"The King's Good Servant, but God's First:
Responses in Canon and Civil Law to Governmental Threats
to the Church's Freedom to Carry Out Her Mission"

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Summary

This presentation on "Responses in Canon and Civil Law to Governmental Threats to the Church's Freedom to Carry Out Her Mission" will begin with examining the basic foundations for religious freedom in theology and natural law. After surveying key canons from the *Code of Canon Law* that deal with the rights of the Church and her faithful, an overview will be given examining some key cases of the United States Supreme Court dealing with COVID restrictions on freedom of worship; same-sex marriage; foster care and adoption services; abortion, contraceptive and abortifacient mandates; school funding; Blaine amendments; church and school employees/ministers; school prayer; and public expressions of religion. Finally, some resources will be noted highlighting organizations providing legal assistance for litigation involving religious liberty.

I. Religious liberty in theology and natural law

The title of this presentation is, "The King's Good Servant, but God's First: Responses in Canon and Civil Law to Governmental Threats to the Church's Freedom to Carry Out Her Mission." Not too long ago, references to "Governmental Threats to the Church's Freedom to Carry Out Her Mission" would have brought to mind the repressive atheistic regimes of the Soviet Union and Communist China, as well as the ant-Christian laws of Muslim-dominated countries such as Saudi Arabia. While Communist China and predominantly Muslim nations certainly continue to impede the Church's freedom to carry out her mission, it is disconcerting, to say the least, that threats to the Church's freedom to carry out her mission are becoming

increasingly apparent here in the United States. It is here in our domestic context that I will focus our attention.

A. Maxim: "Law follows theology"

In the canon law courses that I teach at Notre Dame Law School, I emphasize the maxim that "law follows theology." By that I mean that we canon lawyers do not just sit around making up canon law out of thin air. The norms of canon law emanate from the teachings of Sacred Scripture and the principles of our faith in the Sacred Tradition of the Church as handed down over the past 2,000 years by lawful ecclesiastical authority. Thus, the canons of the *Code of Canon Law* that address the preeminence of divine law and canon law over civil law are based on Sacred Scripture and Tradition. So we will look at some of these principles first.

B. Sacred Scripture on the Preeminence of Divine Law

The classic biblical basis for the relationship between religious belief and government authority is found in the instruction from Jesus for His disciples to "render unto Caesar the things that are Caesar's, and unto God the things that are God's," in the translation that is most familiar to English-speaking people (cf. Matthew 22:21 and Mark 12:17). While at first hearing it may seem that Our Lord is making a neat distinction between Church and State, the more incisive listener will realize that since God is the Creator of the universe, everything in it effectively belongs to Him. Nevertheless, Our Lord is allowing that there are circumstances in which civil authority should be followed as long as they are not contrary to divine purposes.

Thus, Saint Peter wrote that Christians should "Be subject to every human institution for the Lord's sake, whether it be to the king as supreme or to governors as sent by him for the punishment of evildoers and the approval of those who do good. For it is the will of God that

by doing good you may silence the ignorance of foolish people." But he quickly adds, "Be free, yet without using freedom as a pretext for evil, but as slaves of God" (1 Peter 2:13-16).

We see Saint Peter put this teaching into practice in the *Acts of the Apostles*, which tells us about the activities of the first Christians during the earliest days of the Church. There we read that when the apostles were imprisoned for preaching about Jesus, the angel of the Lord opened the doors of the prison during the night and led them out, and said,

> "Go and take your place in the temple area, and tell the people everything about this life." When they heard this, they went to the temple early in the morning and taught. When the high priest and his companions arrived, they convened the Sanhedrin, the full senate of the Israelites, and sent to the jail to have them brought in. But the court officers who went did not find them in the prison, so they came back and reported, "We found the jail securely locked and the guards stationed outside the doors, but when we opened them, we found no one inside." When they heard this report, the captain of the temple guard and the chief priests were at a loss about them, as to what this would come to. Then someone came in and reported to them, "The men whom you put in prison are in the temple area and are teaching the people." Then the captain and the court officers went and brought them in, but without force, because they were afraid of being stoned by the people. When they had brought them in and made them stand before the Sanhedrin, the high priest questioned them, "We gave you strict orders [did we not?] to stop teaching in that name. Yet you have filled Jerusalem with your teaching and want to bring this man's blood upon us." But Peter and the apostles said in reply, "We must obey God rather than men." (*Acts* 5:20-29)

Thus, we see both in the teachings of Jesus and the life of Saint Peter, the premise that Christians should generally comply with civil authority, however, that compliance is not absolute, but is conditioned on civil authority being subservient to the divine law.

