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## Contemporary Challenges to Catholic Lawyers

The Honorable Henry J. Hyde

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# CONTEMPORARY CHALLENGES TO CATHOLIC LAWYERS

THE HONORABLE HENRY J. HYDE\*

By any relevant measure, the United States is the most intensely religious country in the developed world.<sup>1</sup> Those who travel abroad know from experience that Sunday is very different in America than it is in Western Europe or Japan. Moreover, evidence suggests that Americans have become even more religious over the past several generations.<sup>2</sup> To be sure, there has been a shift in the dynamics of American Christianity; the churches of the old Protestant mainline are losing congregants rapidly, while evangelical Protestantism and Roman Catholicism continue to grow.<sup>3</sup>

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\* Chairman, House Judiciary Committee.

<sup>1</sup> See GEORGE H. GALLUP, JR., *RELIGION IN AMERICA 1995*, at 5-6 (1996) (finding that "the United States is one of the most religious nations of the entire industrialized world in terms of the level of attested religious beliefs and practices" and that the second half of the twentieth century has been "the most churching half-century in the nation's history"). Moreover, in a 1974 poll, 77% of those responding favored a constitutional amendment to allow school prayer; in 1995, 71% favored it. See *id.* at 75.

<sup>2</sup> A recent study by Andrew Greeley found that America not only retained its religious vitality over the last century, but that the ranks of the faithful were increasing. See *Belief in Afterlife Found Greater in Gen-Xers Research: In Comparison with Those Born Early in Century, Change Is Most Notable Among Catholics and Jews, Study Finds*, L.A. TIMES, Sept. 20, 1997, at B4. Significant gains resulted from large numbers of Catholic and Jewish immigrants earlier in the century. See *id.*; see also JOHN TRACY ELLIS, *AMERICAN CATHOLICISM 122-23* (1956) (quoting statistics for the increasing numbers of Catholics from 1900 to 1956).

<sup>3</sup> See Gregory C. Sisk, *Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Disclosure*, 46 RUTGERS L. REV. 1691, 1747-48 (1994) (noting that many baby boomer parents are returning to church with their children; not to the liberal mainline Protestant churches, which are declining in membership, but rather to the evangelical churches). See generally Ira C. Lupu,

The vitality of religious conviction and practice in the United States is the single greatest source of our moral strength as a democratic people.<sup>4</sup> Indeed, religious conviction is the most powerful buttress of democratic conviction in the United States. The American people are democratic because the American people are a religious people.

This point is too often passed over today, even by those sympathetic to the utility of religion as a source of values. Ask yourself: why is it that in this vibrantly, intensely, and diversely religious country, we enjoy such a high level of religious tolerance and civic good-will among people of different faiths? Have the American people made a grand, pragmatic bargain, choosing to be tolerant because that is the easiest way to get along with neighbors? Does religious tolerance in America rest on essentially utilitarian foundations? Or, is it much more likely that the American people are religiously tolerant because they believe themselves religiously obliged to be religiously tolerant? As Americans, we are tolerant of those who disagree with us about the will of God because we believe it is God's will that we be tolerant of those who have a different view of God's will.

That is, religious tolerance in America rests on the firmest possible foundation: religious conviction.<sup>5</sup> Religious-tolerance-as-pragmatic-bargain can quickly erode under the pressures of plurality and difference. Religious tolerance that is religiously grounded, however, is better able to withstand the pressures of plurality, because it rests on the conviction that "difference" is part of God's master plan for history, as Pope John Paul II suggested at the United Nations in October of 1995.<sup>6</sup> This means

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*To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996).

<sup>4</sup> See Robert F. Kane & Fred M. Blum, *The International Year of Bible Reading—The Unconstitutional Use of the Political Process to Endorse Religion*, 8 N.Y.L. SCH. J. HUM. RTS. 333, 343 (1991) (quoting President Ronald Reagan: "the Bible inspired many of the early settlers of our country, providing them with the strength, character, convictions, and faith necessary to withstand great hardship and danger in this new and rugged land ... which laid the foundation for the spirit of nationhood that was to develop").

<sup>5</sup> See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 177-78 (1996) (praising Catholic schools because they convey values that are the foundation of a democratic society: compassion, tolerance, and commitment to justice; such schools are open to non-Catholics, "the poor, the alienated, and the culturally distinct").

