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## THE CONSTITUTIONALISM OF MARY ANN GLENDON

*Donald P. Kommers\**

Mary Ann Glendon is an accomplished legal scholar whose books and essays in the field of marriage and family law have received universal acclaim among her peers in the legal academy. More recently, and particularly in the last decade, she has emerged as a notable public intellectual. In this capacity, she has focused her careful reflections on topics such as abortion, religious liberty, social welfare legislation, the changing nature of the legal profession, and the condition of political discourse in America. One of the things that makes her recent work, as well as her earlier publications on family law, so relevant politically and so insightful intellectually is the international and comparative perspective that she brings to it. By comparing American legal trends with those of other countries, she offers her readers a clarifying lens through which to obtain a better understanding of these developments and, of equal importance, their relationship to the creation of a vibrant democracy and a caring civil society.

I'd like to begin with a brief overview of Professor Glendon's publications on family law because they constitute the best example of her general approach to the analysis of law and its impact on society. After commenting on what she considers to be the constitutional implications of this work, I move on to publications in which she addresses constitutional issues more directly. In this brief and selective account, I can only hope that I have properly understood her concerns and communicated a sense of the subtlety and complexity of her constitutionalism.

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## I

Mary Ann Glendon's work on family law provides us with impressive models of both comparative and normative legal scholarship. What is more, her claims are as modest as her prescriptions are discriminating. A devoted comparativist, she nevertheless recognizes the limits of comparative knowledge in recommending improvements in American law. Concerned with the morality of law, she also avoids moralism in her statements about law's failings. Later in this essay, I characterize Glendon's approach as moral realism, an approach that pays close attention to cultural differences in her comparative work and to social reality in her critical appraisal of American law, but which simultaneously challenges Americans to aspire to a higher social and political morality.

Glendon's early interest in comparative family law appears to have been sparked by her mentor, Max Rheinstein, a renowned teacher and scholar at the University of Chicago. (In the 1960s and 1970s, Rheinstein was arguably the world's leading authority in comparative family and succession law.) After Glendon's entry into the legal academy in 1968, following several years as an associate in the law firm of Mayer, Brown & Platt in Chicago, she collaborated with Rheinstein in producing a 194-page chapter on "Interspousal Relations" in the *International Encyclopedia of Comparative Law*.<sup>1</sup> By the time this chapter appeared, Glendon had achieved standing in her own right as a dominant authority in comparative family law. When Rheinstein died in 1977, the year in which her first book appeared,<sup>2</sup> she was well on her way to becoming one of this country's foremost comparative legal scholars, a reputation conclusively sealed with the publication of *Comparative Legal Traditions*, a major coursebook in the West Publishing Company's American Casebook Series.<sup>3</sup>

As with the 1977 volume, Glendon's other books on family law revealed the profound changes that had taken place in legal norms relating to marriage, divorce, family support, and parent-child relationships in the United States and Western Europe.<sup>4</sup> More importantly, these books were seminal studies in the sociology of law. By

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1 Max Rheinstein & Mary Ann Glendon, *Interspousal Relations*, in THE INTERNATIONAL ENCLYCLOPEDIA OF COMPARATIVE LAW (Aleck Chloros ed., 1980).

2 See MARY ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977).

3 See MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (1985).

4 See MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989) [hereinafter GLENDON, TRANSFORMATION OF FAMILY LAW].

relying on the work of anthropologists and social historians, not to mention her own keen sense of evolving social reality, she was able to relate developments in family law to fundamental, albeit often imperceptible, changes that were beginning to emerge in private life and the social economy. We read, for example, how new forms of property such as wages, social security, welfare benefits, and other entitlements influenced attitudes toward marriage, transposing it from a relationship based on the moral unity of two-in-one-flesh to one rooted in an ethic of personal autonomy and self-fulfillment, a development that defined modern marriage as a legal union as freely dissolved as it was freely entered into.

The power of Glendon's work on family law stems from its close examination of the connection between law and society. In this respect, her work is descriptively rich and unfalteringly honest in its account of the belief systems and social practices that have undermined the traditional institution of marriage as well as older definitions of the family. (She has found it more difficult to assess the impact of legal norms on social practices.) With the skill of a cartographer, she has mapped out law's twentieth century geologic shift away from protecting the bonds of marriage and the unity of the family to its modern emphasis on dividing property after the breakdown of a marital union and on looking after—all too inadequately in her view—the needs of indigent mothers and children. She documented law's inattention to the responsibility of unmarried and divorced fathers to support their former wives and mistresses and minor children. As a consequence, the latter have been forced to rely on government for their essential needs, casting them into an impersonal world overseen by huge welfare bureaucracies.

Glendon traces this change in family law in part to the emancipation of women from the so-called "housewife-marriage" and the modern tendency of both spouses to find their identities in their jobs rather than in personal relationships or traditional institutions. As law's traditional solicitude for the integrity of the marriage bond declined, she notes, its control over the employment relationship increased, usually in the interest of the employee.<sup>5</sup> On this front, she tells us, law and society moved forward pretty much together. She

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5 In the 1990s, however, the bond between employers and employees would loosen. The decline in union membership during these years was precipitous while corporate "downsizing" resulted in the summary discharge of tens of thousands of employees and workers throughout the nation. For an excellent essay relating unions and the workplace to some of Glendon's views on the proper constitution of the polity, see Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279 (1995). This article has been reprinted in Thomas C. Kohler, *Civic*

concedes that this forward movement was largely inevitable and, from a feminist perspective, not altogether unwelcome. It paralleled the increasing pluralism of American and European society and the "ideology of tolerance"—her words—that pluralism generated, an ideology that prevented family law "from trying to articulate a common morality." Instead, law would now "confine itself merely to defining the current outer limits of permissible diversity in family matters,"<sup>6</sup> thus diminishing the distinction once made between *de jure* and *de facto* marriage as well as between the marriage-centered family and "familial" lifestyles rooted in various biological and social relationships.

