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## Review of *What Are Freedoms For?*, by John H. Garvey

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WHAT ARE FREEDOMS FOR? By *John H. Garvey*. Cambridge, Mass.: Harvard University Press. 1996. Pp. viii, 312. \$35.

In 1988, Jeffrey Kendall and Barbara Zeitler Kendall were married.<sup>1</sup> Though Jeffrey was Catholic at the time and Barbara was Jewish, the couple agreed to raise their children in Barbara's faith. In 1991, Jeffrey joined Boston Church of Christ, a fundamentalist Christian church. The tenets of that faith include a belief that those who do not accept Jesus Christ are damned to Hell, where there will be "weeping and gnashing of teeth." Barbara's faith also underwent a change during the marriage: she became an Orthodox Jew. Citing irreconcilable differences, the Kendalls sought a divorce in November, 1994.

Before their marriage dissolved, the Kendalls had three children, all of whom were under ten at the time of the divorce. In the divorce petition, Barbara sought to restrict Jeffrey's ability to expose the children to his fundamentalist faith. The probate court was then faced with a choice: it could deny this aspect of Barbara's petition or it could order such a restriction and thereby appear to endorse one religion over the other. Reasoning that it was acting in the best interests of the children, the divorce court prohibited Jeffrey from taking his children to church, exposing them to Bible study, or otherwise expressing to them his religious views, if such activities alienated the children from their Jewish self-identity or from their mother, or if the activities caused the children emotional harm. Though it had no evidence that any present harm had come to the children, the court nevertheless found that the likelihood of future substantial psychological harm was sufficient to justify the restriction. The Supreme Judicial Court of Massachusetts upheld the order.

Reflecting the increasing number of interfaith marriages<sup>2</sup> — and subsequent interfaith divorces that potentially put courts in the position of deciding between allegedly irreconcilable but abstractly "good" religious practices — the *Kendall* case provides fertile ground for examining John H. Garvey's new study of constitutional freedom, *What Are Freedoms For?* In most of this book, Garvey aims to debunk the most common conception of freedoms: that they are "rights to make choices" (p. 1). In philosophical terms, this conception is expressed by the phrase "the right is prior to the

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1. All the following facts are related in *Kendall v. Kendall*, 687 N.E.2d 1228, 1230 & nn.4-7 (Mass. 1997).

2. See Robert Marquand, *Kids' Choice of Religion in Divorce*, CHRISTIAN SCI. MONITOR, Dec. 12, 1997, at 1, 9 (reporting that more than 50% of Buddhists and Jews, 40% of Muslims, and 30 to 40% of Catholics marry outside their faith).

good,” where the right in question is the right to make a choice (p. 1). Under this approach, the Constitution’s guarantees of freedom are intended to permit each person to decide for himself what is the good and how to achieve it.

In opposition to this conception of freedom, Garvey argues that the good is prior to the right. He envisions freedom “as a right to act [in particular ways], not a right to choose” (p. 2). He thus distinguishes autonomy from freedom. He also believes that some actions are better than others, and that the Constitution gives freedom to perform such actions without government interference because they are better.

Garvey recognizes the difficult task he has set for himself: he acknowledges that the first view of freedom has become orthodox. His strategy therefore is patient and meticulous. In chapter after chapter, he acknowledges the now-conventional view, often admitting its *prima facie* merits. He then offers his competing conception, attempting to demonstrate that it is a superior explanation of the law of constitutional freedoms.

Using *Kendall v. Kendall*<sup>3</sup> — a case in which two religions came into conflict — as a foil, this Notice examines Garvey’s theory of freedom particularly as it relates to religion.<sup>4</sup> Part I sets forth Garvey’s general argument in regard to freedom of religion. Part II describes Garvey’s views on the freedom children achieve through their representatives. Part III analyzes *Kendall* on Garvey’s terms and concludes that while Garvey’s theory does have some explanatory power, it may not perfectly capture the dynamic at stake in cases like *Kendall*.

## I. FREEDOM

Garvey largely rejects the idea that constitutional freedom has the purpose of allowing choice, or a zone of autonomy.<sup>5</sup> Because “autonomy is a moral ideal, [and] freedom is a legal rule” (p. 6), Garvey concedes that freedom might conceivably be a way of setting up the legal rules to ensure autonomy. Such a concept of free-

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3. 687 N.E.2d 1228.

