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Can the Seamless Garment Be Sewn?
The Future of Pro-Life Progressivism

Changing Minds: Proselytism,
Freedom, and the First Amendment

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Fides et Iustitia

ARTICLE

CHANGING MINDS: PROSELYTISM,
FREEDOM, AND THE FIRST AMENDMENT

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I.

Not long ago, a man armed only with a Bible jumped into the lion's den at a zoo in Taiwan, proclaiming, "Jesus will save you!" One big cat, it turned out, was hard hearted, and it attacked the man, but "zoo workers drove it off with water hoses and tranquilizer guns."¹ Whatever this modern-day amalgam of Paul the Apostle and Daniel the Prophet lacked in prudence, he left little room to doubt his zealous determination to take up and fulfill Christ's charges to his disciples: "Fear not" and "teach ye all nations."² And here is another item for the creative-evangelism file, taken from a recent issue of the *Wall Street Journal*: reporting on the "wave of religious revival" sweeping across China, the *Journal's* front page detailed the case of an enterprising woman, Su Xueling, who "decided to run [her] business to spread [her] religion."³ So, she has started using the proceeds from her company's "Gospel Noodles" to support an evangelical Christian seminary.⁴

These and many other, more sober stories and events both illustrate and confirm the contemporary salience of "proselytism" and the problems

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1. MSNBC, *Man Tries to Convert Lions to Jesus, Gets Bitten: 46-Year-Old Leaps into Den at Taipei Zoo, Calls Beasts to Christianity*, <http://www.msnbc.msn.com/id/6396422/> (Nov. 3, 2004).

2. *Matthew* 28:10, 19.

3. Charles Hutzler, *Business Mission: Mixing Religion and Noodles Lands Ms. Su in Hot Water*, *Wall St. J.* A1 (June 2, 2005).

4. *Id.*

thought to attend it. As Paul Griffiths has observed, proselytism is a “topic enjoying renewed attention in recent years[,] . . . largely because it is increasingly obvious that religious commitments and conflicts are and will remain central to the reconfiguration of global politics that began in 1989.”⁵ John Witte has similarly linked the growing awareness of and sensitivity to the proselytism problem with the “modern democratic evolution [that] has helped to catalyze a great awakening of religion around the globe.”⁶ Not surprisingly then, the practice, aims, and effects of proselytism are increasingly framed not merely in terms of piety and zeal; they are seen as matters of geopolitical, cultural, and national-security significance as well.

To mention a few examples: After the fall of Baghdad, the commentariat was abuzz with alarm over the prospect of destabilizing Christian missionary activity in Iraq.⁷ The Russian Orthodox Patriarchate has—with at least tacit support from political leaders in that country—criticized harshly the Holy See and Protestant missionaries alike for invading Orthodox “canonical territory.”⁸ In India, Hindu nationalists have strongly and stridently condemned religious leaders and religious-freedom advocates—including Pope John Paul II—for meddling in local affairs by criticizing that country’s anti-conversion laws,⁹ and Naxali rebels have violently expelled Christian converts from their villages.¹⁰ The Vietnamese government has started enforcing its new “Ordinance on Religions and Beliefs,” which requires, among other things, registration of religious groups and

5. Paul J. Griffiths & Jean Bethke Elshtain, *Proselytizing for Tolerance*, 127 *First Things* 30, 30 (Nov. 2002).

6. John Witte, Jr., *Human Rights and the Right to Proselytize: Inherent Contradictions?* 94 *Am. Socy. Intl. L. Procs.* 182, 182 (2000).

7. See e.g. Steven Waldman, *Why We Should Keep Franklin Graham Out of Iraq*, <http://slate.msn.com/id/2081432/> (Apr. 11, 2003) (“Franklin Graham’s mission to Iraq will help convince the Arab world that America is out to convert Muslims to Christianity.”); Kenneth Woodward, *Graham’s Crusade: Should Evangelicals Invade Iraq?* 130 *Commonweal* 9, 9 (June 6, 2003) (“Common sense dictates that the Pentagon, which will supervise humanitarian efforts in Iraq, bar these evangelizers and their organizations from entering the country.”); Laurie Goodstein, *Seeing Islam as ‘Evil’ Faith, Evangelicals Seek Converts*, *N.Y. Times* A1 (May 27, 2003); Michelle Cottle, *Bible Brigade*, *The New Republic* 16 (Apr. 21, 2003); cf. Mark O’Keefe, *Evangelicals Plan to Minister to Iraqis’ Needs—Physical and Spiritual*, *Christianity Today*, <http://www.christianitytoday.com/ct/2003/112/45.0.html> (Mar. 27, 2003).

8. See e.g. Frank Brown, *Pope’s Proposed Ukraine Visit Rankles Orthodox*, http://www.beliefnet.com/story/52/story_5277_1.html (Nov. 14, 2000); Willard Francis Jabusch, *A Papal Visit to Russia: Where Is Alexei II’s Invite?* 128 *Commonweal* 11, 11 (Mar. 9, 2001); Lawrence A. Uzzell, *Letter from Moscow*, 93 *First Things* 16, 16 (May 1999). See also Peter Finn, *From Russia, Sympathy and Suspicion*, *Wash. Post* A20 (Apr. 15, 2005).

9. See e.g. Catholic World News, *Pope Raps India’s Restraints on Religious Freedom*, <http://www.cwnews.com/news/viewstory.cfm?recnum=23179> (June 26, 2003). In September of 2003, the Supreme Court in India ruled that there is “no fundamental right to convert” to another religion. See Catholic World News, *Indian High Court Denies a Right to Religious Conversion*, <http://www.cwnews.com/news/viewstory.cfm?recnum=24490> (Sept. 3, 2003).

10. See e.g. ZENIT, *Rebels Expel Converts to Christianity*, http://www.hrwf.net/html/2004PDF/India_2004.pdf (June 12, 2004).

state approval of religious instruction.¹¹ And, in the United States, some have voiced concerns about advocacy and religious activism by “radical” or “fundamentalist” Muslims in schools, prisons, and the nonprofit sector.¹²

One could go on and on, of course, but it is enough for now to observe that one of today’s more pressing challenges is the conceptual and practical tangle of religious liberty, free expression, cultural integrity, and political stability. And it seems particularly appropriate to address this tangle here at the John Paul II Cultural Center in Washington, D.C. After all, even as many legislators, legal scholars, and human-rights lawyers are casting a skeptical eye both on the practice of proselytism and on increasing state-sponsored efforts to control it, the late Holy Father put the Great Commission at the heart of his thought, teaching, and ministry, calling time and again for a “new evangelization.”¹³ Not long ago, marking the occasion of the fortieth anniversary of the Second Vatican Council’s dogmatic constitution, *Lumen gentium*, the Pope exhorted the faithful to “assume with greater determination” their privilege of proclaiming the Gospel and “build[ing] up the Kingdom of Christ.” The “evangelical animation of the temporal order,” he proclaimed, “is a duty of every baptized person.”¹⁴ Indeed, he also insisted, it is *precisely* “[t]he social and religious challenges facing humanity in our day”¹⁵—the challenges, that is, of the ongoing “democratic revolution”—that “call believers to renew their missionary fervor.”¹⁶ At the same time, a thoroughgoing commitment to the freedoms of conscience and religion is a hallmark of John Paul II’s thinking and teaching, both before and during his papacy.¹⁷ While embracing and promoting both re-

11. Bill Broadway, *Intersection of Faith and Freedom; Richmond Group That Promotes Religious Tolerance Presents Listing of Top 10 Issues*, Wash. Post B11 (Jan. 15, 2005).

