THE SUPREME COURT DECIDES LIFE AND LIBERTY

by William A. Donohue

We will soon know whether it is okay for doctors to kill their patients and whether religious institutions can govern without undue governmental interference. The common denominator is one of autonomy: how much slack should government accord those who claim that they have a constitutional right to do what they want?

It will not do to say that the answer lay in the constitution itself. We have lived through too much to know that the constitution is not what the Framers intended it to be. Sitting judges decide what the constitution means, and they frequently do so by choosing innovation over interpretation. That being the case, there is all the more reason to consider the philosophical and sociological import of what comes before them.

How much autonomy individuals and institutions should have cannot be decided absent the social context in which issues arise. The sociological insight that says no one lives in a vacuum is understood by the courts when they rule that there must be a "balancing" of rights. As such, demands for autonomy must be weighed alongside other competing rights, as well as a genuine interest in the public weal.

DOCTOR ASSISTED DEATH

"Doctor knows best" is the medical profession's grandest assertion of autonomy. The doctors who testified at the Nuremburg trials also thought they knew best, which is why they justified the killing of their subjects in the name of humanity. Dr. Kevorkian thinks he knows best and that is why he continues to kill. But unlike the German doctors of the

1930s and 1940s, Kevorkian practices his autonomy in a free country, and he does so with the express approval of many juries.

The polls show that most Americans support doctor-assistedsuicide. How much thought they have given to this issue is not known, but it is fair to say that most have reached their position out of sincere concern for the welfare of old people dying in pain. But it must also be said that in some cases they have reached their conclusion out of self-interest or ignorance, or both.

Survey data shows that there is an inverse correlation between age and support for doctor-assisted suicide, meaning that young people are the most enthusiastic about allowing doctors to help kill their patients and old people are the least enthusiastic. This should give us pause. Is it not a strange right that those who are alleged to benefit from it most also want it least, while those who are not the purported beneficiaries want it most?

Moreover, why is it that white, well-educated, healthy and wealthy men are most likely to support this right while non-white, undereducated and poor persons oppose it? And why is it that the disabled have campaigned against this right? In addition, why is it that in the Netherlands, where doctor-assisted death is most common, do we get reports that those who are the most likely to ask for the invocation of this right are relatives of the patient, and not the patient himself?

No one wants to die in pain. But this is not the 19th century. The idea that persons are writhing in pain while next of kin watch in horror is more science fiction than reality. This is why when I debate this subject on TV, I often ask my challenger whether he’s ever heard of something called a sedative. His silence is deadening.

If it is wrong for someone to kill himself, it is doubly wrong for someone to assist him, and it is triply wrong for a doctor to do so. Doctors are pledged to save lives, not end them. Once society says it's okay to do both, the status of a doctor is ineluctably corrupted. His newly granted autonomy cannot be restrained, even by regulations. Again, the experience of the Netherlands is instructive. All the regulations written by the bureaucrats to prevent doctors from exploiting their autonomy have failed: Dutch doctors kill more of their patients without approval than with their consent.

The autonomy that allows a doctor to kill sickly old people can easily be extended to other patients as well. After all, why should we confine a right to one segment of the population, and not to others? Would it not be a violation of the Fourteenth Amendment's equal protection clause to restrict a right to one class of citizens? To put it bluntly, why not allow doctors to kill 15-year-olds?

Think of it. A 15-year-old girl learns she is pregnant out-of-wedlock. She is afraid to confront her parents, is being pressured against her will by the father of her child to have an abortion, and is so despondent that she is thinking about committing suicide. Now if only someone would help.

Every time I have thrown this issue at someone in favor of doctor-assisted suicide, they have refused to answer. Even Kevorkian lawyer's, Jeffrey Fieger, wouldn't answer me. Make no mistake about it – they think it's grand, it's just that they don't want to turn the public against them.

Fieger doesn't care because all he cares about is autonomy. A radical individualist, Fieger believes everyone should be allowed to do whatever he wants to his own body (sounds familiar, doesn't it?). This libertarian extremism has become so ingrained in the culture that even sensible persons have come to espouse it.

To begin with, the law does not allow us to do whatever we want to our own body. For example, we are not allowed to take whatever drugs we want. Now this may not please Mr. Fieger, and it certainly doesn't please William F. Buckley, Jr. and the ACLU, but the fact remains that our bodies are not sovereign vessels into which any trash can be thrown. Drugs are proscribed because of the effect they have on mind and body, and not simply on the mind of body of the user, but on the mind and body of those with whom he interacts.

We also have laws against dueling: two men who want to have it out have no legal right to duel to death. Moreover, it is not lawful for a masochist to hire a sadist to kill him at high noon onMain Street. Come to think of it, we don't allow animals to do whatever they want to their own bodies, which is why cock-fighting is illegal. So much for bodily autonomy.

Though it will not do so, the Supreme Court should listen carefully to the teachings of the Catholic Church before it renders its decision on this issue. The Church understands the difference between a doctor who withholds extraordinary means of life-support and a doctor who actively partakes in the death of his patient. Even those who are critical of the Church's position must admit the logical consistency that imbues in the Church's approach to issues of life and death.

While the judges may reject this line of thinking in *Quill v. Vacco*, they surely understand the difference between someone who jumps off a bridge and a doctor who pushes him over the edge. They also understand the cultural havoc that the court created when they invented a right to abortion. So we might escape with a victory on this one.

Boerne v. Flores

Things may not go as well in the two major cases involving religious liberty that are before the Supreme Court. *Boerne v. Flores* and *Agostini v. Felton* both touch on sensitive

territory. Churches, like other institutions in society, want as much autonomy as they can get, but, like everything else, the degree of autonomy that the court is likely to grant must be balanced against other competing interests.