4. Garvey does not confine his discussion to religion. He also focuses on freedom of association and freedom of speech.

5. P. 12. Garvey notes two arguments that posit choice as the ultimate value. The autonomy theory holds that “each person is an end in himself, a kind of sovereign over a kingdom of one.” P. 23. Following others’ orders, as opposed to making one’s own choices, would violate this sovereignty. In contrast, the political theory stresses the idea that people disagree irreconcilably “about whether some forms of life are better than others.” To achieve democratic stability of government such questions are removed from the lawmakers’ table and left to the choice of individuals. P. 23. Garvey cites no sources for these views and the reader suspects immediately that perhaps, even under these views, choice is valued only in a limited subset of cases and not in a sweeping range of cases.

dom, however, would need to be extremely broad<sup>6</sup> and both bilateral and universal in character.<sup>7</sup> Without such a broad conception of freedom, autonomy would not be possible, because it would be impossible to achieve unanimous and voluntary consent to the legal rules. If choice or autonomy were the ultimate value, dissent would arise from legal rules informed by a narrower conception of freedom because these rules would protect some choices but not others.

Garvey points out that we do not have such a broad conception of freedom. Freedom is particular and not universal (p. 12). The Constitution protects only certain kinds of freedom. “[T]he law does not give us any special freedom to hunt, fish, drink whiskey, shoot pool, or work for Toyota” (p. 13).

Freedom is also not necessarily bilateral. Not every act has an opposing act that people might choose (p. 17). Reproductive freedom<sup>8</sup> might include the right to abortion and the right to childbearing. But it might not. Abortion, Garvey points out, might also not be considered a *reproductive* choice at all, but rather its antithesis. Thus, a right to childbearing would not necessarily entail a right to an abortion (p. 18). Similarly, a right to religion does not entail a right to atheism (p. 40). Each action requires its own justification. Freedoms do not come in pairs *a priori*; they must be paired (p. 39).

Because our concept of freedom is so limited, autonomy cannot be its sole purpose. Instead, Garvey argues, freedom’s purpose is to protect particular ways of acting that we deem good: “[F]reedoms allow us to engage in certain kinds of actions that are particularly valuable. The law leaves us free to do *x* because it is a good thing to do *x*” (p. 19).

Garvey uses freedom of religion to illustrate his point about the purpose of freedom. He contrasts two approaches to religious freedom, the *Agnostic Viewpoint* and the *Believer’s Viewpoint*. The former posits autonomy as the underlying purpose of freedom of religion (pp. 42-49). Under this view, religious decisions are one way — but only one way — in which we shape our lives and express our individual humanity and identity. For this purpose, the truth

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6. The view that autonomy requires a very broad conception of freedom may be no more than a straw man. On the other hand, the argument Garvey espouses is not limited to how widely one defines the type of choice freedom permits. In such a dispute, the relevant issue is what counts as a choice about religion, or a choice about reproduction. Garvey will deny that “choice” is an improper term to describe those particularly valued activities in which people engage.

7. It would need to be bilateral in the sense that freedom to act in a particular way would necessarily entail freedom to act in the opposite way. It would need to be universal in the sense of being sufficiently applicable to a wide number of activities so as to provide an equal measure of freedom for all the various actions a citizen might think important.

8. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (recognizing marriage and procreation as fundamental rights).

and value of particular religious decisions are unimportant. Particular outcomes are unimportant. The value lies in the choice. For this reason, one religious choice is accepting God. Choosing to reject Him, however, is as good a choice as acceptance.

Garvey rejects the Agnostic Viewpoint on several grounds, including the mistaken conception of personhood that it assumes (p. 44), its inconsistency with the experience of believers (p. 46), and its inconsistency with existing legal doctrine.<sup>9</sup> First, the Agnostic Viewpoint posits an essential self unburdened by "habitual convictions and desires" (p. 44). This self can examine its convictions and desires, rejecting those that conflict with the self's idea of what life should be like and accepting those that are congruent. Garvey questions both whether this examination is possible and whether it is desirable.<sup>10</sup> Second, the viewpoint does not match the experience of many believers. They do not experience belief as a choice: "[F]aith is a gift" (p. 51). Furthermore, at least some would contest the definition of freedom: "[I]t is accurate to say that Christian freedom consists not in making our own [value] choices but in obeying the law of God" (p. 46). The believer does not cherish his freedom because it allows him to make value choices, but rather because it permits him to obey God. Lastly, Garvey points out that the viewpoint does not match existing legal doctrine.<sup>11</sup> While believers and nonbelievers are sometimes accorded equal protection, this is not always true.<sup>12</sup> In some cases, believers get special protection.

Garvey's alternative to the Agnostic Viewpoint is the Believer's Viewpoint. The value underlying freedom of religion here is the shared moral belief that religion and the acts associated with it are good things (p. 49). Freedom permits a person to achieve these goods and to do these good acts without governmental interference. Presumably, by contrast, the government could freely interfere with the vast range of activities constituting nonbelief and nonreligion.