Where does Glendon's constitutionalism appear in all this? We find it in the normative and comparative aspects of her work. Even as she accepts the positive values associated with the emergence of modern family law—for example, law's emphasis on the equal rights of husband and wife—she sees dangers in the modern tendency, accelerated by decisions of the United States Supreme Court, to "ideologize" the freedom to marry and to remarry. Paradoxically, she notes, just as our society—or, more accurately, our law—has trivialized the significance of the marital bond, the Supreme Court has elevated the right to marry to one of the most fundamental of constitutionally protected liberties. Accordingly, and lamentably in her view, laws that seek to strengthen the marriage bond or to condition a person's right to remarry on the fulfillment of obligations toward children born of a previous marriage are likely to be struck down as unconstitutional.

Glendon's constitutional perspective emerges more clearly in *The Transformation of Family Law*, published in 1989 by the University of Chicago Press.<sup>7</sup> In a concluding chapter, she views with dismay the breakdown of an institution that she characterizes elsewhere as a "seedbed of virtue,"<sup>8</sup> that is, an important mediating structure between the individual and the state. The breakdown may not have been caused by the Supreme Court, but it was coterminous with the escalation of its individualistic-egalitarian jurisprudence in the last half of the twentieth century. *Boddie v. Connecticut* and *Zablocki v. Redhail* are examples of this jurisprudence.<sup>9</sup> Both cases are based on

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*Virtue at Work: Unions as Seedbeds of the Civic Virtues*, in SEEDBEDS OF VIRTUE 131 (Mary Ann Glendon & Daniel Blakenhorn eds., 1995).

6 GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 4, at 14.

7 GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 4.

8 See SEEDBEDS OF VIRTUE, *supra* note 5.

9 *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that a state may not constitutionally deny persons the right to sue for divorce without payment of court fees and service-of-process costs that they are unable to pay); *Zablocki v. Redhail*, 434 U.S.

the view that marriage exists for the self-fulfillment of the individual rather than for the benefit of the family or the common good of society.

Glendon suggests that judicial activism has exacerbated the crisis of American family law. (The theme of judicial activism, by the way, creeps increasingly into Glendon's work and becomes one of her major concerns in books and essays published in the 1990s.) She suggests in *Transformation of Family Law* that the constitutionalization of family law has seriously eroded the power of local governments to make laws for the stability of the social order, the good morals of the community, or the needs of children from broken homes. She would doubtless second Justice Hugo Black's dissenting opinion in *Boddie*. Black wrote that the "unbounded authority in any group of politically appointed or elected judges [to nullify such laws] would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast."<sup>10</sup> As just noted, Black's view would find a louder echo in Glendon's later work.

Mary Ann Glendon nevertheless doubted law's capacity *substantially* to change or redirect the march of social events. First, she noted that any "attempt to impose a single ideal of marriage becomes more and more futile" in an age marked by increasing diversity in morals and ideology.<sup>11</sup> Second, she found that developments in the United States paralleled those of other advanced democracies such as England, France, Germany, and Sweden, the main sources of her comparative findings and reflections. While careful to point out critical differences in the marriage and family laws of these nations, she documented the common transnational tendency to place the family in the service of the individual and to establish new forms of state intervention in family life. These commonalities appeared to reflect a socio-cultural reality heavily resistant—or so it would seem—to law's influence.

In comparing the family law of the United States with that of the countries mentioned, Glendon enables Americans to measure themselves against the standards of other advanced democracies. American and European family law may well have been affected in similar ways by twentieth century social movements, yet she found that the legal norms of the nations under study project different images of the

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374 (1978) (holding that a state could not validly deny persons the right to remarry unless they could fulfill their legal obligations to support the children of a prior marriage).

10 *Boddie*, 401 U.S. at 393 (Black, J., dissenting).

11 See Mary Ann Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1, 26 (1975).

human person and society. The United States and Sweden, for example, seem united in placing law's primary focus on individuals, treating family members as separate and independent. These countries, she tells us, "hold self-sufficiency up as an ideal, suggesting that dependency is somehow degrading, and implicitly denying the importance of human subjectivity."<sup>12</sup> In continental civil law, on the other hand, she found a greater tendency to support the family as a unit (reflected, for example, in family allowance policies) and to envision the individual in a richer context of social and interpersonal relations.

As suggested at the outset, Glendon's critical approach to family law might be defined as moral realism, one that encourages balance between liberty and order. Her moral realism rejects absolutism. In a multi-cultural America, she would be the last to insist on any traditional view of the marriage relationship, especially if its legal defense would render wives and mothers less equal than husbands and fathers. "All are engaged," she tells us, "in trying to work out an understanding of sexual equality that takes account of women's roles in procreation and child raising without perpetuating their subordination."<sup>13</sup> What is more, she does not think that direct state intervention in family life would repair the ills that bedevil it. She advocates here, as elsewhere, an "ecological" approach, one that would direct its attention to nurturing an environment in which families could continue to serve as "the only theater in which we can realize our full capacity for good or evil, joy or suffering."<sup>14</sup> A holistic vision of this nature would seek to revitalize those "seedbeds of virtue"—that is, churches, schools, neighborhoods, workplaces, and other subcultures—that would help to insulate the family against the cold bureaucracy of the state as well as the cruelty of free market capitalism.