<sup>6</sup> See Pope John Paul II, *Address Before the United Nations General Assembly*,

that religious people, instead of having to apologize for their convictions, should celebrate those convictions as one of the well-springs of democratic civility. Unfortunately, this celebratory view of the place of religious conviction in public life is not universally shared.

Peter Berger, the distinguished sociologist of religion, once said that on any index of religiosity and secularity, India is the most intensely religious country on earth, and Sweden the most secular.<sup>7</sup> The trouble with America, Berger concluded, is that we are a nation of Indians ruled by elite Swedes.<sup>8</sup> Beyond Berger's metaphor, the "Swedes" seem determined to wage war against the "Indians." The vast majority of the "Indians" are content to live in an America in which there is room in the public square for the "Swedes"; the "Swedes" seem feverishly determined to drive the "Indians," and the convictions the "Indians" most cherish, from the arena of public life.<sup>9</sup> It is not too difficult to locate the cultural high ground from which the "Swedes" operate.<sup>10</sup> Think of American higher education: many elite universities in the United States were founded as religious schools.<sup>11</sup> On most of

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Oct. 5, 1995, reprinted in ORIGINS, Oct. 19, 1995, at 293.

<sup>7</sup> See generally PETER L. BERGER, *THE SACRED CANOPY, ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967). "The global tendency seems to be in all cases the emergence of a state emancipated from the sway of either religious institutions or religious rationales of political action." *Id.* at 130. In America the "state is most benign to religion," parallel to its role in "*laissez-faire* capitalism." *Id.* at 131.

<sup>8</sup> See *id.* at 130. This situation illustrates a severe blow to the traditional purpose of religion, that is, to establish a common set of mores with universal meaning for the members of a society. See *id.* at 134.

<sup>9</sup> Berger refers to contemporary religious consciousness as being in an "age of skepticism," where religious tenets are pushed from "fundamental 'truths' on which ... all 'sane' men will agree," to a lesser level of "subjective' views," where intelligent people often disagree and "of which one is not altogether sure oneself." Berger, *supra* note 7, at 150.

<sup>10</sup> See Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 266 (1992) (commenting that the Supreme Court "has noted that official governmental hostility to religion is not mandated by our Constitution" and citing voluminous Court cases following this rationale); Edward McGlynn Gaffney, Jr., *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143, 1147-51 (1990) (exposing weaknesses in leading theories of liberal Bruce Ackerman, who advocates a rule where religion would not play a significant role in the public sphere); Gustav Niebuhr, *Land of Religious Freedom Has Universe of Spirituality*, N.Y. TIMES, Mar. 30, 1997, at 4 (lamenting that because religious freedom is guaranteed, "belief in God remains vastly popular" and the "Heaven's Gate" cult was able to exist and commit mass suicide).

<sup>11</sup> See David L. Gregory, *Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools*, 1993 BYU L. REV. 1287, 1304

those campuses today, many of the faculty regard Jewish and Christian orthodoxy as, at best, a whimsical tolerable "lifestyle choice," of no more consequence than vegetarianism or parakeet-keeping.<sup>12</sup> Indeed, the secularization of American higher education over the past seventy-five years is one of the most astonishing transformations in our national cultural history. What, for example, do you think of when you think of Syracuse University and the University of Southern California? You probably think of basketball and broadcasting first, football and film-making second. What you certainly do not think of is Methodism, despite the fact that both of these schools were founded precisely as Methodist institutions.<sup>13</sup> More than a few observers see the same process of secularization at work in our Catholic colleges and universities today.<sup>14</sup>

Similarly, the negative attitude toward religion, particularly Christianity, is evidenced within the popular entertainment industry. There is no need here to rehearse the evidence of the rampant "Christophobia" in Hollywood, a loathing of Christianity that often is focused most intently on Catholic belief and practice.<sup>15</sup> But the Hollywood problem goes far beyond Catholicism. Painful as it may be, think for a moment about the weekly prime time sitcom fare on American network television. Can you find, from Sunday night through Saturday night, a single depic-

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n.68 (1993) (naming fifty-two institutions, including Harvard, Duke, Southern California, and Syracuse, that originally had religious affiliations).