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9. He also questions whether the choice to reject God is appropriately characterized as an act "of religion" protected by the First Amendment's text. P. 43.

10. This vision of humanity is entirely at odds, for one example, with the Christian notions of grace and of original sin, the "inability to master sinful desires and to freely will doing good." P. 45.

11. As a general matter, Garvey's analysis is somewhat slippery. When current constitutional law matches Garvey's theory, he cites it to prove his theory is right, by which he means it has more explanatory power. Other times he notes the divergence of the Supreme Court decisions and his theory, yet still argues that he is right. It is not clear in such cases what he means by right. Perhaps Garvey "take[s] seriously . . . the possibility that there are right answers to political-moral problems." MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 102 (1982).

12. Garvey points out, for example, that the law still protects religions from discrimination and exempts religions from certain obligations solely because they are religions. Pp. 54, 192-93.

The Believer's Viewpoint also recognizes that religion, as a general matter, requires freedom (pp. 50-54). One cannot, after all, coerce faith, and interference with the acquisition and dissemination of religious knowledge would inhibit the search for truth. From the perspective of the individual believer, religion also requires freedom because it is particularly cruel for a government to subject a person to dire otherworldly spiritual consequences by interfering with religious practice (p. 52) and because it is offensive to God to do so (p. 53).

Garvey acknowledges that only some people will find such reasons convincing and that these people will tend to be believers (p. 54). He has several answers to this charge. First, he notes that everybody — believers and nonbelievers alike — benefits from freedom from coercion and from noninterference with truth-seeking. The government may not prevent believers from engaging in their religious observances, but it may not compel an agnostic to participate in any such observances either (p. 53). Second, Garvey reiterates his criticism that the Agnostic Viewpoint is no more neutral than the Believer's Viewpoint, because it, too, rests on assumptions that only some people can accept.<sup>13</sup> Finally, he argues that the Believer's Viewpoint has more explanatory power. The Agnostic Viewpoint offers no reasons why autonomy with regard to religion is protected but autonomy with regard to cigarette smoking is not (pp. 45, 49). The Believer's Viewpoint at least can answer this question.

## II. CHILDREN, REPRESENTATIVES, AND FREEDOM

In his discussion of children and freedom, Garvey starts with the observation that “[t]he constitutional rules about freedoms don't work well for [children and others who are legally incompetent]” (p. 82). Garvey rejects in part one explanation for this phenomenon — a utilitarian view that the consequences of freedom are more grave for children (p. 82). Instead, Garvey argues that children's limited ability to engage in practical reasoning is a better explanation (p. 82). Thus, “[o]ur moral intuitions suggest that a child's freedom is less important than an adult's, not just that it is more often outweighed” by grave consequences.<sup>14</sup>

His proof that we value adults' freedom differently lies in the way we balance, in particular cases, freedom and the adverse conse-

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13. P. 56; *see supra* notes 9-10 and accompanying text (describing notions of personhood and the experience of belief that the Agnostic Viewpoint entails).

14. Pp. 84-85. Garvey has a disconcerting habit of making declarations of what “our” intuitions are and are not. *See, e.g.*, p. 27 (discussing “our intuitions about random sexual conduct”). The title of one review of *What Are Freedoms For?* seems to question how widely shared some of Garvey's declared intuitions are. *See* Alan E. Brownstein, *The Freedom Not to Be John Garvey*, 83 CORNELL L. REV. 767 (1998).

quences flowing from keeping an activity free from governmental interference. In the case of adults, two principles guide this balancing: the harm principle and the least-restrictive-alternative rule. The harm principle sets a maximum threshold of harms that we are willing to tolerate as a consequence of the exercise of freedom. The constitutional requirement that the government show a “compelling state interest” embodies this principle: the state has a compelling interest in preventing only those harms above the threshold and so may restrict the freedom that gives rise to these harms’ occurrence.<sup>15</sup> The least-restrictive-alternative rule “holds that even when an activity causes significant harm the government must be careful not to overregulate” (p. 85). Children’s freedom is shown to be different not because the principles used to balance are different, but because we tolerate fewer harms and permit more restrictions on children.<sup>16</sup> The freedom that children enjoy is thus less expansive than adults’ freedom — and obviously much less expansive than that which autonomy requires.

The reason for the lower value placed on children’s freedom has its root, according to Garvey, in responsibility. Drawing on the criminal law, Garvey argues that the law generally respects the ability to choose by punishing only those capable of conforming their actions to the dictates of the law.<sup>17</sup> Garvey does not, however, deny children’s ability to choose. Rather, he says “[w]e are inclined to say about children that though they can make choices, they are not very good at choosing; they habitually choose the wrong things” (p. 91). Therefore, he goes on to say, “we excuse children not because they can’t *choose* but because they can’t make the *right* choices” (p. 91), and “[t]hose who are too young or too disordered to understand the difference between good and bad have no need of freedom.”<sup>18</sup> Why? Because freedom, to recall, “is valuable because it allows us to do good things” (p. 95).

