nagel's idea of "reasonable rejectability." See THOMAS NAGEL, *EQUALITY AND PARTIALITY* 154-68 (1991). Both Rawls and Nagel argue that a belief may be rationally held by the believer but reasonably rejected by others. *Id.* at 159-67; RAWLS, *supra* at 299-304. All such beliefs must be excluded from the justification of coercion in a liberal state. See also BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 160-88 (1995).

10. There is vast literature attacking this move from Truth to Reasonableness. See, e.g., Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 792-97 (1993); Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2324-32 (1997); Jean Hampton, *The Moral Commitments of Liberalism*, in *THE IDEA OF DEMOCRACY* 292, 292-313 (David Copp et al. eds., 1993); Michael Huemer, *Rawls's Problem of Stability*, 22 SOC. THEORY & PRAC. 375, 382-84 (1996); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 10-15 (1990); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1776-94 (1994).

11. See Alexander, *supra* note 10, at 793-94.

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

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

14. *Id.* at 42-57.

of any argument for religious liberty that is nonpartisan among religions and between religion and nonbelief.<sup>15</sup>

With respect to autonomy, Garvey argues that autonomy covers all sorts of choices, not just religious ones.<sup>16</sup> If autonomy protects religious choices, why does it not also protect, say, the multitude of other types of choices that have not been constitutionally enshrined? As Frank Michelman once quipped regarding roughly the same point, “[W]hy . . . not golf?”<sup>17</sup>

Moreover, says Garvey, not only does autonomy fail to justify a special constitutional regard for religion, but it also fails to reflect why religious people value religious freedom.<sup>18</sup> They value religious freedom, not because they have autonomously chosen their religious paths, but rather because those paths present themselves as the Truth which they have no choice but to follow. It is God who has chosen, not they.<sup>19</sup>

The civil peace rationale for special protection of religious freedom is also deficient.<sup>20</sup> It does not justify protecting groups too small or fringe to fight back or muster widespread sympathy.<sup>21</sup> Moreover, more ruthless religious suppression might be even more productive of civil peace than toleration.<sup>22</sup> Witness, says Garvey, the absence of religious strife in the former Soviet Union.<sup>23</sup>

Garvey believes, as I do, that any successful defense of religious freedom as special will have to be sectarian.<sup>24</sup> So after attacking the liberal justifications for religious freedom, he presents his alternative, which is to approach religious freedom from the believer’s viewpoint.<sup>25</sup>

There is, says Garvey, a religious argument for not forcing people to utter prayers, express beliefs, or engage in ceremonial rituals.<sup>26</sup> In the matter of religious belief, this argument goes, coercion is futile.<sup>27</sup> “[I]t is futile because it cannot put the soul in touch with God. The individual cannot hear God unless he

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15. *Id.* at 56-57.

16. *Id.* at 42-45.

17. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 59 (1969).

18. GARVEY, *supra* note 13, at 45-46.

19. *Id.*

20. *See id.* at 48-49.

21. *Id.*

22. *Id.* at 49.

23. *Id.*

24. *Id.* at 57.

25. *Id.* at 49-54.

26. *Id.* at 49.

27. *Id.* at 50.

has faith. And faith does not come to people just because they go through the ritual motions. God gives it to whom he wills.”<sup>28</sup>

Garvey acknowledges that this argument regarding coerced ritual is not only controversial—many would claim that coerced ritual can, over time, acquaint people with the truth—but also distinctly Protestant.<sup>29</sup> As he points out, the argument began as a protest against the claim of the Catholic Church that it must mediate between God and man.<sup>30</sup> But not only has the argument now been accepted by the Catholic Church;<sup>31</sup> more importantly, it is no mark against the argument that it is narrowly sectarian. Garvey is claiming that any argument for religious freedom will perforce be sectarian.<sup>32</sup> (A broad, capacious “sectarian” argument, one that could be accepted by all “religions,” would most likely collapse into the rejected argument from autonomy.)