12. See e.g. Chuck Colson, *Evangelizing for Evil in Our Prisons*, Op. J. (June 24, 2002) (available at <http://www.opinionjournal.com/editorial/feature.html?id=110001885>); Susan Schmidt, *Spreading Saudi Fundamentalism in U.S.; Network of Wahhabi Mosques, Schools, Web Sites Probed by FBI*, Wash. Post A1 (Oct. 2, 2003).

13. See e.g. Pope John Paul II, *Redemptoris missio*, No. 3 (Dec. 7, 1990) (available at http://www.vatican.va/edocs/ENG0219/_INDEX.HTM) (“God is opening before the Church the horizons of a humanity more fully prepared for the sowing of the Gospel. I sense that the moment has come to commit all of the Church’s energies to a new evangelization and to the mission *ad gentes*. No believer in Christ, no institution of the Church can avoid this supreme duty: to proclaim Christ to all peoples.”). The “Great Commission” is the popular name for the task Christ entrusted to the Apostles, i.e., to “teach . . . all nations.” See *Matthew* 28:18-20; *Mark* 16:15 (“[P]reach the [G]ospel to every creature.”).

14. Pope John Paul II, Speech, *A Milestone in the Journey of the Church* (St. Peter’s Square, Nov. 21, 2004), (available at http://www.zenit.org/english/angelus_eng/visualizza.phtml?sid=62314).

15. Pope John Paul II, Speech, *Eucharist and Mission* (Vatican City, Rome, Apr. 19, 2004) (available at http://www.catholicmission.org/world_mission_sunday.html).

16. *Id.*

17. The late Holy Father is widely regarded as having been a significant player in the development and production of *Dignitatis humanae*, the Second Vatican Council’s 1965 Declaration on Religious Freedom. See e.g. Pope John Paul II, Speech, *Freedom of Conscience and Religion* (Vatican City, Rome, Sept. 1, 1980) (available at <http://www.cin.org/jp2ency/freedom.html>).

ligious liberty and “missionary fervor,” the Pope has not overlooked the potential for tension, even conflict, between the two.¹⁸

The Pope was no doubt aware that what is for Christians our Great Commission—and, as Paul put it to the Church at Corinth, “Woe is unto [us] if [we] preach not the Gospel!”¹⁹—is increasingly regarded by political and legal theorists as a threat to democracy, security, and freedom. John Witte captured well the situation:

The problem of proselytism is one of the great ironies of the democratic revolution of the modern world. . . . On the one hand, the modern human rights revolution has helped to catalyze a great awakening of religion around the globe. . . . On the other hand . . . the human rights revolution has brought on something of a new war for souls between indigenous and foreign religious groups. . . . Local religious groups resent the participation in the marketplace of religious ideas that democracy inflicts. . . . They resent the massive expansion of religious pluralism that democracy encourages. [And,] [t]hey resent the extravagant forms of religious speech, press, and assembly that democracy protects.²⁰

And it is not simply “resent[ment]” that today threatens religious freedom. Surveying the international human rights landscape a few years ago, Witte observed that “[t]he world has entered something of a ‘Dickensian era’ in the past two decades. We have seen the best of human rights protections inscribed on the books, but some of the worst of human rights violations inflicted on the ground. . . . These Dickensian paradoxes of the modern human rights revolution,” he added, “are *particularly* striking when viewed in their religious dimensions.”²¹ It turns out that, “[b]eneath shiny constitutional veneers of religious freedom for all and unqualified ratification of international human rights instruments,” a number of countries have cracked down, in a variety of ways, on religious proselytism, conversion, and pluralism.²²

18. See e.g., Pope Paul VI, *Declaration on Religious Freedom: Dignitatis humanae* No. 4, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (Dec. 7, 1965) (“[I]n spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy, especially when dealing with poor or uneducated people.”).

19. I *Corinthians* 9:16 (Douay-Rheims); see also *Acts* 4:20 (Douay-Rheims) (“[W]e cannot but speak the things which we have seen and heard”); Harold O.J. Brown et al., *The Call to Holiness: A Statement of Evangelicals and Catholics Together*, 151 *First Things* 23, 25 (Mar. 2005) (“The entire mission of the Church may be summarized under the rubric of evangelization.”).

20. John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 *Cumb. L. Rev.* 619, 619 (2000).

21. John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 *Wm. & Mary L. Rev.* 707, 707-08 (2001) (emphasis added).

22. *Id.* at 717.

Not surprisingly, then, it is in the context of contemporary efforts to protect human rights through international law that we encounter some of the most important and provocative work concerning the relationship between proselytism and religious freedom. This essay's topic, though, is not the interpretation or application of the religious-freedom provisions of the relevant human-rights instruments.²³ Nor is it the conflicts that, unfortunately, persist in many countries and cultural contexts between believers and missionaries, on the one hand, and local political and religious establishments, on the other.²⁴ These are, no doubt, fascinating and pressing issues; the goal for this essay, however, is to help solve the "proselytism problem" by drawing upon what might at first appear to be quite different, even discordant, sources—namely, the work of Pope John Paul II and the Free Speech Clause of the First Amendment to the Constitution of the United States.

Here, in a nutshell, is the argument: Running through and shaping our First Amendment doctrines, precedents, and values is a solicitude for *changing minds*—our own, as well as others'. Put differently, the Amendment is well understood as protecting and celebrating not just *expression* but *persuasion*—or, if you like, *proselytism*. And so, there are reasons, grounded in our Constitution and traditions, for regarding proselytism and its legal protection not as *threats* to the common good and the freedom of conscience, but instead as *integral* to the flourishing and good exercise of that freedom. What's more, John Paul II sounded a similar note often and consistently. This same solicitude for persuasion and freedom pervades his writing. He emphasized, for example, that the Church must take care to "address[] people with *full respect* [my italics] for their freedom." In so doing, he added, the Church is guided and inspired by the awareness that it is "*furthering* [my italics] human freedom [precisely] by *proclaiming* [my italics] Jesus Christ." Thus, the Pope insisted, "[The Church's] mission does not restrict freedom but rather promotes it." "The Church *proposes*," thereby inviting the exercise of human freedom, "she *imposes* nothing."²⁵

23. See generally e.g. Robert F. Drinan, *Can God and Caesar Coexist? Balancing Religious Freedom and International Law* (Yale U. 2004); Natan Lerner, *Religion, Belief, and International Human Rights* (Orbis Books 2000); Natan Lerner, *Proselytism, Change of Religion, and International Human Rights*, 12 Emory Intl. L. Rev. 477 (1998); Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. Rev. 251, 255. For an overview of First Amendment doctrine relating to the regulation and protection of proselytism in the United States, see Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 BYU L. Rev. 537 (2001).