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15. Pp. 276-77 nn.12-13 (citing cases).

16. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults.”).

17. The law respects choice by punishing the wrong choices. Garvey acknowledges the counterintuitive nature of this claim, but he does not make what appears to be an obvious connection to a Christian’s finding freedom in obeying God. See *supra* text accompanying note 11.

18. P. 95. Thus, in the case of freedom of speech, Garvey is willing to suppress some points of view for children, because doing so helps “to make sure children can recognize the good, the true, and the beautiful.” P. 104. Children have representatives precisely to make good choices for them. For this reason, Garvey would no doubt reject the *Kendall* court’s reliance on the children’s identifying themselves as Jewish and in one instance “choosing” to study Orthodox Judaism. *Kendall v. Kendall*, 687 N.E.2d 1228, 1230 (Mass. 1997). These factors are not terribly relevant: the fact that the children have chosen an objective good — religion — does not mean that they consistently can choose the good. That is why their representatives make all the choices for them and this scenario renders the children free.

To overcome his inability to make the right choices, a child must achieve freedom through a representative who can make such choices. Thus, "[t]he real question [becomes] who his representative should be — parents or the state" (p. 117). Parent representatives are superior to government representatives because their ties to the child, the likelihood that the child's interests overlap with the parents', and the absence of objective standards to guide a governmental decisionmaker all point to a kind of functional consent between parent and child that does not exist with the government.<sup>19</sup> Government intervention, on the other hand, may succeed in

mak[ing] children more free vis-à-vis their parents, [but it] makes children less free in their relations with the state. If a child is in danger of being overwhelmed by his parents' Islam, exposing him to Sunday School and pork chops might assist his choice of a religion when he comes of age. But the purpose of the Constitution's guarantee of religious liberty is to protect people from the government, not [from] their relatives.

. . . The Constitution requires, as a general rule, that the government withdraw from these cases. [p. 122]

Garvey claims that children have freedom "in the constitutional sense when relatives or friends act for them," but they are not free when governmental agencies or judges act for them (p. 113).

Accordingly, Garvey disapproves of the dominant model that permits courts to review choices of the child's representative under a purportedly objective standard like *best interests of the child*. He finds a subjective model more consistent with the Constitution. Under this model, the family representative defines what is good for the child according to the representative's own standards (p. 117). This model is particularly attractive when applied to decisions about which there are no objective standards, such as matters involving the child's education or religious upbringing.<sup>20</sup>

### III. GARVEY AND *Kendall*

This Part applies Garvey's theory to some of the questions raised by *Kendall v. Kendall*. Section III.A resolves a threshold issue by acknowledging that the ruling is in fact a constraint that involves the First Amendment. Section III.B argues that at first glance Garvey's theory requires the government to withdraw, but

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19. Garvey says the proper metaphor is a republic where people are considered self-governing because they elect the representatives who do the governing. Parents are "elected" by virtue of their ties to the child. P. 119.

20. Garvey contrasts such decisions with decisions about health care issues. For the latter, the objective model is somewhat more palatable "because there are certain primary goods (life, health, the absence of pain) that any rational person would want." P. 116. Nevertheless, even if he concedes that these goods are primary, Garvey explains that some people value other things as well, some more highly than the identified primary goods. For this reason, he prefers the subjective approach. P. 116.



points to elements in Garvey's thinking that undermine such a hasty conclusion. It concludes that Garvey's simple dichotomy of Agnostic and Believer's Viewpoints does not fully capture what is at stake in *Kendall*.

### A. Constraints

In the second part of his book,<sup>21</sup> which is considerably more discursive than the first, Garvey constructs a taxonomy of government constraints. He makes the point that what counts as a constraint ought to be a critical threshold issue (p. 166). Only constraints and not other measures need to be justified by compelling state interests.

With regard to this threshold issue, the *Kendall* court forbade Jeffrey to expose his children to his religious beliefs because the court believed its order to be in the best interests of the children. In doing so, the court admitted that it constrained Jeffrey's freedom,<sup>22</sup> though its admission was not without reservation.<sup>23</sup> Even had the court not characterized its order as a constraint, Garvey's theory provides two reasons for thinking that it is.<sup>24</sup> First, any burden on Jeffrey in his role as representative is therefore a burden on the rights of his three children to free exercise — at least of Jeffrey's religion.<sup>25</sup> To recall, a child is free in the constitutional sense when

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21. The second half of Garvey's book tackles the other side of the freedom coin. His argument on this score is lengthy and complex and not particularly relevant to the *Kendall* case, so this Notice will leave it to the reader. Suffice it to say, because Garvey argues that freedom has a moral aspect in that it gives us freedom to do good acts, he recognizes a flip side: that a government that interferes with freedom is doing not simply an amoral, but a positively bad act. P. 2.