The Protestant argument from futility can explain freedom from coerced religious ritual.<sup>33</sup> A second Protestant argument, again now embraced by Catholicism, can explain freedom to express religious beliefs and to proselytize.<sup>34</sup> The argument, found in Milton’s *Areopagitica*,<sup>35</sup> is that God’s revelation is progressive, and that it is achieved through free religious inquiry.<sup>36</sup>

So far, Garvey has given a sectarian justification for freedom from coerced religious observance and freedom of religious expression.<sup>37</sup> If one is a Protestant or a Catholic who accepts the positions Garvey portrays as orthodox, then one will believe these freedoms are justified. If one is not a mainstream Christian, as I am not, then one might remain skeptical, as I am. For instance, as I indicated, coerced observance can plausibly place people in a better position to accept truth. (That is why many coerce their children to engage in religious rituals that the children do not understand, much less autonomously accept.) And although I would like to believe that freedom of expression does bring us nearer to the truth in all matters, including religion, I remain unpersuaded that such a belief can ever be based on more than a hunch.

But so what? If the Constitution was adopted by people holding the narrowly sectarian beliefs that Garvey describes, then it is *their* beliefs, not mine, that account for the constitutionalizing of religious freedom. It is, I repeat, no

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 50-52.

32. *Id.* at 56-57.

33. *Id.* at 50-51.

34. *Id.* at 51.

35. JOHN MILTON, *AREOPAGITICA* (Edward Arber ed., 1972) (1644).

36. *Id.* at 44-54; GARVEY, *supra* note 13, at 51-52.

37. See GARVEY, *supra* note 13, at 42-57.

objection to Garvey's account of religious freedom that it is religiously partisan. For that is exactly the kind of account Garvey purports to be offering and that he maintains is necessary. So I am with Garvey to this point, even if I personally am skeptical of the grounds he provides for religious freedom. Because I have argued against the possibility of a nonsectarian liberalism, I cannot object to an account of constitutional liberties that is based on religious and other sectarian beliefs that I reject.

So far, then, so good. But not very far. Garvey's religious arguments for religious freedom have to this point justified only freedom from coerced observance and freedom of religious thought and expression.<sup>38</sup> An unremarkably capacious conception of freedom of expression and thought could encompass these aspects of religious freedom.<sup>39</sup> To justify a separate constitutional provision on religious freedom, Garvey's religious arguments must go further. They must extend to religious-based exemptions from laws of general applicability. It is in this area that a separate guarantee of religious freedom must have real bite.

Garvey recognizes this and proceeds to make out a case for such exemptions.<sup>40</sup> He points out that religious believers often feel bound by special moral obligations—a breach of which might risk damnation or other bad extra-worldly consequences.<sup>41</sup> Or such believers might be concerned, not with the consequences for them of a breach of God's duties, but with the consequences for God.<sup>42</sup>

Exemptions from secular laws enable religious believers to avoid the great harms of after-life suffering and betrayal of God. And unlike the rights against coerced observance and restrictions on religious expression—rights which by their nature protect everyone—the right to religious-based exemptions applies only to believers.<sup>43</sup> Only they believe that they will suffer the harms of breach of religious duties. Atheists cannot be compelled to pray or forbidden to express skepticism about God.<sup>44</sup> Only believers, however, can claim the right to follow the mandates of their religion rather than those of the state.<sup>45</sup>

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38. *See id.*

39. *See, e.g.*, William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 386-87 (1996) (arguing for protection of religious ideas and expression but not religious conduct).

40. GARVEY, *supra* note 13, at 52-54.

41. *Id.* at 52.

42. *Id.* at 53.

43. *Id.*

44. *See id.* at 48.

45. *Id.* at 50.