24. See U.S. Dept. of State, *Religious Freedom Report*, <http://www.state.gov/g/drl/rls/irf/> (Sept. 15, 2004); see generally e.g. *Religious Human Rights in Global Perspective: Legal Perspectives* (John Witte, Jr. & Johan D. van der Vyver eds., Martinus Nijhoff Publishers 1996).

25. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 39 (emphasis in original except where noted); see also e.g. Martin E. Marty, *Proselytizers and Proselytizees on the Sharp Arete of Modernity*, in *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism 2* (John Witte, Jr. & Richard C. Martin eds., 1999).

The claim here, then, is that insights from our First Amendment tradition both indicate and illustrate that proselytism, properly understood and fairly defined, is consistent with religious freedom. It is that proposing, persuading, proselytizing, and evangelizing are at the heart of, and need not undermine, not only the freedoms protected by the Constitution, but also—and more important—those that are proclaimed in the Gospels and inherent in our dignity as human persons.

II.

Before turning specifically to the tasks of defining “proselytism” and working through that activity’s relationship with human freedom, we begin with a kind of Constitutional Law crash course. Each year, I start my First Amendment course at Notre Dame Law School with readings and discussion devoted to this question: what are the *purposes, central underlying values, or animating themes* of the Free Speech Clause and, more generally, of the freedom of speech?²⁶ Now, the point of this exercise is neither to answer nor to discount questions about the Clause’s original or other meaning;²⁷ it is not to lay down fixed markers that will reliably distinguish correctly from wrongly decided cases or determine precisely the most efficient or normatively attractive legal doctrines and “tests.” It is, instead, only to begin an examination of, and conversation about, the connections among the “freedom of speech” (whatever that turns out to mean), the common good, and the flourishing of persons.

For starters, freedom of speech is often conceived by courts and commentators in terms of the “marketplace of ideas” and as a means of facilitating the search for truth. That is, free speech serves for many primarily as a

26. We start the class with Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); John H. Garvey, *What Are Freedoms For?* (Harv. U. Press 1996); Stanley Fish, *There’s No Such Thing as Free Speech: and It’s a Good Thing, Too* (Oxford U. Press 1994); and, Pope John Paul II, *Fides et Ratio* (Sept. 14, 1998) (available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html).

27. I am inclined to believe, actually, that the meaning and scope of the Free Speech Clause has, for better or worse, expanded far beyond what was originally expected or envisioned. That is, it seems to me that we now ask the First Amendment’s command—“Congress shall make no law . . . abridging the freedom of speech”—to do more legal work, and we employ it as a standard against which to judge far more government action, than those who drafted and ratified the provision intended. There is, in my view, much to Justice Thomas’s contention that, when interpreting the First Amendment’s various clauses, courts “must be guided by their original meaning, for ‘[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.’” *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *S.C. v. U.S.*, 199 U.S. 437, 448 (1905)). Nevertheless, there is no avoiding the fact that First Amendment doctrine and outcomes in free-speech cases are powerfully shaped, if not determined, by philosophical premises and normative claims as much as by text or history. In a sense, the First Amendment—and, in particular, the Free Speech Clause—has taken on a life of its own, apart from its place in our written Constitution, as a piece of justiciable and enforceable high political theory.

truth-discovering (or, perhaps, as an error-revealing) device. “[T]ime has upset many fighting faiths,” Justice Holmes asserted famously in his *Abrams* dissent.²⁸ Those who recall and appreciate this fact, he continued,

may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²⁹

We protect the freedom of speech, so the argument goes, because we believe that only through the robust, open, uninhibited, and often rough-and-tumble exchange of ideas are we likely to arrive at the truth—or, at least, to uncover our mistakes.

Whether or not Holmes was correct in constitutionalizing his pragmatic skepticism,³⁰ it is not possible to deny the marketplace metaphor’s power and pedigree. John Milton issued the challenge more than 350 years ago: “Let [Truth] and [Falsehood] grapple; whoever knew Truth put to the wors[e], in a free and open encounter?”³¹ And nearly every undergraduate has probably read of (and likely embraced, at least at first) John Stuart Mill’s defense of open and uncensored discussion as the only reliable route to “the clearer perception and livelier impression of truth.”³²

Another influential way of thinking about the freedom of speech is in terms of self-government. Here the guiding image is that of a fabled New England town meeting, of the kind where Norman Rockwell’s everyman might have been inspired to speak.³³ The Constitution is thought to protect speech as a way of facilitating the operations of democratic government and the equal participation of engaged citizens. Expression is valued, or not, depending on whether it serves or undermines this end. And for many who embrace this theme, the First Amendment serves not simply to disable government from silencing or regulating individual speakers, but also to authorize public action—including, perhaps, the preferring of some speakers over others—that, in their view, advances and expands democratic values like

28. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

29. *Id.*

30. As Frederick Schauer has argued, it is not obvious that the “marketplace of ideas” is “more likely to lead to knowledge than to error, ignorance, folly, or nonsense.” Frederick Schauer, *Free Speech: A Philosophical Enquiry* 19 (Cambridge U. Press 1982).

31. John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing* 35 (Payson & Clarke Ltd. 1927) (originally published 1644).

32. John Stuart Mill, *On Liberty* 15 (Oxford: Blackwell 1947) (cited in *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

33. See e.g. Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper & Bros. 1960). A reproduction of Norman Rockwell’s painting titled *Freedom of Speech* is available at http://www.1st-art-gallery.com/artists/Norman%20Rockwell/index_norman.html (accessed Sept. 16, 2005).

participation, equality, and diversity.³⁴ A recent lecture presented by Justice Stephen Breyer (in which, among other things, he defended campaign-related regulations from free-speech objections) is an example of this theme in action. Breyer stated:

[T]he First Amendment's constitutional role is not simply one of protecting the individual's "negative" freedom from governmental restraint. The Amendment . . . also forms a necessary part of a constitutional system designed to sustain . . . democratic self-government. The Amendment helps to sustain the democratic process . . . by . . . encouraging an exchange of views among ordinary citizens It thereby helps to maintain a form of government open to participation.³⁵

Still others find in the Free Speech Clause a less utilitarian or communitarian, and perhaps a more Promethean, core value. For many prominent scholars, the freedom of speech ultimately serves the expression or (in more New Age terms) the actualization and realization of the autonomous individual. As Thomas Emerson put it,

[t]he right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.³⁶

Martin Redish goes even further, insisting that the freedom of speech "ultimately serves only one true value, . . . 'individual self-realization.'"³⁷ (In this free-speech vision, we might hear echoes of the so-called "mystery passage," which Justice Kennedy inflicted on the U.S. Reports in *Planned Parenthood v. Casey*, and which constitutionalized the ambitions of adolescents everywhere to "define one's own concept of existence, of meaning, of the universe" ³⁸) Understood in this way, the freedom of speech owes little to instrumentalist calculations about expression's error-exposing (or truth-attaining) tendencies. Instead, the idea seems to be that, as Justice Jackson famously wrote, there is a "sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."³⁹ The "self wants to say what the self wants to say," in other words, and so the self has a right to say it.