22. See *Kendall*, 687 N.E.2d at 1235 (noting that constraint is permissible if justified by a compelling government interest). The court was somewhat schizophrenic, however, because it conflated the existence of a constraint with whether it is justified. See, e.g., *Kendall*, 687 N.E.2d at 1236 (explaining that the restriction is not a constraint because it is for a secular purpose, a logical non sequitur). Later the court denied both that it had burdened the practice of religion and that it had "established Judaism" as the children's religion as forbidden by the First Amendment. *Kendall*, 687 N.E.2d at 1236. If it had not constrained the practice of religion, it would not have needed to mention — much less show — that there was a compelling government interest, the best interest of the *Kendall* children. Thus, it is safe to conclude that the court believed it had burdened the practice of religion, but that the burden was justified.

23. The court hedged by stating that, technically, it had not burdened Jeffrey's exercise at all. *He* remained free to pray and follow whatever religious observances he wished. To the extent religious observances include proselytizing and other evangelical work, the court's conclusion seems plainly mistaken.

24. It is unclear from the *Kendall* decision which parent had legal custody or whether the custody was joint. The matter, however, is not strictly important to this analysis. The selection of one parent over the other as the child's representative, if done in part because the chosen parent's religion is ostensibly the same as the expressed religion of the children, would amount in effect to the same type of restriction the court in fact imposed in this case.

25. The Supreme Court's decisions, while not unequivocal, appear to support Garvey's point. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (distinguishing between regulation of religion qua religion and generally applicable rules and holding that only

his representative is free to make choices for the child in what the representative believes to be the child's best interest.

Second, to Garvey, the essence of constraint is intention.<sup>26</sup> He distinguishes among three types of intention; in Garvey's taxonomy, laws of the first two kinds are constraints:

1. In the easiest case . . . the government forbids people to do *x* because it thinks that *x* is bad. . . .

2. More typical is the case where the government forbids *x* as a means to some other end . . . . The government not only foresees that *x* will be abridged, but actually tries to bring that about [even though] [i]t might do so with genuine regret. . . .

3. . . . [T]he impact on *x* [may be] only a side effect, not a means. [pp. 212-13]

*Kendall* represents the second type. The court forbade the practice of religion qua religion to produce its desired end. It did not, for example, prohibit nonreligious denigration of Barbara. Instead, it singled out religion — an ironic, backhanded recognition of what Garvey believes, that religion is “special” (p. 45). The court's order was, therefore, a constraint on free exercise and needed to be justified by a compelling state interest.<sup>27</sup>

### B. *Justifications*

According to Garvey, freedom gives us the space in which to do good acts. Exercise of religion is one such intrinsically good act. Freedom is the legal rule that gives people the opportunity to pursue this good. As a general rule, government ought to withdraw from situations involving religious decisionmaking for children in favor of decisionmaking by representatives.<sup>28</sup> At first glance, the *Kendall* court appears to have flouted the general rule.

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the latter are not constraints). The *Kendall* court burdens religion qua religion. While it purports to be acting in the child's best interest, it regulates only exposure to religion and not exposure to other behaviors that might also lead to distress. See *Kendall*, 687 N.E.2d at 1231.

Furthermore, *Smith* explicitly retains the old test from *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963) (requiring that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest) for “individualized decisions” — which the best-interest-of-the-child test assuredly is. Finally, *Smith* notes the Court's particular solicitude for “hybrid situations” in which, as in *Kendall*, the law in question burdens both the freedom of religion and another right, such as a parent's right to control his child's schooling or upbringing. *Smith*, 494 U.S. at 881 (citing, *inter alia*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

26. Pp. 216-17 (“Bad intentions have an intrinsic significance; they are part of what it means to *violate* the Constitution.”). This conclusion follows from his argument that the government has a duty not to interfere, not simply a lack of power to interfere. See *supra* note 22.

27. This conclusion is true regardless of the government's purported interest; that interest could justify the constraint, but it could not make it any less of a constraint.