<sup>12</sup> See Helen C. White, *What Place Has Religion In State University Education?*, in RELIGION AND THE STATE UNIVERSITY 89-90 (Erich A. Walter ed., 1958). White observed that "in most intellectual circles theology is not regarded as the queen of the sciences." *Id.* at 89. The average student, once "awed by the incomprehensible words of the expert" professor, now casts aside the professor's claims of expertness. *Id.* at 90. For an interesting contrast, see JERALD C. BRAUER, PROTESTANTISM IN AMERICA 102-03 (1965) (describing debates between students and the president of Yale College in 1759 over the validity of the Bible). In defending the Bible the president had "little difficulty in demolishing every argument of the students ... [in a] full, frank, and reasonable discussion ...." *Id.* at 102.

<sup>13</sup> See GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 276 (1994); see also Gregory, *supra* note 11, at 1310 n.68 (listing schools that in response to his survey disclaimed any institutional religious affiliation, including Southern California and Syracuse).

<sup>14</sup> See generally MARSDEN, *supra* note 13.

<sup>15</sup> See Yechiel Eckstein, *Hollywood's Anti-Christian Bias*, JEWISH PRESS, Feb. 14, 1997, at 4 (observing that where there is a Christian character in a film, he is "usually depicted as a fool, a liar, cheater, a diabolical murderer or a crazy person" and citing numerous examples, yet conceding that the Jewish faith is generally depicted in a favorable light).

tion of a family doing what the majority of America's families do every week, namely, go to church? The last network sitcom that showed churchgoing as a normal part of the principal characters' lives was the "Cosby Show," which vividly demonstrated that you can be funny, successful, and unapologetically unsecular at the same time.

At best, elite universities regard religious conviction as a curious personal intellectual fetish. At worst, religious conviction is a threat to the scholarly pursuit of truth. Hollywood mocks religious conviction, or is simply complacent toward the way in which most Americans conduct their lives. It is submitted, however, that neither Harvard nor Hollywood pose the most pressing danger to religious conviction and practice in the United States today. That threat, I regret to report, comes from the Supreme Court of the United States.

For over fifty years now, since *Everson v. Board of Education*<sup>16</sup> in 1947, the Supreme Court has bent and distorted the First Amendment's religion clause until it is barely recognizable today. Please note that I say religion "clause," rather than "clauses." We are, of course, accustomed to the language of religion "clauses": a "Free Exercise Clause" and an "Establishment Clause."<sup>17</sup> But this false imagery of multiple religion "clauses" points us, in fact, toward the root of the problem. As Professor Mary Ann Glendon and Father Richard John Neuhaus have argued, in my view, persuasively, there is only one "religion clause" in the First Amendment,<sup>18</sup> and its purpose is to foster the free exercise of religion through, among other things, disestablishment, the refusal to put the power of the state behind any one creed or church.<sup>19</sup> In other words, free exercise is the end, and "no establishment" is the means.

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<sup>16</sup> 330 U.S. 1 (1947) (upholding a program to reimburse parents who spent money transporting their children to both public and private schools, thereby viewing religious and secular schools neutrally).

<sup>17</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

<sup>18</sup> See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991); see also Richard John Neuhaus, *Polygamy, Peyote, and the Public Peace*, FIRST THINGS, Oct. 1990, at 63 (criticizing the 1990 Supreme Court decision in *Employment Division v. Smith* as virtually nullifying the Religion Clause).

<sup>19</sup> See Glendon & Yanes, *supra* note 18, at 483-84 (stating that disestablishment "is obviously not the purpose of the First Amendment") (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947)).

The goal is an America in which religious conviction flourishes and religiously grounded moral argument enlivens a public discourse carried on within the bounds of democratic civility. The goal is most certainly not the naked public square. Nor is the goal to officially sanction secularism as the national ideology.

Over the past fifty years, the Supreme Court has first divided the First Amendment's religion clause into two separate religion clauses,<sup>20</sup> and, second, attempted to balance the two "clauses."<sup>21</sup> Ultimately, the Court subordinated "free exercise" to "no establishment," so that "no establishment" became the overarching goal and "free exercise" became something merely to be accommodated, if possible.<sup>22</sup> Or, as the 1978 edition of Professor Laurence Tribe's constitutional law textbook put it, with admirable directness, there is a zone that the Free Exercise Clause carves out of the Establishment Clause for permissible accommodations of religious interests.<sup>23</sup> This zone might be characterized as the "zone of permissible accommodation."<sup>24</sup>

I disagree with Professor Tribe. Religious conviction is not an "interest" to be understood by analogy to the used car dealers' lobby, and people of faith are not here to be "accommodated." Indeed, I can imagine nothing more likely to erode the loyalties of American citizens to their country and its democratic experiment than the notion that the deepest convictions of the over-

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<sup>20</sup> Glendon and Yanes argue that the separate incorporation dates of the First Amendment religious freedom language in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (guaranteeing a qualified right to free exercise of religion) and *Everson v. Board of Education*, 330 U.S. 1 (1947) (interpreting the Establishment Clause provision to require the strict separation of church and state), "created an appearance of conflict between two provisions that history and text suggest were meant to work together in the service of religious liberty." Glendon & Yanes, *supra* note 18, at 482.