There is, obviously, a great deal more that could be said about the content and implications of these and other First Amendment theories. The freedom of speech, it has been said, "check[s] the abuse of official

34. See e.g. Owen M. Fiss, *The Irony of Free Speech* (Harv. U. Press 1996).

35. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 252-53 (2002).

36. Emerson, *supra* n. 26, at 879.

37. Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 591 (1982).

38. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion).

39. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

power.”⁴⁰ Also, it helps to promote social stability and to smooth over social changes.⁴¹ That is, the Free Speech Clause functions as a kind of safety valve. In Justice Brandeis’s words,

Those who won our independence . . . knew that . . . it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . .⁴²

For John Garvey, the freedom of speech facilitates not just the exchange of ideas in a market, and it represents more than a tactic for avoiding strife and instilling toleration; instead, the point of free speech is to protect the intrinsically valuable human activity of searching for knowledge.⁴³ Judge Richard Posner seems to regard the freedom of speech as a kind of shorthand for judges’ authorization to find an optimal balance of costs and benefits.⁴⁴ Of course, intellectual gadfly Stanley Fish would likely be amused by all of these and other free-speech theories and principles, given his view that there is little more to “free speech” than the rationalizations concocted by those with power for protecting certain views and messages and silencing others.⁴⁵

In any event, Garvey is clearly correct in noting that the Constitution’s Free Speech Clause “serves a number of values—it helps us pursue knowledge, it makes democracy work, it teaches us tolerance, it is a means of self-expression, and so on.”⁴⁶ And it should be just as clear that to identify various ends and values served by the freedom of speech is not necessarily to interpret and apply the First Amendment correctly. That said, and for present purposes, I want to propose that near the heart of the Free Speech Clause, and high on any list of its influences and animating values, should be a special concern for a particular human activity—namely, *changing minds*. In other words, the Clause is not so much “about” one’s Whitmanesque “barbaric yawp,” but is instead about *advocacy*, and *persuasion*, and *conversion*. The paradigmatic First Amendment enterprise is not self-projection or pop-psychology-style actualization, but is instead a complex and dynamic transaction in which what is taken to be true is proposed by the

40. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 ABA Research J. 521, 523 (1977).

41. Emerson, *supra* n. 26, at 884 (“The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community. . . .”).

42. *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

43. Garvey, *supra* n. 26, at 65.

44. See generally Richard A. Posner, *Frontiers of Legal Theory* ch. 2 (Harv. U. Press 2001).

45. See generally Fish, *supra* n. 26.

46. John H. Garvey, *The Architecture of the Establishment Clause*, 43 Wayne L. Rev. 1451, 1453 (1997) (noting also that “[t]his is one reason why one rule can’t do all the work that the speech clause is designed for”). For another detailed collection of free-speech rationales, see G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. Rev. 829, 892-93.

one and then accepted or rejected by the other, thereby changing or transforming him in some meaningful way. Stanley Fish has observed,

[W]hen one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. These are the reasons for which speech exists. . . . In any normal situation you speak for a reason: to inform, to command, to acquiesce, to ask a question, to further an agenda, to close an agenda down.⁴⁷

This seems right. My claim here, though, is not simply about speakers' motivations, but also about the normative and other justifications for protecting the freedom of speech that shape the interpretation and application of the First Amendment.

Consider just a few examples: In *Abrams v. United States*, the Supreme Court upheld the convictions under the Espionage Act of several First World War-era radicals who had urged in colorful and passionate language opposition to that war and support for the Russian Revolution.⁴⁸ The defendants' words were, in the Court's view, designed and intended to undermine the American war effort, and therefore fell within the scope of the Act, which itself did not violate the First Amendment. Justice Holmes, famously, dissented. Although he conceded the power of government, in some cases, to respond with censorship to a "clear and imminent danger," he insisted nonetheless that "Congress . . . cannot forbid . . . effort[s] to change the mind of the country," even by "poor and puny anonymities" preaching "the creed of ignorance and immaturity."⁴⁹ Justice Holmes returned to this theme a few years later in the *Gitlow* case, which involved a prosecution under New York's Criminal Anarchy statute.⁵⁰ Again in dissent, Holmes questioned the majority's distinction between mere theory and "incitement," insisting that "every idea is an incitement. It offers itself for belief and if believed it is acted upon unless some other belief outweighs it or some failure of energy stifles the movement at its birth."⁵¹ In other words, the communication of ideas—i.e., speech—aims at a "movement" in and towards belief; that such a "movement" might occur is not a justification for suppressing speech, but is precisely why it is protected.⁵²

47. "There Is No Such Thing as Free Speech": An Interview with Stanley Fish, 9 Australian Humanities Rev. (Feb. 1998) (available at <http://www.lib.latrobe.edu.au/AHR/archive/Issue-February-1998/fish.html>).

48. 250 U.S. 616.

49. *Id.* at 627-29 (Holmes, J., dissenting).

50. *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

51. *Id.* at 673.

52. *See id.* ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

Turn next to what might seem a very different kind of case. In 1980, the Court considered a free-speech challenge to a New York law prohibiting advertising that “promot[es] the use of electricity.”⁵³ Just a few years earlier, the Justices had abandoned the notion that the First Amendment provides no protection to advertising, or “commercial speech.”⁵⁴ Evaluating New York’s ban, the Justices concluded that the “interests” or policy goals that, in the State’s view, justified the restriction on speech—i.e., energy conservation and fairness in rates—were not obviously advanced or served by the commercial-speech regulation, while the burdens imposed on speakers’ expression were significant.⁵⁵ Justice Blackmun agreed with this conclusion, but wrote separately in strong opposition to the notion that the government may curtail accurate advertising—i.e., speech—about a legal product simply in order to dampen demand for that product.⁵⁶ Such a regulatory effort, he insisted, “strikes at the heart of the First Amendment . . . because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion . . . but by depriving the public of the information needed to make a free choice.”⁵⁷ “If the First Amendment guarantee means anything,” he continued, “it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.”⁵⁸ In other words, he might have said, whether the issue in dispute is the war effort or electricity use, it is no justification for suppression that speech might influence decisions, shape views, or change minds because, in our tradition, this possibility is precisely why speech is protected. Because the very *point* of free speech is to persuade, “the government has no power to restrict expression” on the ground that it might, in the end, have that effect.⁵⁹

Another example: In *NAACP v. Claiborne Hardware*, the Justices took up the question whether intimidating and menacing statements, made in the context of a politically motivated boycott by civil-rights activist Charles Evers, were proscribable and punishable as “true threats.”⁶⁰ Writing for the majority, Justice Stevens conceded that the activities of Evers and the boycott organizers went beyond peaceful assembly and discussion among supporters. He accepted the fact that they “sought to persuade others to join the boycott through social pressure and the ‘threat’ of social ostracism.”⁶¹ The First Amendment is, he acknowledged—as Justice Breyer might to-

53. *C. Hudson Gas & Elec. Co. v. Pub. Serv. Commn.*, 447 U.S. 557, 568 (1980).

54. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

55. *C. Hudson Gas & Elec. Co.*, 447 U.S. 557.

56. *Id.* at 573-79 (Blackmun, J., concurring).

57. *Id.* at 574-75.

58. *Id.* at 575.

59. *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

60. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

61. *Id.* at 909-10.

day⁶²—a “charter for government,”⁶³ but this does not mean that Robert’s Rules or the norms of a town-hall meeting control. “[The First Amendment] extends to more than abstract discussion,” Justice Stevens wrote, and “[f]ree trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”⁶⁴ In our tradition, again, the point of speech is not only to inform, but also to transform, and the latter process is not always easy or pleasant.

A recent abortion-related case provides another, final illustration (though not a vindication, as it happened) of the centrality of persuasion to the Free Speech Clause. In *Hill v. Colorado*, the Court upheld a number of restrictions on expression that were designed to constrain the expression of pro-life sidewalk counselors near facilities where abortions are performed.⁶⁵ Even here, though—while concluding that the limits were content-neutral, and appropriately tailored to important public interests—Justice Stevens acknowledged, as he had in *Claiborne Hardware*, that “the right to free speech . . . includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”⁶⁶ For the dissenters, though, this acknowledgement made the majority’s decision all the more troubling. Justice Kennedy highlighted the fact that the restrictions in question expressly singled out for regulation precisely those activities that should be of paramount First Amendment concern, namely, “counseling,” “education,” and *persuasion*. Particularly in the abortion context, he complained, it is essential that citizens be afforded an expansive freedom to change others’ minds. After all, “[a]bsent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause.”⁶⁷ He continued:

[W]e have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is

62. See Breyer, *supra* n. 35.

63. 458 U.S. at 910 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

64. *Id.*

65. *Hill v. Col.*, 530 U.S. 703 (2000). I believe that *Hill* was wrongly decided. *Cf. id.* at 741 (Scalia, J., dissenting) (suggesting that the majority’s misapplication of the relevant First Amendment doctrines was so striking as to justify the lament that the Court was employing an “ad hoc nullification machine” . . . to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice [i.e., abortion]).

66. *Id.* at 716.

67. *Id.* at 787-88 (Kennedy, J., dissenting); see also *id.* at 741-42 (Scalia, J., dissenting) (“Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.”).

about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.⁶⁸

* * * * *

To be clear, the foregoing is not offered as an exhaustive chronicling of the Court's invocation of persuasion in free-speech cases. The point is not to construct and defend a grand theory, but only to highlight a prominent, influential theme. Whatever other values the First Amendment might serve, and however it should be understood and applied, it is fair to say that a special concern and respect for the activity of changing minds has informed and profoundly shaped our free-speech law and rhetoric.⁶⁹

III.

Turn back to the problem of "proselytism" and its regulation. What, exactly, are we talking about? What *is* proselytism, and why should human-rights lawyers, religious believers, and citizens in liberal democracies care and worry about it? Is proselytism an activity that should be identified by its *tone* or *methods*? By its *purpose* or *effects*? Or by something else? To make a long story short, it turns out that "proselytism" is "an equivocal term, rife with misapplications."⁷⁰ What's more, as Lawrence Uzzell has noted, "[a]s with 'fascism' in the 1960s and 'terrorism' today, the definition of 'proselytism' seems to grow less and less precise the more often the word is used."⁷¹

Now, one fairly accessible and straightforward definition might go something like this: "'[P]roselytism' means expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another."⁷² In sophisticated circles, however, the connotations of the term are almost always more negative, even sinister.⁷³ For many of

68. *Id.* at 792 (Kennedy, J., dissenting).

69. To be clear: To say that a concern and respect for the activity of changing minds has powerfully shaped our First Amendment doctrine and discourse is *not* to claim that proselytism is categorically exempt from regulation. See generally Hunter & Price, *supra* n. 23.

70. Lawrence Uzzell, *Don't Call It Proselytism*, 146 *First Things* 14 (Oct. 2004) (quoting Bert Beach, *Evangelism and Proselytism: Religious Liberty and Ecumenical Challenges*, <http://www.irla.org/documents/articles/bbbeach-proselytism.html> (Sept. 8, 1999) ("Proselytism is witness and evangelism aimed at conversion. Proselytism is false or corrupt witness, using wrong methods. Proselytism is sheep-stealing with a view to enlarging one's own church and empire-building, using false motivation. Proselytism is evangelizing the wrong people, using false targets. Proselytism is interfering with the belief and religious life of other people Proselytism is keeping people ignorant about real faith and religion")).

71. Uzzell, *supra* n. 70.

72. Stahnke, *supra* n. 23.

73. *Id.* at 254-55.

us, “[t]he picture of the proselytizer is of some latter-day Savonarola, severe and intimidating, or an Elmer Gantry-type huckster.”⁷⁴ *New York Times* columnist Nicholas Kristof captured the typical “right thinking” reaction well: “Mention the words ‘evangelical missionary,’ and many Americans conjure up an image of redneck zealots forcing starving children to be baptized before they get a few crusts of bread.”⁷⁵ And even in the pages of the *U.S. Reports*, the word is invoked, but rarely defined; it is usually thought to be enough to suggest a distinction between proselytism and more innocuous, perhaps less religious, expressive activity.⁷⁶

In fact, terms like “proselytism” and “proselytize” descend to us from a Greek word (*proselutos*) meaning “one who has come to a place” or “one who comes over.” A more faithful image of the “proselytizer,” then, might be one of a *guide*—or even a *friend*—extending an invitation, or providing companionship and counsel on a journey. True, as Paul Griffiths notes, the convert “leaves an old community, whether of belief or practice, and enters a new one”;⁷⁷ but it would not seem that we are etymologically required to regard him as doing so reluctantly, desperately, or alone. It is probably also helpful to remember that, in many Christian circles, “proselytism” is casually and commonly understood as “evangelism.” This suggests that to “proselytize” is not just to argue, but also to proclaim the “good news.”⁷⁸ Proselytism is more than advocacy; it is the *transmission* of a religious message, which in turn prompts the *transformation* of the hearer. In this sense, proselytism-as-evangelism goes beyond the spoken word and includes what Cardinal Dulles calls “a lifelong process of letting the gospel permeate . . . all our ideas and attitudes.”⁷⁹ And a rich, non-cartoonish definition of “proselytism” would try to capture the idea that it involves not only the

74. Griffiths & Elstain, *supra* n. 5, at 36.

75. Nicholas D. Kristof, *God on Their Side*, N.Y. Times A15 (Sept. 27, 2003).

76. See e.g. *Good News Club v. Milford Sch.*, 533 U.S. 98, 130-34 (2001) (Stevens, J., dissenting) (distinguishing “proselytism” from “speech from a religious viewpoint”); cf. *id.* at 121 (Scalia, J., concurring) (“What is at play here is not coercion, but the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one’s children receive it) is protected by the Free Speech and Free Exercise Clauses, not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.”).