Glendon's moral realism also rejects the ideology of moral neutrality that she thinks infects so much of American family law, particularly at the constitutional level. She rightly reports that older family values and virtues are still widely shared in American culture, and she reminds us that social reality is not always what it is portrayed to be. Strong undercurrents and countercurrents often challenge received notions of social reality. Accordingly, in her view, law *may* seek to foster marital unity, spousal fidelity, and parental responsibility without eroding individual freedom. To keep law from fostering such values—moral values if you will—is to strip law of its symbolic and didactic character. Law does not exhaust itself with its capacity to coerce.

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12 *Id.* at 297.

13 GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 4, at 307.

14 *Id.* at 313.

Like a constitution, ordinary law influences the way people think about themselves. It reminds us of ideals and aspirations which if lost would impoverish us and the communities around us.

## II

In *Abortion and Divorce in Western Law* and *Rights Talk*, books reviewed in over fifty-five law journals and other periodicals (by my count), Glendon returned to substantive themes sounded in her publications on family law<sup>15</sup> and, as before, she continued to dwell on the way we Americans talk about law, life, persons, and relationships in the wider society. In these studies, however, and in her shorter essays and occasional pieces dealing with religious liberty and the conditions of American democracy, she turned more directly to constitutional issues and with far more critical bite than in her earlier work.

In the books just mentioned, she peers into the soul of America, again in great part by means of comparative legal analysis. She examines American and Western European law for the "stories" they tell about their respective societies and for the messages they convey about human character and personhood. As she reminds us in her work on family law, law's language is important because of its capacity to influence popular values and attitudes. When this language appears in constitutional decisions dealing with crucial social and moral issues, it takes on even greater importance, particularly if it pretends to represent a social reality that may not reflect reality at all. In such cases, law distorts reality and, worse, our view of ourselves, often leading to a distortion of the meaning of liberty. In comparing the United States with Western Europe, and occasionally with Canada, she finds that American law talk is more absolute, more individualistic, and more insular in its conception of social and political life than the legal voices heard from abroad. And she makes no bones about which voices are the morally superior ones. "American Failures, European Challenges" is the subtitle of *Abortion and Divorce in Western Law*.

In *Abortion and Divorce* and *Rights Talk*, as in her recent study of the American legal profession,<sup>16</sup> Glendon listens carefully to the dom-

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15 See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter GLENDON, *RIGHTS TALK*]. For related essays see Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992) [hereinafter Glendon, *Rights in Twentieth-Century Constitutions*]; Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

16 See MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).



inant voices of the American judiciary, bar, and legal academy. What she hears are voices that project a false image of the nation's identity and its constitutional morality. It is largely the image of a society cut off from a rich heritage rooted in denominational commitments, neighborhood networks, local subcultures, and other forms of community and association. The image is one that has elevated liberty into *the* superordinate value of our constitutional polity, thus undermining the significance of the social fabric in which our lives are embedded.

It should be clear to anyone who has read Glendon that she is not criticizing the language of constitutional rights as such, or for that matter of rights generally. Any person as devoted as she is to Tocquevillian "jurisprudence" and Madisonian constitutional theory<sup>17</sup>—rightly understood, that is—could only celebrate the traditions of liberty and republican government bequeathed to us by the nation's Founders. What troubles her is the "dialect" in which Americans talk about rights. The purpose of her grand enterprise is to show how the grammar and vocabulary of rights talk has crippled political discourse in America. The crippling results from an obsessive fascination with rights and liberties to the exclusion of other values that we as citizens should also defend and cherish. The essence of her message is captured in the following passage from *Rights Talk*:

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertion over reason-giving.<sup>18</sup>

"This passage," wrote Suzanna Sherry, "is worth careful rereading, for it identifies with great clarity and specificity the separate but related pathologies that render American rights talk so paralyzing."<sup>19</sup>

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17 See Mary Ann Glendon, *Philosophical Foundations of The Federalist Papers: Nature of Man and Nature of Law*, 16 HARV. J.L. & PUB. POL'Y 23 (1992).

18 GLENDON, RIGHTS TALK, *supra* note 15, at 14.

19 SUZANNA SHERRY, *Rights Talk: Must We Mean What We Say?* 17 L. & SOC. INQUIRY 491, 492 (1992).

The pathologies referred to are the absolutism of our law, its winner-take-all mindset, and its tendency to invade the rightful prerogatives of families and communities. *Abortion and Divorce in Western Law* and *Rights Talk* highlight these pathologies. *Roe v. Wade*,<sup>20</sup> for example, virtually reduced the meaning of liberty to unrestrained freedom of choice. The mischief of *Roe*, Glendon suggests, is not that the Supreme Court vindicated the right of a woman to procure an abortion. It was rather the Court's decision to recognize only one player in the game by giving everything to the woman and nothing to the unborn child. The state had no constitutional duty to protect the life of the unborn child, no matter what the stage of pregnancy, because, according to the Court, the fetus is not a "person" within the meaning of the Constitution. In fact, the woman's right to end her pregnancy was as absolute as the physician's right to define the medical procedure for killing it. Accordingly, with one blow, Glendon charged, the Court stopped the legislatures of all 50 states from striking a better or more creative balance between individual interests and common values. Similarly, and largely because of the Court's categorical ruling, *Roe* tore apart the national community, giving rise to an uncompromising and unending face-off between opposing groups. In fomenting societal division rather than consensus, *Roe* rendered virtually impossible any meaningful national dialogue on the merits of abortion.