<sup>21</sup> Compare *Lee v. Weisman*, 505 U.S. 577 (1992) (disapproving of expressions of religious conviction at a public school graduation ceremony), with *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (stating that the First Amendment requires neutrality, not hostility, toward religion; "[t]he basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end"). See generally ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY* (1990).

<sup>22</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that an Alabama moment-of-silence statute, while allowing free exercise, was unconstitutional because it violated the establishment clause).

<sup>23</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4, at 822-23 (1st ed. 1978).

<sup>24</sup> *Id.* at 823.

whelming majority of our people are something that can only be “accommodated.” Yet that is precisely what the Supreme Court has done over the past two generations.

Moreover, the Court has not been content with distorting, and then inverting the First Amendment’s provision for a robust national religious life. The Court has also taken to instructing the American people on the dangers of religious conviction. Justice Anthony Kennedy, in *Lee v. Weisman*, claimed that public expression of religious conviction is inherently divisive, coercive, and irrational.<sup>25</sup> Justice David Souter, concurring, suggested that religious conviction lacks substantive importance.<sup>26</sup> Not to be outdone, Justice Henry Blackmun argued in his concurrence that religious conviction generated violent tendencies.<sup>27</sup> We might also note, in this unhappy trajectory, the charge raised by Justice David Souter during oral argument in the 1995 case *Rosenberger v. University of Virginia*,<sup>28</sup> that a student fee-funded Christian publication had been “proselytizing,” to which counsel for the students, Professor Michael McConnell of the University of Chicago Law School replied, “[P]roselytize ... is nothing but an ugly word for persuade, which is just exactly what the Free Speech Clause is designed to protect.”<sup>29</sup>

The Court’s warped First Amendment jurisprudence has not only damaged the law, but has also had a chilling effect on the American public square, where too many public employees and bureaucrats now assume that they have a mandate to promote secularism and to deny any “space” for Christian religious conviction. Public school teachers will accept papers on witches, but forbid students to write reports on Jesus.<sup>30</sup> A school board is forced to determine the constitutionally permissible balance between Bach and Irving Berlin in a public school choir’s

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<sup>25</sup> *Lee*, 505 U.S. at 588.

<sup>26</sup> *See id.* at 629-30 (Souter, J., concurring).

<sup>27</sup> “Of all the issues the ACLU takes on ... by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.” *Id.* at 607 n.10 (Blackmun, J., concurring) (quoting Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, 4 UTAH BAR J. 19, 19 (June/July 1991)).

<sup>28</sup> 515 U.S. 819 (1995).

<sup>29</sup> Transcript of Oral Arguments at \*53, *Rosenberger v. University of Va.*, 515 U.S. 819 (1995) (No. 94-329), available in 1995 WL 117631.

<sup>30</sup> *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that the Court has routinely overruled statutes which provide for religion being taught in primary and secondary schools).

"Christmas concert."<sup>31</sup> Pardon me, it is now the "Winter Holiday Concert."

Religious non-profit schools and charitable institutions are also affected when public welfare funds flow through their books.<sup>32</sup> Should an American diocese that operates a homeless shelter known as the "St. Vincent de Paul Shelter" be pressured by the Department of Housing and Urban Development, which provided the diocese with modest funds for blankets and cots, to change the name of the shelter to "Mr. Vincent de Paul Shelter?"<sup>33</sup>

This cultural and constitutional madness is eroding the foundation of American democracy, which is why I have introduced H.R.J. Resolution 121.<sup>34</sup> H.R.J. Resolution 121 is a constitutional amendment aimed at repairing the damage that has been done by the Supreme Court beginning with *Everson*.<sup>35</sup> This amendment is, I believe, a contemporary expression of the great constitutional tradition of American democracy. It is also congruent with the teaching of the Second Vatican Council on the "first right," which is religious freedom.<sup>36</sup> Like the American Founders and Framers, the Fathers of Vatican II, and Pope John Paul II, who himself has done so much to develop the Council's teaching on religious freedom, I believe that the state, as an institution, is, by its nature, theologically incompetent. That is why I do not want to see the State in the business of orchestrating or composing liturgies.