77. Griffiths & Elstain, *supra* n. 5, at 30.

78. U.S. Conf. of Catholic Bishops, *The Gospels*, <http://www.nccbuscc.org/nab/bible/gospels.htm> (accessed Sept. 19, 2005) (The English word “gospel” is translated from the Greek term *euangelion*, or “good news.” And, “evangelization” is obviously connected to *euangelizomai*, which means “to proclaim good news.”).

79. Avery Dulles, *Evangelizing Theology*, 61 *First Things* 27 (Mar. 1996); see also e.g. Documents of the Second Vatican Council, *Lumen Gentium*, No. 35 (Nov. 21, 1964) (available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html) (referring to evangelization as “[the] announcing of Christ by a living testimony as well as by the spoken word”); Catholic News Agency, *Evangelize Asia with Faith that Penetrates Every Aspect of Life, Says Pope*, <http://www.catholicnewsagency.com/new.php?n=2505> (Nov. 19, 2004) (quoting Pope John Paul II’s statement that “the Kingdom of God must be proclaimed with ‘a silent witness of life,’ carrying the cross and following in the footsteps of the suffering and crucified Christ”).

dissemination of information, but the proclamation of Truth—as Truth—and the extension of an invitation to embrace that Truth. The proselytizer is not just “expressing” ideas, or proposing claims; he is making disciples and changing minds. As John Paul II put it, “The proclamation of the Word of God has *Christian conversion* as its aim: a complete and sincere adherence to Christ and his Gospel through faith.”⁸⁰

Now, “proselytism” so understood is almost certain to be controversial, since it can only jar our pervasive modern indifferentism, and to upset those “lukewarm relativists” whose “need is for psychological defenses and social barriers against those who would vigorously advocate eternal truths.”⁸¹ After all, as Paul Griffiths has noted,

To engage in proselytizing implies a moral judgment of error (in assent) or impropriety (in action) on the part of [those] being proselytized Particular proselytisms, then, imply (and are sometimes explicit about) the rightness or propriety of what they proselytize on behalf of, and, concomitantly, the wrongness or impropriety of what they proselytize against.⁸²

To his “lukewarm” critics, then, the proselytizer’s offense lies in failing to evidence an appropriately skeptical or ironic detachment from the merits of his message.⁸³

All that said, there is no escaping the run-of-the-mill, colloquial, disparaging sense of the term. For many, unworthy methods, unwarranted confidence, and excessive zeal are necessarily included in the very definition of proselytism. To “proselytize” is to proclaim one’s message *in a certain way*—a way that is thought to threaten or insult the freedom of the hearer, and perhaps also the dignity of the proselytizer’s message. Thus, “proselytism” has been defined as “evangelistic malpractice,”⁸⁴ as “counter-witness,”⁸⁵ and as an “offense against the authentic nature of religion.”⁸⁶

80. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 46.

81. Uzzell, *supra* n. 70, at 15.

82. Griffiths, *supra* n. 5, at 32.

83. *Cf. Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (plurality) (warning that the Court should not “reserve special hostility for those who take religion seriously [and] who think that their religion should affect the whole of their lives”). On the other hand, there is reason to think that among Americans who are religious believers—and even among “born-again Christians”—the “modern orthodoxies of tolerance and inclusion” have more appeal than “traditional teachings” regarding evangelization and salvation. Dave Shiflett, *Uncertain Crusaders*, Wall St. J. W15 (Nov. 14, 2003) (available at <http://www.opinionjournal.com/taste/?id=110004301>); see generally e.g. Alan Wolfe, *The Transformation of American Religion: How We Actually Live Our Faith* (Free Press 2003); Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. Rev. 1645, 1660-69 (2004).

84. Lerner, *Proselytism, Change of Religion, and Intl. Human Rights*, *supra* n. 23, at 495.

85. His Beatitude Teoctist, Patriarch of the Orthodox Church of Romania, Address, *Address of His Beatitude Teoctist* (Vatican City, Rome, Oct. 12, 2002) (available at http://www.vatican.va/latest/documents/teoctist_spe_20021012en.html) (“Proselytism is a counter-witness and must be denounced as such in every circumstance.”).

Now, to reject “evangelistic malpractice” seems easy and wise enough. The danger, of course, is that definitions and critiques that focus on the proselytizer’s “unworthy methods”—e.g., “coercion,” “manipulation,” “propaganda”—will shade into condemnations of the *evangelical mission itself*. Thus, Jean Bethke Elshtain has observed that proselytism’s critics tend to “disdain[] distinctions between coercion, manipulation, and persuasion.” For these critics, “[i]f I change my mind about something after an encounter with you, or after having spent some time in your religious community, the presupposition is that I have been messed with: gulled or brain-washed or taken for the proverbial walk down the primrose path.”⁸⁷ It is, perhaps, too easy for those appropriately concerned with coercion—and with remaining true to the Gospel while proclaiming it—to confuse one who converts or “comes over” with one who is duped or dragged.

Even more troubling is the fact that some unfriendly definitions of “proselytism” seem to reflect not just disapproval of the proselytizer’s *methods*, but also hostility toward her *message*. On this view, what is objectionable about the proselytizer is not merely her canniness or her zeal, but her claims and her commitments. “Proselytism” becomes, then, just a code word for “expression that we find offensive” or “claims that we reject.” It serves as little more than a proxy for the demand that religion remain *private*, a demand which itself often reflects discomfort with the claim or premise that religious beliefs can be *true*. In turn, Elshtain observes, “the continuing privatizing of religion means that when religion shows its face it must not take the form of actually trying to persuade someone else of the truth of the religious beliefs being displayed.”⁸⁸ And yet, for many religious believers, it is—in Cardinal Dulles’s words—“essential that faith be true.”⁸⁹

Another way, perhaps, to get a handle on “proselytism” is to look not only at *methods*, or at the content of the *message*, but also and more specifically at the *harms* it is thought to cause. Many such harms are cited in both the scholarly and the polemical literature, and I will mention here just a

86. Pope John Paul II, Speech, *Address to H.E. Mrs. Sarala Manourie Fernando, Ambassador of the Republic Sri Lanka to the Holy See* (Vatican City, Rome, May 27, 2004) (available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/may/documents/hf_jp-ii_spe_20040527_ambassador-sri-lanka_en.html) (The pope rejected “proselytization” understood as “the attempt to violate another person’s freedom of conscience through moral or financial coercion. Such acts represent an offense against the authentic nature of religion.”).

87. Griffiths & Elshtain, *supra* n. 5, at 35.

88. *Id.*

89. As Dulles notes,

For [Biblical authors and classical theologians] it is essential that faith be true, for it gets its saving power from its reliance on the only power that can effectively vanquish the destructive forces of sin and death. Faith, in other words, saves by reason of its object. If we were not convinced that salvation comes from the God who speaks His saving word in Christ, we could perhaps be good therapists or social engineers but not evangelists.