In Glendon's view, *Roe* represented a heartless and impersonal constitutionalism. It projected an image of the human person as a "lone rights-bearer." Persons were seen as atomistic individuals with little or no connection to family, place, church, workplace, or community. *Rights Talk* repeats this theme on a wider range of issues, including controversies involving freedom of speech, religious liberty, homosexuality, and privacy more generally. Once again, Glendon finds the Supreme Court putting up a fence around individuals, regarding them as isolated units free to do anything they please so long as they do no physical harm to other persons. Relevant here are certain free speech cases that vindicate *expressive* conduct no matter how offensive or crude or hateful. Liberated from the restraints of the community, self-regarding individuals need feel no obligation to society or to those around them. In short, the deafening sound of rights talk has drowned out the voices of trust, self-discipline, compassion, friendship, responsibility, and goodwill.<sup>21</sup>

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20 410 U.S. 113 (1973).

21 For an inspiring book of stories celebrating several of these virtues, see WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* (1993).

Yet Glendon refuses to indict the judiciary as such for the absolutism found in American rights discourse. I would have thought, for example, that she would be inclined to take the Supreme Court to task for its decision in the flag burning case.<sup>22</sup> *Texas v. Johnson*, after all, permits individuals to define themselves by smashing the most cherished symbols of our national life together, vindicating expressive individualism in the extreme, or so I would have argued. In her discussion of *Johnson*, however, she is less appalled by the Court's decision than by popular reactions to the flag's meaning. Americans asked to define the meaning of the flag tended to give no-holds-barred answers. The question "elicited passionate defenses of freedom of expression on the one hand, and equally fervent protests against desecration of the national symbol on the other."<sup>23</sup> In the popular battle, she tells us, emotion prevailed over reason.

Thomas Merton died several years before many of the Supreme Court decisions Glendon laments were handed down, but he seemed to capture the spirit of America—and American law—in the following lines:

We are like billiard balls bumping against each other. The American idea, which was built up in the eighteenth century, likewise assumes that is how people are. Everybody is an individual and he operates from this center where he is completely separated from everybody else, but he still obeys the traffic laws.<sup>24</sup>

In the American view, Merton thought, "society works if everybody just observes two things: a) he seeks his own interests while b) he observes the rules."<sup>25</sup> This attitude toward human nature and civil society is undoubtedly what Glendon had in mind in tracing the American penchant for *uncompromising* rights talk back to Locke, Blackstone, and Hobbes.

She reminds us, however, that individual rights also enjoy elevated status in European constitutions, but she finds the latter also employing the language of responsibility and sociality. Examples abound: Germany guarantees the right to property, but "property entails obligations" just as its use "should serve the public interest"<sup>26</sup>; Italy recognizes "the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds

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22 See *Texas v. Johnson*, 491 U.S. 397 (1989).

23 GLENDON, RIGHTS TALK, *supra* note 15, at 110; see also Mary Ann Glendon, *Reflections on the Flag-Burning Case*, in *FIRST THINGS*, Mar. 1990, at 11–13.

24 THOMAS MERTON, *THOMAS MERTON IN ALASKA* 132 (1988).

25 *Id.*

26 BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (CG), art. 14 [2] (1949).

expression, and imposes the performance of unalterable duties of a political, economic, and social nature"<sup>27</sup>; the Council of Europe, now composed of over 35 nations, confers on "everyone . . . the right to respect for his privacy and family life," but this right may be limited by "law [when] necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>28</sup> Similar provisions could be cited in many other modern constitutions, including the Constitution of Japan (1946), the Constitution of South Africa (1996), and the post-Communist constitutions of Eastern Europe.<sup>29</sup>

According to Glendon, Americans have read too much of Hobbes, Locke, and Blackstone into the meaning of the Constitution, a reading that impels them to insist on realizing all the rights and prerogatives associated with their perceived autonomy and individuality. Yet, despite its lack of any language of cooperation and responsibility, the United States Constitution need not be so interpreted. Glendon reminds us that the Founding Fathers assumed that guaranteed rights would be construed in light of the public virtues, moral values, and responsible citizenship that they took for granted when they wrote the Constitution. As Tocqueville discovered, Americans exercised their liberty with moderation and restraint. They filtered liberty through the social discipline and common values of the community, which in turn spoke through the political institutions of representative government.

In today's culture of expressive individualism, however, Americans have virtually obliterated the line between individual liberty and social obligation, as well as between liberty and license, and, I would

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27 CONSTITUTION OF ITALY, art. 2 (1947).

28 European Convention on Human Rights and Fundamental Freedoms, 1950, art. 8.

29 For example, the Japanese Constitution declares that "the people . . . shall always be responsible for utilizing [their rights] for the public welfare." *KENPO*, art. 12. Article 3 of South Africa's Constitution (1996) affirms that all persons are "equally subject to the duties and responsibilities of citizenship." Many Eastern European constitutions imitate the provisions of Germany's Basic Law. Article 27 of the Constitution of the Republic of Estonia (1992), for example, declares that "parents have the right and the duty to raise and care for their children," just as article 48 of the Constitution of the Republic of Croatia (1991) affirms that the "ownership [of property] implies obligations." See also Glendon, *Rights in Twentieth-Century Constitutions*, *supra* note 15; Donald P. Kommers, *Constitution-Writing Abroad: What Lessons for Americans?*, in *COMPARATIVE CONSTITUTIONALISM, 1945-1995: RIGHTS AND NATIONAL IDENTITY* (Kermit L. Hall & David M. O'Brien eds., forthcoming 1998).

add, most particularly in the area of freedom of speech. But even with the obsessive egoism that we Americans see so much of these days, responsible freedom and the values of sociality are still celebrated in our society. That this benign orientation to life and politics in America is not as prominent as it perhaps could be owes something, Glendon suggests, to the culture of rights venerated in many decisions of the modern Supreme Court and promoted with such moral fervor in the legal academy, even to the point of romanticizing the values of the First Amendment.<sup>30</sup>