28. P. 122. Indeed, his argument is stronger: the government has a moral duty to withdraw. See *supra* notes 22, 25.

Nevertheless, four concepts more or less implicit in Garvey's thinking might seem to support the court's decision. Although in the end, Garvey's theory generally upholds application of the general rule in a case like *Kendall*, it is worth considering the four concepts, which follow. First, it may make sense to argue that there is no equivalence between a religion that says others will burn in Hell and a religion that does not do so. The secular worship of tolerance appears to prohibit equating the two. Second, Garvey's solicitude for representatives suggests that the government ought also to have respected the wishes of Barbara. Withdrawing from the decision was not neutral in this sense; it showed disrespect for Barbara's freedom. Third, because the freedom at stake in *Kendall* may be characterized as the child's and not the parent's freedom,<sup>29</sup> Garvey's conclusion that children have less freedom may make the court's intervention more palatable constitutionally. Fourth, acknowledging that religion is a good does not necessarily mean that more religion is better, or even also good. Indeed, Garvey makes much of rejecting choice. The following paragraphs in turn describe how Garvey's theory ultimately rejects three of these four reasons despite their facial plausibility, and proves inconclusive in answering the fourth.

*Evaluating Religions.* The modern ethic of tolerance might call for courts to decide that a tolerant religion should be favored over an intolerant one. While the court did not, of course, announce that it had made an evaluation of the Kendall parents' respective religions on this basis,<sup>30</sup> the district court's findings nonetheless included numerous references to the belief of Jeffrey's church that nonbelievers will burn in Hell, that there will be "weeping and gnashing of teeth," and that Jeffrey Kendall vowed never to stop trying to get his children to accept Jesus Christ. Despite the fact that the probate court found that "leav[ing] *each parent* free to expose the children . . . to *his or her* religion"<sup>31</sup> would substantially damage the children, it detailed no written findings on Barbara's faith and did not refer to its tenets, despite the fact that Barbara's faith, too, had shifted, from Reform to Orthodox Judaism. It seems possible that Barbara's religion may also have tenets that implicitly or explicitly denigrate the father. The whole concept of the Chosen People, for example, conceivably denigrates Jeffrey as "unchosen." The court did not examine this issue, and this lack of reflection embodies the fears of Garvey and those who think like him: "[This decision] is also an invitation for judges to do what the Constitution

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29. See *Kendall*, 687 N.E.2d at 1234 (so characterizing the issue).

30. See *Kendall*, 687 N.E.2d at 1236 (claiming that the restriction's focus is on the physical and emotional well-being of the child, not on the merits of the parents' respective religions).

31. See *Kendall*, 687 N.E.2d at 1231 (emphasis added).

doesn't want them to do — discriminate on the basis of the content of religion."<sup>32</sup> Thus despite one's temptation to evaluate on the basis of tolerance, Garvey rejects government evaluation of religious truth claims. By this measure, at least, *Kendall* is not a special case and Garvey would apply the general rule of governmental noninterference.

*Protecting Barbara.* Barbara is as much the representative of her children as Jeffrey is. The children's freedom, therefore, according to Garvey's model, also lies in Barbara's freedom to do for them what she thinks best. Inaction by the court, then, would not have been a neutral stance at all, but rather a loaded one that would have failed to protect Barbara's freedom — and by extension the children's. Alternatively, governmental action might have been necessary to prevent a situation in which *neither* representative could exercise the children's freedom effectively because of the other's interference.

In contexts unrelated to the *Kendall* case, Garvey recognizes the strength of this argument.<sup>33</sup> This recognition suggests at first that application of his theory to *Kendall* might lead to the conclusion that there is no neutral stance consistent with freedom. Government inaction would not have been neutral from Barbara's perspective. The court's order was not neutral, because although it purported to use a neutral standard, the best interest of the child, this standard presumes an Agnostic Viewpoint.<sup>34</sup> A radically neutral outcome, in which neither parent may expose the children to his or her religion, or in which the court orders the children exposed to a third religion — say, Buddhism — is also radically unfree, like living, Garvey says, under an "evenhanded despot" (p. 190).

Garvey's theory would not accept this suggestion. While he would recognize that from Barbara's perspective government inaction was not neutral, he would deny that it was *constitutionally* unfree. The Constitution, he points out in other contexts, regulates

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32. Marquand, *supra* note 2, at 9 (quoting University of Michigan Law School Professor Carl Schneider) (internal quotation marks omitted).

33. In a discussion of free speech, for example, Garvey notes that, to the speaker, it makes no difference whether it is the government or a private actor that burdens speech. He therefore makes a plausible straw-man argument that the Constitution might require that the government step in to protect speakers from content-based restraints on speech by private actors—actors like Jeffrey Kendall. P. 246. Garvey calls this theory the "public interest" theory of the public function argument. Pp. 247-48. He attributes the theory to the now-overruled Supreme Court decision in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976). Garvey subsequently demolishes this superficially attractive straw man. Pp. 251-59.