Dulles, *supra* n. 79.

few. *First*, on what might be called the “personal” or “individual” level, proselytism is often said to threaten the hearer’s right to privacy, her religious liberty (that is, her right to hold religious beliefs without interference or coercion), and—more generally—her freedom of conscience. *Second*, and on what could be called the “political” or “public” level, the dangers thought to attend proselytism tend to involve alleged distortions of public debate, insults, or challenges to the dominant or established local religion, instigation of civil unrest or political dissent, and imperialistic assaults on local cultures’ traditions.

Starting with the “individual” level, I submit that a legally operative definition of “proselytism” built on claims about the hearers’ “right to privacy” should be a non-starter, at least outside the hearer’s private sphere, narrowly understood. In the public square anyway, there really is, generally speaking, no “right to be left alone,” or to be protected from challenging, irritating, and even offensive expression. As Justice Harlan once insisted, the “State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us,” and the Constitution places tight constraints on the ability of government to “shut off discourse solely to protect others from hearing it”⁹⁰ In any event, as Griffiths reminds us,

Proselytism . . . is virtually unavoidable. . . . It may be possible for those almost or entirely without connection to others (hermits, those at the far end of autism or Alzheimer’s, long-term coma patients, and so on) to avoid proselytism completely; but otherwise we are all proselytizers Being such is inseparable from having a social existence.⁹¹

So “privacy,” or a desire to be “let alone,” or the possibility of “offense,” are not particularly helpful either in defining proselytism or in justifying its regulation. (This is not to deny of course that those who engage in evangelism, proselytism, or advocacy of any kind should, if only out of prudence and good manners, respect the privacy and space of their intended hearers.)⁹² What, then, about the other “individual” level harms associated

90. *Cohen v. Cal.*, 403 U.S. 15, 25, 21 (1971); see also *Hill*, 530 U.S. at 751 (Scalia, J., dissenting) (“We have consistently held that the Constitution does not *permit* government to decide which types of otherwise protected speech are sufficiently offensive to require protection *for the unwilling listener or viewer.*” (citation omitted)); but cf. *Hill*, 530 U.S. at 716-17 (“The unwilling listener’s interest in avoiding unwanted communication . . . is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’” (quoting *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

91. Griffiths & Elshtain, *supra* n. 5, at 31.

92. Witte, *A Primer on the Rights and Wrongs of Proselytism*, *supra* n. 20, at 627-28 (concluding that “[t]he preferred solution to the modern problem of proselytism is not so much further state restriction but further self-restraint” and observing that “[t]his is the heart of the Golden Rule”).

with proselytism? Does proselytism threaten—and should it be defined in opposition to—the freedoms of conscience and religion?

The work and thought of Pope John Paul II suggest a way to mediate the apparent tension between expression, persuasion, and evangelization, on the one hand, and religious liberty, freedom of conscience, and human dignity on the other. As was noted earlier, John Paul II put the call to evangelization at the heart of his ministry, convinced as he was of the “urgency of missionary activity.”⁹³ Far from being optional—far from being, in Professor Stephen Carter’s famous words, a “hobby”⁹⁴—the “missionary thrust . . . belongs to the *very nature* of the Christian life.”⁹⁵ As a result, “[n]o believer in Christ, no institution of the Church can avoid this supreme duty: to proclaim Christ to all peoples,” inviting them to “open the doors to Christ” and to *change their minds*.⁹⁶

At the same time, the Pope spoke out clearly and often against any corruption of the Christian witness by appeal to what the Second Vatican Council called “coercion or . . . devices unworthy of the Gospel.”⁹⁷ Is there a contradiction here? Can the Pope so enthusiastically celebrate missionary evangelism while at the same time criticizing proselytism? After all, in today’s context, and to many liberal listeners, the Pope’s words can only sound like a troubling call to arms, to intolerance, to cultural imperialism, and even—horrors!—to judgmentalism. The purpose of this call, though, is not to gain an edge in a global inter-faith competition for souls or to run triumphantly roughshod over non-Western cultures. It is, instead, *to serve*—“to serve man by revealing to him the love of God made manifest in Jesus Christ,” and to “direct [his] gaze . . . toward the mystery of Christ.”⁹⁸

But again, how could the Pope simultaneously call for a new evangelization and warn against proselytism?⁹⁹ The key is his rich understanding of

93. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 1.

94. Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L.J. 977 (1987).

95. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, No. 1 (emphasis added); *see also* Pope Paul VI, *Evangelii nuntiandi*, No. 5 (“[T]he presentation of the Gospel message is not an optional contribution for the Church. It is the duty incumbent on her by the command of the Lord Jesus, so that people can believe and be saved.”).

96. Pope John Paul II, *Redemptoris missio*, *supra* n. 13 at No. 3.

97. Pope Paul VI, *Dignitatis humanae*, No. 11 (Dec. 7, 1965) (available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

98. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 2, 4.

99. For example, John Paul II expressed concern about what he regarded as the aggressive tactics and uncharitable, deceptive claims employed by members of some Protestant “sects” in the developing world. *See e.g.* Pope John Paul II, *Ecclesia in America*, No. 73 (Jan. 22, 1999) (available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html). Pope John Paul II notes,

The proselytizing activity of the sects and new religious groups in many parts of America is a grave hindrance to the work of evangelization. The word “proselytism” has a negative meaning when it indicates a way of winning followers which does not respect the freedom of those to whom a specific kind of religious propaganda is di-

freedom. As the fathers at the Second Vatican Council proclaimed—and as the Pope often re-affirmed—“the human person has a right to religious freedom,” and so no one should be forced to act against his conscience in religious matters nor prevented from acting according to his conscience”¹⁰⁰

However,

[p]roclaiming Christ and bearing witness to him, when done in a way that respects conscience[], does not violate freedom. Faith demands a free adherence on the part of man, but at the same time faith must be offered to him. . . . [A]ll are impelled by their own nature and are bound by a moral obligation to seek truth, above all religious truth.¹⁰¹

Properly understood, authentic freedom is not immunity from persuasion or obligation, or from the sometimes unsettling invitation to “come over.” The claim, instead, is that evangelization *liberates* the hearer *because it gives him the power to say “no.”*¹⁰² Indeed, “true liberation consists in opening oneself to the love of Christ.”¹⁰³ Thus, the same freedom that is *exercised* by the evangelist is *enjoyed* also by the hearer, who is extended an opportunity to embrace true freedom and authentic human flourishing.¹⁰⁴ The Pope’s moral anthropology—his view about what human persons are and are for—goes a long way toward untangling the knots identified by proselytism’s critics.¹⁰⁵

What, then, about the harms said to attend, and even to define, “proselytism” at the “public” or “political” level—harms to the civic order, to the public square, to vulnerable cultures, and to the status and authority of locally dominant religions? A recent news account, for example, reports that “[t]he hill tribes of northern Thailand have survived centuries of displace-

rected. The Catholic Church in America is critical of proselytism by the sects and, for this reason, rejects methods of this kind in her own evangelizing work.