European constitutional judges and courts, by contrast, while certainly vigorous in defense of individual liberty under their respective constitutions, have not exalted rights to the exclusion of sociality or responsibility. They tend to envision persons as cooperative beings and in community with others. As Germany's Federal Constitutional Court has declared,

The image of man in the Basic Law [Germany's Constitution] is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between the individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.<sup>31</sup>

The balance between rights and responsibilities implied in this remark finds strong refrains in the jurisprudence of the European Court of Human Rights. In a recent free speech case, for example, the European Court declared:

[W]hoever exercises the rights and freedoms enshrined in [the free speech guarantees of Article 10 (2)] undertakes "duties and responsibilities." Among them—in the context of religious opinions and beliefs—may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>32</sup>

As Glendon points out in various places, the European perspective on rights is heavily rooted in the concept of human dignity. To the extent that the Supreme Court speaks of dignity as such, it tends to identify the concept with individual rights and autonomous self-

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30 See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

31 DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 305 (1997).

32 *Otto-Preminger Institute v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 34 (1995).

determination. But dignity is not itself a right, and it is a far cry from the concept of autonomy embedded in Supreme Court opinions. In the European view, dignity precedes rights, which is one reason the concept of dignity is given explicit and separate recognition in several post-1945 modern European constitutions. Germany's Basic Law, for example, begins by declaring that "the dignity of man shall be inviolable" and that "to respect and protect it shall be the duty of all state authority."<sup>33</sup> Similarly, Poland's 1997 Constitution, the newest of the post-Communist constitutions, reads: "The inherent and inalienable dignity of persons shall constitute a source of the freedoms and rights of persons and citizens. It shall be inviolable."<sup>34</sup> There is no such language in the U.S. Constitution.

These textual differences, of course, matter. Yet as David Beatty has suggested, judicial review as practiced by most of the world's constitutional courts is less a matter of *interpreting* the words and phrases contained in a constitution than applying those principles of rationality and proportionality that are commonly used in determining whether the state has unjustifiably invaded a guaranteed right.<sup>35</sup> Even much of American constitutional law can be understood in terms of these principles of rationality and proportionality. Still, one hears a gentler voice—or dialect—emerging from the "dignitarian" jurisprudence of European constitutional courts than from the "libertarian" decisions of the American Supreme Court, especially those decisions that the Court has grounded in the concept of substantive due process liberty. The pitch of the American cases is especially harsh regarding abortion. As Glendon points out, the abortion liberty in the United States is virtually unlimited since a woman can destroy her fetus at any time during the course of a pregnancy unless a state *chooses* to bar post-viability abortions, but even here American courts seem poised to keep that power narrowly cabined.

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33 BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (GG), art. 1. The enumeration of particular guaranteed rights follows this provision.

34 THE CONSTITUTION OF POLAND, art. 30 (1997). In *State v. Makwanyane and Another*, South Africa's Constitutional Court underscored the importance of a constitutional clause singling out human dignity for special protection. In striking down the death penalty, notwithstanding the absence of any constitutional provision banning it, the Court was severely critical of *Gregg v. Georgia*, 428 U.S. 153 (1976), in which the Supreme Court sustained the constitutionality of capital punishment. Chief Justice A. Chaskalson remarked that "the difficulties that have been experienced in following the American path . . . persuade me that we should not follow this route. . . . Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary.'" *State v. Makwanyane and Another*, 1995 (6) BCLR 665, 694–95 (SA).

35 DAVID BEATTY, *HUMAN RIGHTS AND JUDICIAL REVIEW* 18–23 (1994).

European constitutional courts have been less dismissive of the value of the fetus and less prone to see abortion as a privacy right. Abortion abroad tends to be viewed less as a right than as a social policy. In European judicial cases on abortion, for example, as the passage on the image of man from Germany's Federal Constitutional Court indicates, we hear more about personhood, relationships, and solidarity and less about individuality, autonomy, and disengagement. All these values—both of liberty and solidarity—receive protection at some level in constitutional democracies but, as Glendon reminds Americans, the European dialect is different. The language of liberty is of course unmistakable in European constitutionalism, but it is spoken with a stronger accent on dignity, one that accounts for the balance that European constitutionalism seeks to achieve between sociality and individuality. In the United States, by contrast, individual rights usually trump values grounded in sociality.

Glendon's comparative scholarship underscores this difference between American and European law. In *Abortion and Divorce in Western Law*, she found that most European constitutional courts have been willing to sustain laws permitting abortion. Most of these laws permit abortions early in pregnancy—usually in the first three months—or, alternatively, for particular reasons specified by law. But they also recognize unborn life as a fundamental value worthy of legal protection, thus communicating the view, often through compulsory counseling and waiting periods—requirements that American courts have struck down—that all human life, postnatal or prenatal, is sacred. Yet, as a matter of social policy, and out of compassion for women in distress who might otherwise endanger their own lives by illegal interruptions of pregnancy, abortion is allowed for particular reasons or prior to a certain stage in the development of the fetus.

