

“A DELICATE BALANCING ACT”: THE CONSTITUTION AND “ORDERED LIBERTY”

In the 1997 U.S. Supreme Court case *Washington v. Glucksberg*, the justices ruled **unanimously** (9-0) that the state of Washington’s **ban** on physician assisted suicide **did not** violate the Fourteenth Amendment’s Due Process Clause by denying competent terminally ill adults the liberty to choose death over life. The decision states that such protection applies only to those rights “**deeply rooted** in this Nation’s **history** and **tradition**.” (my emphasis added) More importantly, the case highlighted a **key concept** in constitutional law, namely that the government has a duty to seek “ordered liberty.” Legal scholars trace the genesis of “ordered liberty” even farther back to *Palko v. Connecticut* (1937), the Supreme Court case concerning the so-called “double jeopardy” of criminal defendants.

The 8-1 *Palko* decision **allowed** the state of Connecticut to **retry a man** who had been charged with first-degree murder. Due to a judge’s refusal to allow a confession into evidence, the defendant was convicted instead of second-degree murder. The state appealed and won a new trial; this time the court found Palko guilty of first-degree murder. It is a “wonky” decision that evaluates the competing protections afforded by the fifth and fourteenth amendments as it relates to states. The key innovation is the court’s discussion of “ordered liberty,” the clarification that some rights are **more fundamental** than others, rights that are “of the very essence of a scheme of ordered liberty ... that neither liberty nor justice would exist if they were sacrificed.” Incidentally, Minnesota’s own Justice **Pierce Butler** cast the lone dissenting vote.

This refers to the often-delicate **balancing act** between societal welfare and individual rights. In short, **some** rights are **not** of the very essence of a scheme of “ordered liberty.” Regarding the “right” of a patient to choose death, the *Glucksberg* decision stated: “to abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Last month’s *Dobbs v. Jackson* decision that effectively overturned *Roe v. Wade* employs this terminology: “Ordered liberty sets limits and defines the boundary between competing interests.” When it comes to contentious issues of morality and individual rights, things get dicey—and **quickly!** While acknowledging the contentious nature of the abortion debate, *Dobbs* held that **abortion** ought **not** to be enumerated as a fundamental right.

It may help to visualize three **concentric** circles. (See sidebar, p.5) For this image, I am indebted to a Law Review article ([here](#)) by Matthew Grothouse. The outside circle reflects the general but enumerated powers of the federal government: e.g., maintaining and securing our national border. The second circle represents the power of an **individual state**, wide-ranging as it is, but still limited. An example is Minnesota’s law stating that “aquatic plants growing in public waters are the property of the state,” protecting us from invasive species. Finally, the innermost circle represents “we the People,” and how we exercise and derive our human rights. (cf. U.S. Constitution, Article X) When government limits personal freedom, it is done with appropriate reserve, balancing rights and responsibilities.

One needn’t pass the bar exam to see how the “ordered liberty” principle plays out in daily life. I’d argue that parents exercise “ordered liberty” every single time that they hand the **car keys** to their high school junior on a Friday night! Parents are equally called to **protect** their children from harm and to **prepare** them for life. Sufficient mutual trust allows teenagers to exercise a **degree of autonomy**, even if some risk is involved. Otherwise, they will never develop any sense of personal responsibility. If the **role** of the federal government is to protect us from **all harm**, then

pray tell, the speed limit on the interstate should be **10 mph!** I guarantee there would be **fewer** highway deaths! But at what cost? It **is** within the purview of the federal government to promote the general welfare of its citizenry. Our National Park System is a treasure! See the **Ken Burns** documentary entitled “**The National Parks: America’s Best Idea.**” Besides the U. S. Constitution and Major League Baseball, I’m inclined to agree with him!

There are **parallels** to this concept in the life of the Church. For example, Minnesota statute 517.08 offers a **discount** to engaged couples who have completed 12 hours of pre-marriage counseling, whether secular or religious. A statement presented that is “signed, dated, and notarized or marked with a church seal” automatically qualifies for a reduced fee of \$40. In Ramsey County, that’s a \$75.00 discount. **Why?** Heretofore, such counseling has been seen to **contribute** to societal **stability**. Stable marriages benefit society, and one could infer that pre-marital counseling would contribute to that stability by encouraging discussion of key aspects of marriage. Government has a right—even a **duty**- to promote societal welfare, while also protecting religious liberty. Yes, it’s contentious and messy— but **absolutely essential** for a well-functioning society.

- Whither patriotism? Who’s running **Orlando’s** social media? The city’s announcement of its July 4 fireworks began: “A lot of people probably don’t want to celebrate our nation right now, and we can’t blame them.” It ended, “Yes, America is in strife right now, but you know what...we already bought the fireworks.” Well, at least Orlando **had** fireworks. Neither Minneapolis nor St. Paul held fireworks within its city limits.
- The St. Paul Center for Biblical Theology (Steubenville, OH) is sponsoring an online event: “Male and Female He Created Them.” Six experts in the fields of philosophy, obstetrics and gynecology, endocrinology, psychology, plastic surgery, and theology will discuss the important topic of **gender ideology**. The webinar is being held this coming **Tuesday, July 12**. Register under the events section online [here](#) or visit www.stpaulcenter.com.
- In the 2021-22 Supreme Court term, **29%** of cases were decided **unanimously**. Unanimous decisions typically outnumber any other single vote; this year they were edged out by 6-3 decisions. In our politically charged climate, this may seem **counterintuitive**, but most cases go unnoticed in the news.
- If you have ten minutes, check out ([here](#)) the interview of **Kristan Hawkins**, president of Students for Life in America, referenced in my homily last Sunday. She represents the **very best** of pro-life advocates— informed, calm, compassionate, patient, yet confident! She hit it out of the park!
- From sea to shiny silver **dollar**? The **Big Ten** is expanding again, this time to the west coast, spanning from sea to shining sea. Make no mistake— this is about one thing, the **almighty** shiny silver dollar! It is about media markets and **revenue**. In theory, UCLA or USC could host Maryland. Flight time from Baltimore to LAX is **over 5 hours**. At least it provides student athletes plenty of **study time** during travel! Crazy.

Sincerely in Christ,

Fr. John L. Ubel,
Rector

Ordered Liberty- Conceptualized