34. Commentators have pointed out that the standard is not neutral in practice. See generally Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

freedom as against the state; it does not protect private citizens from other citizens and so does not protect Barbara from her ex-husband's persuasions. The government's moral duty is noninterference. This duty does not extend to preventing nongovernmental interferences. Protecting Barbara's freedom also does not make *Kendall* a special case under Garvey's theory.

*The Freedom of Children.* Another reason that suggests *Kendall* may not be an easy case under Garvey's theory is his belief that we do not value children's freedom as much as adults'. Because it is the children's and not the parents' free exercise that the court purported to impair, the court was neither bound by the least-restrictive-means test nor required to adhere to as high a harm threshold as it would have were an adult's more valuable freedom at stake. The court needed less reason to impose a constraint on a child's freedom.<sup>35</sup>

In a general sense, Garvey grants this possibility. He acknowledges that there are relatives who do not make good representatives and whose choices for the children could be "callous, selfish, or downright evil."<sup>36</sup> In such cases, "there is a compelling state interest in overriding" the child's — and the representative's — claim to freedom.<sup>37</sup> Indeed, in *Kendall*, there are a number of intuitively appealing reasons for thinking that the court got it right: the children's expressed religious preference, the father's unwillingness to keep to his premarriage bargain,<sup>38</sup> the suspicion that the father was using his children against the mother, and the perverse and outrageous behavior of shaving off his son's *paves*.<sup>39</sup> This view of the freedom at stake may indeed make *Kendall* a special case. In fact, it suggests that *Kendall* is an easy case the other way: the child's best interest trumps the child's freedom claim, a claim that has less value than an adult's freedom claim. If the general rule is noninterference, here interference might have been more appropriate.

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35. The constraint here is not the order, per se, but the substitution of the government for the parents as the children's representative. See p. 118 ("[W]hen the government steps into R's shoes . . . X is not free").

36. P. 122. It is not clear what standard Garvey uses to measure callousness, selfishness, and evil, however, since he had earlier thrown out any objective measure. See *supra* notes 19-20 and accompanying text. It would seem that any inquiry into a representative's motives along these measures would be a back door into precisely the type of governmental interference Garvey does not like. It should be noted, however, that because freedom is not universal for Garvey, this back door is permissible in areas that are unfree. In religious choices, Garvey might argue, the back door is not open.

37. P. 122. But in such cases, Garvey adds, the child "though better off, is not free." P. 122.

38. Indeed, making a kind of estoppel argument, the court somewhat illogically cited these two reasons as proof that its decision did not amount to a preference. See *Kendall v. Kendall*, 687 N.E.2d 1228, 1236 (Mass. 1997).

39. *Paves* are earlocks worn for religious reasons.

Two considerations make accepting this view problematic. First, it glosses over the preliminary question of whose freedom is at stake, the child's or the representative's. Second, while Garvey leaves open the *general* possibility that representatives might be callous, selfish, or evil, and that the government might be permitted to inquire into such motives, he does not specifically allow such an inquiry into the motives behind religious decisionmaking. Indeed, because in his view freedom is particular and not universal, Garvey may permit such governmental inquiries in nonreligious decisionmaking, but not as to religious action.<sup>40</sup> It is therefore unclear whether Garvey's theory would discard the general rule of governmental noninterference on this basis.

*Choice.* Garvey's rejection of the primacy of choice is a final plausible reason for believing that *Kendall* might be an exception to the general rule. Governmental noninterference in this case would provide the children with a choice between religions. For Garvey, however, the fact that exposure to religion is a good act does not entail the corollary that exposure to more religions is better.<sup>41</sup> For this reason, it is at least arguable that Garvey would not recognize the value in exposure to two very different faiths and would therefore endorse the court's order.

Admittedly, this argument is not terribly strong and probably would not permit escape from the general rule of governmental noninterference under Garvey's theory. The argument provides no rule, for example, for deciding which faith gets the governmental stamp of approval. Empirically speaking, too, it is at least open to question in what sense a child's simultaneous exposure to two religions detracts from his practice of either.

In any case, the real utility of the argument comes in helping to illustrate that views about freedom do not resolve themselves neatly into the poles of the Agnostic and Believer's Viewpoints. Consider two points. First, in a perverse sense, the court gives religion the special place that Garvey desires. After all, the probate court judge found "directly contradictory messages from trusted adults to be solidly contrary to [the children's] best interests," yet her order prohibited only contradictory *religious* messages.<sup>42</sup> If the court subscribed to the Agnostic Viewpoint, it would have treated religion as merely one choice among many that are integral in constituting the human. Furthermore, the opinion reveals that the court did not make a god out of choice as an adherent of the Ag-

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40. See *supra* text accompanying notes 8-9.