Garvey concludes that his religious justification for religious freedom accounts for the general contours of free exercise law.<sup>46</sup> Nonbelievers and believers alike can claim rights regarding religious expression and (non)observance.<sup>47</sup> Only believers, however, can claim rights to be exempt from general laws.<sup>48</sup>

I believe Garvey's religious justification for free exercise exemptions is unsuccessful. First, *whose* religious point of view is Garvey assuming? With respect to compelled observance and religious expression, Garvey was clear: a distinctly Protestant viewpoint was constitutionally enshrined.<sup>49</sup> But if certain strands of Protestantism provide the prism through which we are to view claims of religious freedom, then the religious duties that such Protestants recognize—and *only those duties*—should be exempt from general laws.<sup>50</sup> All other assertions of religious duties must be viewed as specious. Put differently, if extra-temporal consequences are what justify exemptions, then Protestants would reject all claims for exemptions not founded on duties to God that they recognize, for only the breach of those duties would in fact produce the extra-temporal consequences.

Religious believers do not view compliance with *imagined* duties as a good.<sup>51</sup> Rather, they view compliance with *actual* duties as a good.<sup>52</sup> A sectarian argument for free exercise exemptions should be sectarian all the way down. It should seek freedom from man's laws only for those following God's laws—those laws that God has actually laid down, not those that someone might believe He has laid down.

Garvey might respond by referring to the Protestant position that revelation is progressive, a position that justifies freedom of religious thought and expression. We may believe we know what God commands us to do, but in an atmosphere of freedom, we may discover that we have erred. Others should be allowed to follow what they believe to be God's commands in order that we may come to grasp those commands with more certainty.

Unfortunately, this argument proves far too much if it proves anything. Suppose I believe that God commands me to secure the welfare of children to the best of my ability. Indeed, I would violate any law that prevented me from helping a child whose welfare was endangered. And suppose, further, that a

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46. *Id.* at 55.

47. *Id.*

48. *Id.* at 52-54.

49. *Id.* at 49.

50. *See id.* at 54-55.

51. *Id.* at 49-50.

52. *Id.*

Christian Science couple believes God commands them not to seek medical attention for their sick child. If the law commands them to do so, they cannot appeal to *my* point of view to justify an exemption for *them*. From *my* point of view, they are threatening to breach God's duties, not comply with them. It is true, however, that I may be mistaken. That may be a good reason to allow them to protest the law and urge its repeal. But I have to take action now, and I cannot both compel them to have the child treated and exempt them from that requirement.

The general point is this: complying with one's conception of God's duties is a good thing only if that conception is correct from whatever point of view counts as authoritative. There is nothing generally good about complying with imagined religious duties. Moreover, in the real world, in real time, we have to take a stand on the likely content of those duties, even if we admit fallibility. We must take action without the luxury of certainty.

What about the psychological anguish one might suffer at being prevented by the state from complying with one's imagined religious duties? Such psychological anguish is surely real, even if the duties are not.

This is, of course, true. But notice that this argument goes down the path Garvey has rejected. Garvey is concerned with real extra-temporal suffering rather than with temporal psychological anguish.<sup>53</sup> The avid golfer might suffer severe psychological anguish from being prevented from playing golf, but he presumably faces no Divine punishment.

Garvey has just not been bold enough to remain completely faithful to the approach he advocates. Religion is not good. *True* religion is good. Religious exemptions for false religions sacrifice real value for counterfeit. Beyond freedom from compelled observance and freedom of religious expression, a religious argument for religious exemptions will only justify those exemptions that the particular religious belief accepts.

Michael Paulsen, in a celebratory review of Garvey's book, argues along lines similar to Garvey's for a return to pre-*Smith* free exercise jurisprudence of constitutionally-mandated religious exemptions.<sup>54</sup> Or rather, Paulsen argues for a return to what the pre-*Smith* jurisprudence proclaimed rather than what it did in practice.<sup>55</sup> Specifically, Paulsen argues that sincere religious beliefs should lead

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53. *Id.* at 52-53.

54. Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1599 (1997) (book review).