Germany's Pregnancy and Family Assistance Act of 1992 is especially noteworthy for its recognition of the values on both sides of the abortion debate. (Glendon might not approve of Germany's new law, but in my own view it does seek to recognize, even though it may not effectively harmonize, the conflicting values of life and self-determination.) The new all-German statute dropped the penalty for abortions performed in the first twelve weeks of pregnancy, but it simultaneously removed many of the hardships and disadvantages associated with pregnancy and childbirth.<sup>36</sup> To this end, the 1992 statute

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36 Article 13 of the Pregnancy and Family Assistance Act amended sections 218–19 of the German Criminal Code. See, Abortion Reform Act of 1992, art. 13 StGB. Before an abortion could be performed, however, the woman would have to produce a certificate verifying the place and date of counseling and the physician-

amended laws dealing with social security, medical insurance, job placement, welfare assistance, housing, and rent control.<sup>37</sup> The social supports resulting from these amendments should also be seen against Article 6 of the Basic Law, which places “marriage and family” under the “special protection of the state” and proclaims that “every mother shall be entitled to the protection and care of the community.”<sup>38</sup> Accordingly, in German constitutional law, as in European law generally, persons—as distinguished from individuals—are perceived as social beings called to shared responsibility with and on behalf of other persons.

These observations underscore two points that Glendon has driven home in her writing on constitutional matters. First, constitutional law, like all law, plays an important educative or didactic role in promoting a virtuous and responsible citizenry. Second, constitutional review should be exercised with due regard and respect for the judgments of legislative majorities. She is not, however, excessively deferential to such majorities. Indeed, her constitutionalism requires an energetic judicial defense of the *ordered* liberty required by the principle of human dignity. In her view, courts damage the quality of democracy when rights are vindicated at the *expense* of civil society or those seedbeds of virtue between the state and the individual that cultivate compassion, competence, and responsible citizenship.

### III

More should be said about Glendon’s perspective on judicial review and democracy. As noted, her quarrel is not with the principle of judicial review. One finds in her work sturdy support for judicial review as a functional necessity in a constitutional democracy, and she would agree that our *constitutional* democracy has been enhanced by the Court’s vigorous defense of the American Bill of Rights. When, however, judicial review overreaches itself, as she clearly thinks it has in fields such as abortion, church-state relations, and family affairs, it tends to weaken our constitutional *democracy*. It weakens democracy by breaking the bonds that enrich human lives and reinforce those seedbeds of virtue so worthy of our common respect and support.

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counselor issuing the certificate could not be the same physician who would perform the abortion. After the twelfth week of pregnancy, the woman could legally abort her fetus only to avert a serious threat to her life or a grave impairment of her physical or mental health.

37 For a discussion of these provisions, see Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL’Y 1, 12–14 (1994).

38 BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (GG), art. 6.



This breaking down of the bonds of community Glendon nicely illustrates in a masterly *Michigan Law Review* essay, coauthored with Raul F. Yanes, on "Structural Free Exercise."<sup>39</sup> The essay describes the devastating results of the Supreme Court's rigid separationist interpretation of the religion clauses, an interpretation that begins with the sweeping dogmas laid down in *Everson v. Board of Education*.<sup>40</sup> In her view, *Everson*, undergirded by the Supreme Court's contemporary free exercise jurisprudence, has metastasized into something more akin to antagonism toward religion than the *religious* freedom that the free exercise clause was clearly meant to privilege. At issue here, as many other critics of the Court's church-state cases have pointed out, is no less than the health of the body politic. Glendon finds fault with judicial decisions that have invalidated forms of interreligious cooperation in the public realm as well as others that have stopped church and state from working together to resolve common problems of a purely secular nature.<sup>41</sup> Some of the Court's decisions have even sown discord in communities where relative harmony had earlier prevailed, just as in certain free exercise cases intolerance rather than tolerance of diversity may well have been the result.<sup>42</sup>

Glendon and Yanes point out that the Supreme Court's narrow construction of free exercise and its broad construction of establishment have resulted in an individualistic view of religious freedom that "largely ignor[es] its associational and institutional dimensions,"<sup>43</sup> suggesting "that religious experience is separable from the rest of human life and activity."<sup>44</sup> In *First Things* they write:

What seems to have paved the way for this remarkable inversion of meaning was the inability of Court majorities to grasp that, for mil-

39 See Glendon & Yanes, *supra* note 15.

40 330 U.S. 1 (1946).

41 Among the examples cited are *McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Aguilar v. Felton*, 473 U.S. 402 (1985). Glendon and Yanes write:

Like the *McCollum* case that had squelched efforts at interfaith cooperation in Illinois nearly four decades earlier, *Aguilar* deployed abstract separationist logic and baseless evocations of sectarian strife to strike down a benign legislative program worked out by Congress after extensive cooperative effort with and testimony from a wide variety of religious organizations. Moreover, the decision seemed to place religion, alone among human activities, in a suspect category.

Glendon & Yanes, *supra* note 15, at 514.

42 Examples of such decisions are *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). See also Glendon & Yanes, *supra* note 15, at 495-99.

43 Glendon & Yanes, *supra* note 15, at 489.

44 *Id.* at 485.

lions of Americans, religious freedom is “exercised” within worshipping communities. The justices lost sight of the fact that the religion language of the First Amendment protected individuals’ free exercise, not only when they were alone, but in their religious associations and institutions.<sup>45</sup>