But, by the same token, I do not want the State to forbid people to bring their most cherished convictions into our public life. Thus, my proposed amendment, which reads, "Neither the

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<sup>31</sup> See *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 n.5 (8th Cir. 1980). A rule provided by the School Board of Sioux Falls states, "[m]usic ... having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." *Id.* at 1319.

<sup>32</sup> See *Johnson v. Sanders*, 319 F. Supp. 421, 430-31 (D. Conn. 1970) (stating that when public assistance is given to parochial schools, the money must be used for a non-religious purpose, so as not to offend the Establishment Clause).

<sup>33</sup> See Mark E. Chopko, *Don't Exclude the Churches*, NAT'L L.J., Feb. 29, 1988, at 14.

<sup>34</sup> H.R.J. Res. 121, 104th Cong. (1995).

<sup>35</sup> 330 U.S. 1 (1947).

<sup>36</sup> See Second Vatican Council, *DIGNITATIS HUMANAE, Declaration on Religious Liberty* (Dec. 7, 1965).

United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination,<sup>37</sup> makes clear that the Constitution does not discriminate against religious speech or practice. There should be, if you will, a level playing field in the American public square. All convictions deserve a voice and should be included within the “bond of democratic civility.”

In addition to the pervasive secular domination of American government, another more specific challenge facing today’s Catholic lawyer is the issue of abortion. Those of us who have been contesting the abortion license granted by the Supreme Court in *Roe v. Wade*<sup>38</sup> sometimes wonder whether there is anything new to be said on the subject. Recently, however, thanks to decisions by the Ninth and Second Circuit Courts of Appeals,<sup>39</sup> we may begin to see just where the *Roe* abortion license, constitutionally redefined in *Planned Parenthood v. Casey*<sup>40</sup> is leading us as a nation.

In 1992, in the plurality opinion in *Casey*, Justices Anthony Kennedy, Sandra Day O’Connor, and David Souter attempted to put the abortion license on a firmer constitutional footing by abandoning the “right to privacy” ground cited in *Roe*,<sup>41</sup> and in its place locating the “right to abortion” in the Fourteenth Amendment’s “liberty” provision.<sup>42</sup> Moreover, the justices, as is too frequently their wont, began to dabble in metaphysics, arguing that “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of hu-

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<sup>37</sup> H.R.J. Res. 121, at 2.

<sup>38</sup> 410 U.S. 113 (1973).

<sup>39</sup> See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev’d*, 117 S. Ct. 2293 (1997).

<sup>40</sup> 505 U.S. 833 (1992).

<sup>41</sup> See *id.* at 852-53 (recognizing the applicability of the reasoning of *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) to the abortion issue).

<sup>42</sup> See *Casey*, 505 U.S. at 846. “Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ The controlling word ... before us is ‘liberty.’” *Id.*

man life."<sup>43</sup>

Astute commentators at the time noted that this was a pernicious, even lethal, doctrine that drained the word "freedom" of its moral content and discarded any authority inherent in moral traditions and moral communities like the family. In addition, lifting up the imperial autonomous self as the be-all and end-all in American democracy reduced the legally relevant actors in our society to only the individual and the state. Those with some sense of the history of the twentieth century, especially twentieth century totalitarianism, have some idea where this stripped down image of society could lead over time.

In 1994, Chief Judge Rothstein of the U.S. District Court in Seattle applied the *Casey* definition of "liberty" in striking down a century-old law in Washington State that forbade physician-assisted suicide.<sup>44</sup> In March 1996, the Ninth Circuit Court of Appeals upheld Judge Rothstein's decision and concluded that the "liberty" provision of the Fourteenth Amendment included a constitutional due process "right" to physician-assisted suicide.<sup>45</sup> Less than a month later, in April 1996, the Second Circuit struck down a New York State law banning physician-assisted suicide, citing the Fourteenth Amendment "equal protection" grounds for its holding.<sup>46</sup> Subsequently, the Supreme Court reversed both Courts of Appeals' decisions, finding in *Washington v. Glucksberg* that the professed "right" to physician-assisted suicide was expressly "not a fundamental liberty interest protected by the Due Process Clause."<sup>47</sup> Unfortunately, the *Glucksberg* decision is not sufficient to repair the substantial damage that has been done by the abortion decisions; therefore, the amendment I propose is still urgently needed.