55. *Id.* at 1625. In practice, despite numerous appearances, those seeking free exercise exemptions won only a handful of cases in the Supreme Court in the 27 years from *Sherbert v. Verner*, 374 U.S. 398 (1963), to *Employment Division v. Smith*, 494 U.S. 872 (1990).

to exemptions from general laws unless such exemptions would jeopardize "an extremely narrow range of assertedly compelling state interests."<sup>56</sup> (In practice, the pre-*Smith* cases found the compelling interest test satisfied by a wide array of state interests that would never pass muster as "compelling" if used to justify, for example, racial classifications.<sup>57</sup> Paulsen would presumably urge that only those interests sufficiently compelling to justify racial classification be deemed sufficiently compelling to justify denial of religious exemptions.)<sup>58</sup>

But again, why should a compelling secular (state) interest ever override the interest in satisfying God's commands? From the believer's perspective, God's commands trump those of the state, however "compelling" the latter might seem to nonbelievers. From the perspective of nonbelievers, on the other hand, the believer is in error. What he believes God has commanded is false. And if it is false, then it is not the case that the state is elevating its laws above God's commands.

This complete opposition over the actual content, if any, of God's commands explains the instability of the compelling interest test in pre-*Smith* free exercise jurisprudence. If I am an official, and on one side of the balance I perceive a real, even if not compelling, governmental interest, and on the other side of the balance I perceive a sincere but, in my opinion, erroneous claim regarding God's commands, I will find it difficult to regard the latter as compelling or even important. At most I will view these claims as reflective of the psychological anguish the claimants are suffering under the law, which will not distinguish them from those who suffer nonreligious psychological anguish over the myriad ways the law restricts autonomy. Or perhaps I can assign the religious claim an artificial weight as a prophylactic against the possibility of covert religious hostility lurking behind the appearance of a law of general applicability. But in neither case will I view the religious claimant's discharging his perceived religious duties as itself a compelling or even important interest, one sufficient to override real state interests.

If I am correct as a psychological matter, then one would expect the compelling interest test in the area of free exercise exemptions to degrade into a test under which only those claimants whose religious views are fairly close to the

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56. Paulsen, *supra* note 54, at 1624-25.

57. *Id.* at 1625.

58. According to Paulsen, the religious claimant should win:

if the claim is really religious (not just secular), if the claim is not shown to be insincere, . . . if the claimant demonstrates that the law operates so as to prohibit his exercise of religion, . . . 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.

judges' will prevail, and then only when the state will barely feel the impact of the exemption. The Seventh Day Adventists and the Amish will win on matters like Sabbath observance<sup>59</sup> and family control over education,<sup>60</sup> and only when the state interests sacrificed are quite marginal.<sup>61</sup> On the other hand, Native American beliefs regarding use of peyote as a sacrament are sufficiently out of the mainstream, and the state interest in banning drug use sufficiently significant, that an exemption will be denied.<sup>62</sup>

In short, there is no general religious point of view that sees compliance with imagined religious duties as good. Rather, there are particular religious points of view, each of which sees compliance with its own list of duties as good. A theory of religious freedom, as Garvey convincingly argues, must be partisan. And I would add, it must be partisan through and through. It should not wimp out at the end in favor of religious exemptions for duties that it rejects. A liberalism that attempts to do without Truth is bound to fail. But so too will a religious argument for religious freedom. That means, unsurprisingly, that a religious argument for religious freedom will account for only that amount of freedom consistent with the religion's account of Truth. And that amount of religious freedom may be quite small indeed.

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59. See *Sherbert v. Verner*, 374 U.S. at 410 (striking down, as applied to a Seventh Day Adventist, a requirement that one be available to work on Saturdays as a condition of eligibility for unemployment compensation).

60. See *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (requiring Wisconsin to exempt Amish children from the last two years of compulsory education).

61. In *Sherbert* there were already several bases under the law for rejecting employment without sacrificing eligibility for unemployment compensation. *Sherbert v. Verner*, 374 U.S. at 406-08. In *Yoder* the Court noted the success of the Amish in educating their children for the tasks of their community. *Wisconsin v. Yoder*, 406 U.S. at 235-36.

62. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