The *First Things* essay summarizes the deeper and more extensive analysis offered in the *Michigan Law Review*. In *First Things*, however, Glendon and Yanes address their concern over the then-proposed Religious Freedom Restoration Act (RFRA), in which Congress sought to restore the “compelling interest” test in the free exercise field that *Employment Division, Department of Human Resources of Oregon v. Smith* appeared to reject.<sup>46</sup> To most critics of the Supreme Court’s religion jurisprudence, the broad construction of the establishment clause had excessively curtailed the realization of religious liberty and now, to make matters worse, *Smith* restricted it even more by relieving government of the duty to marshal a strong—that is, *compelling*—justification for a statute of general applicability that happens to impinge on a person’s free exercise right. Unlike most of *Smith*’s critics, Glendon and Yanes opposed the proposed Act, which Congress passed in 1993, because “nothing it contains will affect the ‘establishment clause,’ [thus freezing] into statutory form the interpretive error that the First Amendment contains two ‘clauses’ with divergent purposes that are often in tension.”<sup>47</sup> With equal discernment they noted that “the reference [in the Act] to ‘any person’s free exercise’ tends to obscure the fact that for many individuals, free exercise has a social dimension.”<sup>48</sup> Needless to say, this particular debate became moot when the Supreme Court struck down the RFRA in 1997.<sup>49</sup>

We might return briefly to the *Michigan Law Review* article because it offers a way out of the interpretive mess represented by the Supreme Court’s religious liberty jurisprudence. The “structural” approach to constitutional interpretation advocated in the *Michigan* piece is a plea for a more holistic view of the Constitution, one that envisions the document as a unified whole and its various provisions and clauses as mutually reinforcing. The Supreme Court’s fixation on particular phrases and clauses of the Constitution, Glendon and Yanes tell us, tends to diminish the unity of the Constitution, resulting in the

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45 Raul F. Yanes & Mary Ann Glendon, *How to Restore Religious Freedom: A Debate*, *FIRST THINGS*, Apr. 1992, at 47.

46 494 U.S. 872 (1990).

47 Yanes & Glendon, *supra* note 45, at 47.

48 *Id.*

49 *Boerne v. Flores*, 117 S. Ct. 2157 (1997).

kind of disharmony, even antagonism, that continues to define the relationship between the free exercise and establishment clauses.<sup>50</sup>

The structural constitutionalism of the *Michigan* essay, of course, is hardly new. The holistic approach to legal—and social—analysis informs all of Glendon's work, including *Transformation of Family Law*, *Rights Talk*, *Abortion and Divorce*, *A Nation Under Lawyers*, and her occasional essays. In one of these essays, she enumerates the prices we have paid for a constitutionalism that ignores social context by overinflating the value of individual liberty:

In our own time, by promoting individual rights at the expense of nearly every other social value in family law, labor law, and constitutional law, we have deprived families, churches, and other forms of fellowship of some of their mutually sustaining influences. Certain family-law and welfare reforms have been carried out, for example, with little regard for the ways in which they might appear to be discouraging personal responsibility. Urban renewal programs often carelessly wiped out entire neighborhoods and irreplaceable social networks. A "wall of separation," erected between church and state, made it difficult for government to benefit from the experience and successes of religious communities in performing certain essential social functions.<sup>51</sup>

Many of these societal ills, Glendon tells us, stem from law's overreliance on adversarial litigation and the "winner-take-all" psychology it inspires, a tendency Glendon finds dramatically represented in "some forty years in pursuing an individualistic, secularist, and separatist approach to [the] religion cases."<sup>52</sup>

As for the religion clauses, all is not hopeless, however. In the *Michigan* article, Glendon and Yanes see signs of a changing interpretive perspective in the opinions of several justices, opinions that recall

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50 The clause-by-clause approach to American constitutional interpretation contrasts sharply with the structural or holistic approach of Germany's Federal Constitutional Court. In her response to Justice Antonin Scalia's essay on legal interpretation, Glendon cited the German Court's "practice of attending consistently to the language and structure of the entire Constitution—to the document as a whole, and to the relationship of particular provisions to one another as well as to the overall design for government." She also highlighted what is known in Germany as the principle of practical concordance, an interpretive approach that requires the Federal Constitutional Court to support the unity of the Constitution and harmonize conflicting provisions. See Mary Ann Glendon, Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 104–05 (1997). See also Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 851–52 (1991).

51 Mary Ann Glendon, *Law, Laws, and Human Community*, FIRST THINGS, June–July 1990, at 28.

52 Glendon & Yanes, *supra* note 15, at 536.

the "holistic" views of Justices Bryon White and Potter Stewart of an earlier era as well as the path-breaking dissenting opinion of Chief Justice Rehnquist in *Wallace v. Jaffree*.<sup>53</sup> The word *structural*, as she deploys it, is used "in an organic, rather than a mechanical, sense to refer to the relations within and among texts, and between legal and social institutions."<sup>54</sup> She quotes approvingly from a public lecture of Chief Justice Rehnquist in which he remarked, "Those who make our laws . . . serve us poorly if they do not recognize that the world in which we live is an intricate web of relationships between people, private institutions and government at its various levels."<sup>55</sup> Rehnquist's admonition—and Glendon's—is a far cry from any attempt to run roughshod over the liberties of individual Americans. Rather, it is to remind Americans that majorities also have rights and that these rights can be respected without encroaching on individual liberty. In short, it is a reminder that constitutional *and democratic* themes run through the text of the Constitution and that these themes can be brought into harmonious balance. It means too, as *Wisconsin v. Yoder*<sup>56</sup> demonstrates, that the beliefs of a religious community can be honored, respected, and even publicly encouraged without putting the state in a position of having to defend itself against endorsing or establishing a religion. As Glendon and Yanes write: "A holistic reading [of the Constitution] thus suggests that individual free exercise cannot be treated in isolation from the need of religious associations and their members for a protected sphere within which they can provide for the definition, development, and transmission of their own beliefs and practices."<sup>57</sup> They might have added that religion in its own right is an essential ingredient of limited government since it constitutes the most important independent source of ethics and morality by which to judge the actions of the state.