41. Cf. p. 122 (discussing the absurdity of exposing the child of Muslim parents to "Sunday School and pork chops" to ensure his religious freedom).

42. *Kendall*, 687 N.E.2d at 1235 (quoting probate court's findings of fact) (internal quotation marks omitted).

nistic Viewpoint would. Indeed, it is by denying choice that the court hoped to accomplish its end of safeguarding identity. In this sense, it is not autonomy that informs what it is to be human, but state-enforced acceptance of one group identity over another.

These two points — regarding autonomy and the special place of religion — suggest three Viewpoints, not two. Massachusetts precedent prior to *Kendall* seems to match the Agnostic Viewpoint. The precedent held that exposing children to the separate faiths of divorced parents was a healthy thing.<sup>43</sup> It assumed that autonomy and choice are the purposes of freedom, and its “metatheory of goodness” was to maximize the possibilities open to children when they were able and allowed to choose (p. 117). Such choices were deemed to be good because autonomy builds or is expressive of identity. For this reason, Massachusetts courts did not interfere in decisions regarding children’s religious upbringing in the context of divorce. Garvey, on the other hand, advocates the Believer’s Viewpoint. He contends that exposing children to parental religion is a good act, that freedom protects this good act, and that courts have a duty not to interfere. The *Kendall* court by contrast reflected neither of these views. The court allowed that freedom may consist of choice — though not because autonomy builds identity. Indeed, autonomy was found to be a threat to the children’s “Jewish self-identity.” The court further allowed that freedom may mean non-interference, but not because exposing children to parental religion is intrinsically good. Rather, the court found religion only instrumentally good. Thus, the court’s viewpoint ultimately is not about freedom; it is about choosing beneficial psychological — and purportedly neutral — outcomes.<sup>44</sup>

## CONCLUSION

This last viewpoint, the one actually taken by the *Kendall* court, is the one Garvey might have found most objectionable had he considered it. The yardstick — the best-interest-of-the-child standard — is the problem.<sup>45</sup> For all its appearance of neutrality, the court’s evaluation was not neutral, because it assumed the supremacy of a

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43. See *Kendall*, 687 N.E.2d at 1235 (“[T]he law sees a value in ‘frequent and continuing contact’ of the child with both its parents and thus contact with the parents’ separate religious preferences.”) (quoting *Felton v. Felton*, 418 N.E.2d 606, 607 (1981) (citations omitted) (quoting *In re Marriage of Murga*, 163 Cal. Rptr. 79, 80 (Ct. App. 1980) (internal quotation marks omitted) (quoting CAL. CIV. CODE § 4600 (West 1979)))).

44. One might question, among other things, whether it is likely that psychology is able to produce more “objective” and less value-laden conclusions about psychological health than religion can produce about spiritual health.

45. For another criticism of this standard, see Elster, *supra* note 34, at 7 (describing the standard as “indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations”).

secular psychological valuation over a religious valuation, the Believer's Viewpoint. Furthermore, the court suggested that freedom is good and relevant only insofar as it produces psychologically acceptable results.<sup>46</sup> Under this view, religion is no more than a tool to service the child's psychological need.

Garvey would question this lack of attention to the child's spiritual health. He would question the inherent cruelty of laws contravening religious practices and having consequences in the Hereafter.<sup>47</sup> He would contend that the government should withdraw because, as one commentator has said, "a court can't possibly decide what is good for a child's religious identity. It has no more insight into that question than you and I."<sup>48</sup> Finally, he would ask, what principled objection could this stance raise to a radical neutrality that either prohibits religious instruction altogether or chooses a third nonparental religion in which to raise the child?

Though the dichotomy between Agnostic and Believer's Viewpoints does not fully explain *Kendall*, this fact does not entirely elude Garvey. Where there is a measure of incompatibility between religions, a contest of good versus good, one representative's religion versus another representative's religion, perhaps freedom, whatever its purpose, by necessity gets thrown out the window. Perhaps some decision as a practical matter needs to be made because a child simply cannot effectively practice both representatives' religions simultaneously. As Garvey indicates in a slightly different context, it may be true at that point that the *Kendall* children are psychologically better off, but it is important to note that — by his standards — they are no longer free.

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46. Indeed, in this case, in which no harm had yet been visited on the children, the court's position is still stronger: freedom is only good and relevant insofar as it creates less risk of psychologically unacceptable outcomes.

47. "To one who believes . . . the vice of the law is that it requires believers to do a bad thing." P. 188.

48. Marquand, *supra* note 2, at 9 (quoting University of Michigan Law School Professor Carl Schneider) (internal quotation marks omitted); *see also* *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (rejecting the propriety of discerning, and a court's ability to discern, what is central to a religion).