Id.

100. Pope Paul VI, *Dignitatis humanae*, *supra* n. 97, at No. 2.

101. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 8; *id.* at No. 4 (“Does not respect for conscience and for freedom exclude all efforts at conversion?”).

102. Cf. Norman K. Miles, *Proselytism and Religious Freedom in the Seventh-Day Adventist Church*, in *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* 305, 319 (John Witte, Jr. & Richard C. Martin eds., 1999) (“In the end, only those who are free to say no to the gospel are really free to say yes.”).

103. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 11; *see also* John Paul II, Speech, *Pastoral Visit in Kazakhstan: Meeting with Young People*, (Astana-Eurasia University, Sept. 23, 2001) (available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2001/sep-tember/documents/hf_jp-ii_spc_20010923_kazakhstan-astana-youth_en.html) (“Allow me to profess before you with humility and pride the faith of Christians. . . . Only in the encounter with him, the Word made flesh, do we find the fullness of self-realization and happiness.”).

104. *See e.g.* Griffiths & Elshain, *supra* n. 5, at 35-36 (“Persuasion . . . begins with the presupposition that you are a moral agent, a being whose dignity no one is permitted to deny or to strip from you, and, from that stance of mutual respect, one offers arguments, or invites your participation, your sharing, in a community and its rhythms and rituals.”).

105. For more on the “moral anthropology” of Pope John Paul II, see John J. Coughlin, *Pope John Paul II and the Dignity of the Human Being*, 27 Harv. J.L. & Pub. Policy 65 (2003).

ment, hardship and discrimination. But now their uniquely colorful culture is under a new threat, albeit a well-meaning one: Christian evangelism.”¹⁰⁶ (Apparently, “[t]ourists don’t want to see these tribal people with a church foisted on them.”)¹⁰⁷ These harms should not be exaggerated, but they should not be ignored either.¹⁰⁸ It might be worth recalling here the discussion above about the values that underlie and have shaped our free-speech law and traditions. It was suggested that, at its best, our First Amendment decisions and doctrine have celebrated and protected speech *precisely* because it persuades, moves, changes, and transforms; and, that the point of the freedom of speech—properly understood—is not to protect hearers from the burdens of argument, but rather to authorize and enable inspired conversions, transformed views, and changed minds. In all but the most pressing cases, then, our free-speech law gives priority to *persuasion*—and, we might say, to *proselytism*—over enforced political tranquility, the comfort of the culture, and the privileges of established orthodoxies. And, it would seem, this is as it should be. After all, “culture is a human creation and is therefore marked by sin, it too, needs to be ‘healed, ennobled and perfected.’”¹⁰⁹ What’s more, “[n]o religious and cultural tradition is ever frozen . . . and for local traditions to seek blanket protections against proselytism is a self-defeating policy of ossification.”¹¹⁰

CONCLUSION

Our free-speech law provides support for the claim that persuasion and proselytism should not be subordinated, in terms of rights or value, to unity and stability. That said, there are trends and arguments that point in the other direction. For example, we could once say with some confidence that the First Amendment denies any power to government to reshape or fine-tune the public conversation in the interest of political stability or to produce a “better” public discourse. We could once be fairly confident that the Constitution served to keep government regulation *out* of the arena of per-

106. Marwaan Macan-Markar, *Christian Conversion Threatens Hill Tribe Culture*, Asia Times (Aug. 29, 2003) (available at http://www.atimes.com/atimes/Southeast_Asia/EH29Ae01.html).

107. *Id.*; see also e.g. *Disrupting the Faith? Interview with Dr. Alexander Berzin*, Newsweek (Asia & Atlantic Eds.) 56 (Jan. 13, 1997) (discussing the threats to Mongolian culture, “traditional values,” and Buddhism posed by the “very large influx of American Christian missionaries.”).

108. See e.g. David M. Smolin, *Exporting the First Amendment? Evangelism, Proselytism, and the International Religious Freedom Act*, 31 Cumb. L. Rev. 685, 707 (2000-01) (“We cannot denigrate the importance of religion to the social order or to civil peace in the name of religious liberty.”); Makau Wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in Johan D. van der Vyver & John Witte, Jr., *Religious Human Rights in Global Perspective* 417-40 (Martinus Nijhoff Publishers 1996) (calling for “mechanisms of redress for forms of proselytization that seek to unfairly assimilate or impose dominant cultures on indigenous religion”).

109. Pope John Paul II, *Redemptoris missio*, *supra* n. 13, at No. 54.

110. Witte, *Human Rights and the Right to Proselytize*, *supra* n. 6, at 184.

suasion, not to authorize government supervision of or intrusions into that arena, in the name of “improving the marketplace of ideas” or protecting hearers from unwanted and uncomfortable challenges.¹¹¹ And we could until recently expect widespread recognition that dissension and division—even what the Court has called “political division along religious lines”¹¹²—are the inevitable and unremarkable results of free speech, not reasons for limiting it. In recent years, however, and in a number of contexts, both judges and commentators have invoked and relied on the notion that the First Amendment should be understood and applied so as to avoid, and even to censor, “divisiveness.”¹¹³ It is suggested—particularly in the context of election- and campaign-related regulations—that the perceived needs and integrity of our political processes, and the asserted obligation to encourage or amplify the speech or comfort of some, justifies controlling the expression of others.¹¹⁴ I have argued elsewhere that such arguments and suggestions are misguided.¹¹⁵ For now, it is enough to say that, just as the prominence long given in free-speech discourse to efforts at changing minds is helpful in understanding, and perhaps in dissolving, the tension between proselytism and privacy, and between the evangelist’s freedom of

111. See e.g. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”). In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, the Court notes,

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. 557, 579 (1995). See also *Stahnke*, *supra* n. 20, at 266 (“[T]he Supreme Court protected the freedom to proselytize even though at times the message and the manner in which it was delivered was intolerant, divisive and abusive, and could disturb the targets in their own religious feelings and in their tolerance of others.”).

112. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

113. See e.g. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723-24 (2002) (Breyer, J., dissenting) (avoiding “religiously based social conflict” and “social dissension” is a fundamental First Amendment “principle”); see also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 198 (1992) (noting that the Establishment Clause “extinguished . . . interdenominational strife”); *id.* at 209-10 (contending that the Establishment Clause forbids certain government measures “because [they] cause profound divisiveness and offense”) (emphasis added).

114. See e.g. Breyer, *supra* n. 35, at 252-53 (“[T]he First Amendment’s constitutional role is not simply one of protecting the individual’s ‘negative’ freedom from governmental restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government. The Amendment helps to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process.”).

115. Richard W. Garnett, *Religion, Division, and the Constitution*, ___ Geo. L.J. ___ (forthcoming 2006).

speech and the hearer's freedom of conscience, the increasing prominence of free-speech arguments that appear to privilege comfort and stasis over persuasion and conversion should serve as a reminder that the invitation to "come over" is, has been, and likely will always be, unsettling.