Structural constitutionalism therefore "suggests that the Bill of Rights is not only a catalogue of negative individual liberties, but a charter of 'positive protection' for certain structures of civil society, notably religious organizations, community militia, and juries." In fact, Glendon and Yanes remark that "Amendments One, Two, Six, and Seven single them out for special treatment," suggesting that "the Founders attached particular importance to the kinds of rights that

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53 472 U.S. 38, 91(1985) (Rehnquist, J., dissenting).

54 Glendon & Yanes, *supra* note 15, at 537.

55 *Id.* at 537-38 (quoting William H. Rehnquist, *The Adversary South*, 33 U. MIAMI L. REV. 1, 18 (1978)).

56 406 U.S. 205 (1972).

57 Glendon & Yanes, *supra* note 15, at 544.

help to create conditions for the exercise of other rights.”<sup>58</sup> Religious organizations and other seedbeds of virtue are found by them to be absolutely crucial for educating citizens about their rights and obligations and for creating protective buffer zones between the individual and the state.

#### IV

In this all-too-brief commentary on the *constitutional* aspect of Mary Ann Glendon’s work, I can only hope that I have not oversimplified or misunderstood her views. She writes with sensitivity and understanding and with a care that matches the elegance of her prose. Her ecological perspective and comparative learning stamp her work with freshness and clear-sightedness. With originality and courage, she also questions the stock conventions and prevailing morality of contemporary constitutional analysis and interpretation. Glendon’s constitutionalism cannot be classified in simplistic libertarian or communitarian terms. She defies all the common labels that pundits in the legal academy like to pin on people. A keen sense of balance and proportionality informs all of her reflections on life and law, which is not the kind of mind-set that pleases people with axes to grind or who take polar positions on some ideological continuum.

Glendon’s work bears the imprint of her personal biography. Hers has been a life-long quest for the common ground that binds people together around shared values. This quest lies at the basis of all her professional roles, including those of civil rights activist, legal scholar, member of the bar, and commentator on public affairs. Without falling prey to the moral and intellectual fadism of the moment, she has traveled a steady course between an overindulgent individualism and a repressive communalism. By honoring the legitimate values on both sides of controversial issues, she has been a model of civility in the marketplace of ideas. Balance is the magic word here. It best describes her ecological approach to life, law, and society, an approach exceptionally displayed in her ardent defense of the family as the major seedbed of individual liberty and dignity in modern society. Indeed, no one has been more committed than she to defending the rights of women and mothers in the workplace and at home or more articulate than she in reminding lawmakers of their obligation to provide for the welfare of neglected children and to ensure that husbands and fathers measure up to their family responsibilities. Glendon is by

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58 *Id.* at 543–44.

any measure a feminist without having succumbed to the allures of hard-line feminism.

Little wonder that Pope John Paul II chose this loyal daughter of the Church to head its delegation to the United Nations' Fourth World Conference on Women in Beijing. The ecological or holistic approach to life and law that marks Glendon's constitutionalism informed her negotiating role in China's Great Hall of the People. Appalled by the "slabs of ideological pork" she found "interspersed among [the] commonsense provisions and bureaucratic boilerplate"<sup>59</sup> that appeared in the conference's working documents, she pleaded for a more balanced approach to women's issues. Apparently, these documents were heavily influenced by old-line feminists and population control groups who emphasized sex and reproduction to the neglect of many other crucial issues. "[R]eading the drafts overall," she wrote,

one would have no idea that most women marry, have children, and are urgently concerned with how to mesh family life with participation in broader social and economic spheres. The implicit vision of women's progress was based on the model—increasingly challenged by men and women alike—in which family responsibilities are avoided or subordinated to personal advancement.<sup>60</sup>

She wrote that the documents barely mentioned marriage, motherhood, and the family "except negatively as impediments to women's self-realization (and as associated with violence and oppression)."<sup>61</sup>

The health section in the draft document, she noted, "focused disproportionately on sexual and reproductive matters, with scarcely a glance toward nutrition, sanitation, tropical diseases, access to basic health services, or even maternal morbidity and mortality."<sup>62</sup> Glendon's was a sane voice in an apparent sea of moral confusion and, in the end, much of the language she objected to in draft document was eliminated from Beijing's final report.

Glendon's defense of democratic representation in American constitutionalism found echoes in Beijing. "Unfortunately," she wrote, "there is an increasing tendency for advocates of causes that have failed to win acceptance through ordinary democratic processes to resort to the international arena, far removed (they hope) from scrutiny and accountability."<sup>63</sup> Finally, her ecological perspective

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59 Mary Ann Glendon, *What Happened at Beijing*, FIRST THINGS, Jan. 1996, at 30.

60 *Id.*

61 *Id.* at 31.

62 *Id.*

63 *Id.* at 35.

shines through again in the observation that “human rights [should not] be redefined and expanded to ‘universalize’ the highly individualistic ideologies of modernizing elites. Nor must human rights be sharply separated from the cultural and religious contexts in which rights are rooted and protected.”<sup>64</sup> Her voice was one that the Vatican and Beijing could hardly have done without.

Mary Ann Glendon’s work inside and outside of the legal academy has been driven by a set of simple propositions long honored in our history and traditions: each individual is a unique person; each person is endowed with dignity; human dignity is both the source and condition of liberty; men and women are society-oriented persons; all persons are entitled as a matter of necessity to all the social, economic, and cultural goods that human dignity requires; healthy mediating structures—seedbeds of virtue—are the true source of moral education and responsible citizenship; and, relatedly, human flourishing requires a buffer zone of protection against the impersonalism of the bureaucratic state and the social costs of unregulated market capitalism. Not a bad formula, I would suggest, for the renewal of American constitutional law.

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64 *Id.* at 36.