What is at stake is nothing less than the meaning of human freedom. The Supreme Court has reduced "freedom" to mere in-

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<sup>43</sup> *Id.* at 851.

<sup>44</sup> See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1466 (W.D. Wash. 1994), *aff'd*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

<sup>45</sup> On further appeal, a panel reversed Judge Rothstein. 49 F.3d 586 (9th Cir. 1995). On *en banc* reconsideration, an eleven member *petit* panel reversed and wrote broadly about a due process "right to die." 79 F.3d 790 (9th Cir. 1996), *rev'd*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

<sup>46</sup> See *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).

<sup>47</sup> *Glucksberg*, 117 S. Ct. at 2271.

strumental categories.<sup>48</sup> Freedom has become understood, quite simply and starkly, as the rules-of-the-game by which imperial autonomous selves, devoid of connections to moral traditions or moral communities, adjudicate their private wills with no religious conviction. James Madison's richly textured concept of freedom and its relationship to moral communities has dropped from the Constitution, to be replaced by Friedrich Nietzsche's nihilism.<sup>49</sup> This is not the freedom in whose cause the Founders pledged their lives, fortunes, and sacred honor. And this most certainly is not the freedom for which, as St. Paul told the Galatians, "Christ ... set us free."<sup>50</sup>

There is hope, but it will take persuasion and perseverance. Congress and the state legislatures have the power to erect barriers against the outrageous implications and consequences of the Court's nihilistic concept of freedom. We may even be able to repair some of the damage that has been done to the Constitution through an amendment that makes plain that there is no constitutionally guaranteed right to abortion or physician-assisted suicide. But, tragically, we cannot so easily repair the damage done to the moral foundations of our democracy, unless and until people of faith help this country to regain the moral substance essential to the freedom that we cherish.

In an address to the United Nations in October 1995, the Holy Father, Pope John Paul II, said that the "quest for freedom ... is one of the great dynamics of human history."<sup>51</sup> But, as he

<sup>48</sup> See e.g., *Lee*, 505 U.S. 577; *Edwards*, 482 U.S. 578; *Everson*, 330 U.S. 1; *Roe*, 410 U.S. 113; *Quill*, 117 S. Ct. 2293; *Glucksberg*, 117 S. Ct. 2258.

<sup>49</sup> See RANDALL HAVAS, *NIETZSCHE'S GENEALOGY: NIHILISM AND THE WILL TO KNOWLEDGE* xiii (1995).

From Nietzsche's point of view ... [perfect] indifference amounts to a form of nihilism. ...

Nietzschean nihilism is usually thought of as a transitional stage between two different ways of evaluating human life, between two different 'tables of values.' ... [W]hile we once measured our lives by a divine standard, and found them wanting, we have ... come to distrust this standard — to find it unbelievable. ... In the future, however, some of us may come to love our lives even in the absence of an external standard by which to measure their value. Those of us who fail to do so will have to learn to live with the thought that not only does human life lack the value that we once hoped it had, but it lacks any other value as well.

*Id.*

<sup>50</sup> See Galatians 5:1.

<sup>51</sup> Address by Pope John Paul II to the United Nations General Assembly (Oct. 5, 1995), reprinted in *ORIGINS*, Oct. 19, 1995, at 293, 295.

went on to remind us at his Mass in Baltimore several days later, "freedom" is not the power to do what we *like*, but rather "the right to do what we *ought*."<sup>52</sup> Freedom is a moral ideal, not merely a legal and political one, and reduced to a mere instrument, freedom destroys itself. For human beings and societies to flourish, freedom must be tethered to the moral truth about humankind. In the end, freedom will only be truly accomplished through goodness.

That is the great task I put before you, as Catholic lawyers and public advocates: be witnesses to the true meaning of freedom; refuse to acquiesce in a national descent into nihilism; help restore moral content to the freedom that is America's hallmark; and, as a result, give this great Republic a new birth of freedom.

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<sup>52</sup> Homily by Pope John Paul II, in Oriole Park, Baltimore, MD (Oct. 8, 1995), reprinted in *ORIGINS*, Oct. 19, 1995, at 312, 314 (emphasis added).