Boerne involves a clash between a church and the community in which it is located. In 1994, Archbishop P.F. Flores and the parishioners of St. Peter's Catholic Church asked the city of Boerne, Texas, for a permit to demolish and rebuild their 73-year-old church. The capacity of the church is 230, and on any given Sunday as many as 290 people seek entrance. The problem, however, is that city officials have denied the permit, citing the town's historic preservation ordinance.

When the permit was denied, the archbishop sued, claiming protection under the 1994 Religious Freedom Restoration Act (RFRA). The act was passed by Congress after the Supreme Court, in 1990, allowed state and local government bodies the right to place certain limitations on religious expression, such as prohibiting the use of illegal drugs in some religious rites. Under RFRA, there must be a "compelling" governmental interest before any restrictions on religious groups are allowed.

One of the questions before the Supreme Court is whether the Congress can pass a law that effectively overturns a decision by the high court. That issue, alone, is of grave constitutional significance and may ultimately be the only real issue before the judiciary. But if RFRA is struck down, the court will have to give some guidance as to just how much autonomy religious institutions can rightly expect.

The immediate issue in *Boerne* is whether local communities have a right to restrict the decision-making of religious institutions. It is not just in Boerne, Texas, that this controversy has arisen, but all over the nation: should government have the right to stop houses of worship from razing buildings that the community deems worthy of landmark

preservation? According to Jeffrey Kayden, a Harvard urban planning professor, the answer is decidedly, yes: “Over time these buildings have become secularized by dint of having become a familiar and reassuring presence.”

There is a measure of truth to what Kayden says, but there is also something very disconcerting in his view. It is rather incredible to assert that a cathedral, for example, becomes less religious over time simply because long-time residents of the community (many of whom may believe in nothing) have grown fond of it. It is one thing to say that a cathedral is a defining element in a community, quite another to say that *because of its centrality* the parishioners who support it necessarily forfeit their right to govern it.

Sentimentalism is no guide to deciding church and state issues, and what is before the court is whether the state has a right to penetrate the wall that separates government and religion. Freedom of religion means very little if religious institutions are not given great autonomy to do what they want. While no right is absolute, it seems plain that if religious liberty is to prosper, the state cannot trump the right of parishioners to rebuild their churches, even if by doing so some in the community get nostalgic.

It is the position of William Bentley Ball, who has filed an amicus brief in support of Archbishop Flores, that “It is essential that government not be awarded a preferred position by operation of law in contests in which religious freedom is at issue.” Ball, who serves on the league’s board of advisors, won a major case for the Amish in 1972 and has written extensively on freedom of religion issues. He has witnessed enough to know that unless religious institutions are given a presumptive right to govern themselves, then the autonomy that they have previously enjoyed will be sundered forever.

Agostini v. Felton

One of the most burdensome decisions that the Supreme Court ever delivered to parochial schools was the infamous 1985 ruling in *Aguilar v. Felton*. Fortunately, the court has agreed to reconsider its decision, and the Catholic League is proud to have filed an amicus in the new test case, *Agostini v. Felton*.

Here's what happened in 1985. In *Aguilar*, the Supreme Court found that there was "excessive entanglement" between church and state in allowing parochial school students to be given remedial education by public school teachers in their Catholic schools. Though Catholic schoolchildren who qualified for remedial education were entitled to partake in a federal program known as Title I, and though no one in the twenty years that the program operated had ever lodged a church-state complaint, the high court still found that the way in which the program was administered was unconstitutional.

The result of this decision was costly, both fiscally and in terms of the autonomy of Catholic schools. To provide for a new venue in which remedial education could take place, many cities paid for vans that were to be used as classrooms. The theory was that this way public school teachers would be free to teach in an environment free of religious overtones. In doing so, the right of Catholic schools to maintain their own environment was compromised.

Aguilar, which was decided by a 5-4 vote, proved to be a total disaster. Since the mid-1980s, it has cost the federal government an extra $100 million to finance the program, with most of the money spent on vans. In New York City alone, $12.5 million is being spent this school year to satisfy the ruling in *Aguilar*. And all of this is unnecessary.

Before *Aguilar*, the system worked well. For example, when I taught in a Catholic elementary school in Spanish Harlem in the 1970s, public school teachers would come to my door and ask to remove certain students for remedial education. The

students were promptly dismissed and left with their remedial teacher to an open classroom.

In the classroom were crucifixes and, to my knowledge, no teacher ever objected to such adornment. Indeed, if he or she felt the need to remove religious symbols before teaching, no one would object. But the idea that somehow the First Amendment might be strengthened if the learning took place in a van parked across the street from the school would surely have struck all parties as positively absurd.

It is because virtually everyone agrees that *Aguilar* has created monumental problems that *Agostini* is being heard. But it is highly unusual for the Supreme Court to rethink one of its own decisions, so the outcome is in doubt.

As in *Boerne*, the Clinton administration is on the side of extending religious liberty, and this is certainly a welcome development: the Justice Department is arguing in court for the right of Archbishop Flores and the parishioners at St. Peter's to rebuild their church and for the right of Catholic schoolchildren to receive remedial education in their own schools.

The Supreme Court carries an increasingly heavy load. But it also has appropriated to itself rights that are at least questionable, if not downright disrespectful of the process of democracy. It is high time that we do what Chief Justice John Marshall once recommended: with respect to Congressional legislation, the opinion of the Supreme Court must be unanimous before a law can be declared unconstitutional. The great philosopher, Sidney Hook, took it even further by suggesting that Congress have the right to override a unanimous court veto by a two-thirds vote in each house.

Even if these reforms became law, there are still thorny issues. Permitting doctors to switch from healer to killer, and allowing the government to tell Catholic institutions how

to run their affairs, poses problems of grave moral consequence. It is hoped that reason, justice and morality will prevail in the end.