C. St. Thomas Aquinas on religious liberty

A comprehensive study of Thomistic thought on religious liberty if beyond the scope of this presentation, but a brief mention of some key themes will be illustrative. Saint Thomas Aquinas, the Angelic Doctor, taught that unbelievers who have never received the faith should not be compelled to believe. He wrote:

> Among unbelievers there are some who have never received the faith, such as the heathens and the Jews: and these are by no means to be compelled to the faith, in order that they may believe, because to believe depends on the will: nevertheless they should be compelled by the faithful, if it be possible to do so, so that they do not hinder the faith, by their blasphemies, or by their evil persuasions, or even by their open persecutions. It is for this reason that Christ's faithful often wage war with unbelievers, not indeed for the purpose of forcing them to believe, because even if they were to conquer them, and take them prisoners, they should still leave them free to believe, if they will, but in order to prevent them from hindering the faith of Christ.[1]

The corollary of this argument is that the faithful should not be compelled to act contrary to their beliefs. While Aquinas did argue that heretics should be compelled to keep the faith, he saw this more as a matter of enforcing the obligations of believers who had freely accepted the faith and thus were abjuring their promises as distinguished from compelling belief *ab initio*.[2]

D. St. Thomas Becket's witness to the rights of the Church vs. the State

St. Thomas Becket was born around 1118 in London, England. He served as Chancellor of England (1155–62) and Archbishop of Canterbury (1162–70) during the reign of King Henry

II. His career was marked by a long quarrel with Henry that ended with Becket's murder in Canterbury Cathedral on December 29, 1170. He is venerated as a saint and martyr in the Roman Catholic Church and in the Anglican Communion. He was canonized in 1173 and his feast day is December 29th.[3]

E. St. Thomas More and St. John Fisher's witness to the priority of God's law

The home page for Religious Freedom Week on the website of the United States Conference of Catholic Bishops has the following description of the heroic witness of the lives of Saints Thomas More and John Fisher:

> Sts. Thomas More and John Fisher were Renaissance men. Talented and energetic, they contributed to the humanist scholarship of early modern England. More wrote theological and philosophical treatises, while making a career as a lawyer and government official. Bishop John Fisher worked as an administrator at Cambridge, confronted the challenge Martin Luther presented to Christian Europe, and most importantly served as Bishop of Rochester. As a bishop, he is notable for his dedication to preaching at a time when bishops tended to focus on politics. These men were brilliant. They both corresponded with Erasmus, who helped Bishop Fisher learn Greek and Hebrew, and who also famously referred to More as a man for all seasons [which is the title of the 1964 movie about his life. It won the Academy Award for Best Picture, while the cast and crew won another five, including Best Director for Fred Zinnemann and Best Actor for Paul Scofield. It also won the Golden Globe Award for Best Motion Picture – Drama. It would be hard to imagine a movie of this nature with such overt religious themes winning any awards in today's "woke" culture!].
>
> Above all their accomplishments, these men bore witness to a deep faith in Christ and his Church. More considered joining religious life and was assiduous in his

devotional practices. As a married man, he committed himself wholly to his vocation as a father. At the time, disciplinary practices with children tended to be severe, but More's children testify to his warmth, patience, and generosity.

St. John Fisher was a model shepherd and demonstrated remarkable humility. He remained in the small Diocese of Rochester his entire episcopal ministry, devoting himself to his local church rather than seeking promotion to a larger, more powerful diocese.

More and Fisher are well-known for opposing King Henry's divorce. Ultimately, it was their refusal to sign an oath of supremacy that led them to be executed. King Henry VIII claimed to be the supreme head of the Church in England, asserting sovereign power over English Christians. Neither Fisher nor More could abide this claim, and their steadfastness to their consciences put them in conflict with the king. They were convicted of treason.

It is good to love one's country, but ultimate loyalty is due only to Christ and his kingdom. Sts. Thomas More and John Fisher show us what faithful citizenship looks like. They loved and served their country. In the moments just before his execution, More is said to have stated, "I die the King's good servant, but God's first." They never rose up to incite rebellion or foment revolution. They were no traitors. But when the law of the king came into conflict with the law of Christ, they submitted to Christ. These men gave their lives for the freedom of the Church and for freedom of conscience. They bear witness to the truth that no government can make a claim on a person's soul. May their example continue to illuminate the path for us, as we seek to faithfully serve our Church and country.

We ask for the intercession of Sts. Thomas More and John Fisher, that we too would be good servants to our country, but God's first![4]

F. Second Vatican Council: Declaration on Religious Freedom, *Dignitatis Humanae*

Pope St. Paul VI on December 7, 1965, promulgated the Second Vatican Council's "Declaration on Religious Freedom," *Dignitatis Humanae*, which bears the subtitle: "On the Right of Persons and Communities to Social and Religious Freedom in Matters Religious." The main principle of this document is stated in the document's second paragraph:

> This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.
>
> The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.[5]

The priority of divine law over human law is clearly stated in paragraph 3:

> Further light is shed on the subject if one considers that the highest norm of human life is the divine law-eternal, objective and universal-whereby God orders, directs and governs the entire universe and all the ways of the human community by a plan conceived in wisdom and love. Man has been made by God to participate in this law, with the result that, under the gentle disposition of divine Providence, he can come to perceive ever more fully the truth that is unchanging.[6]

The rights of families with regard to religious liberty, particularly freedom in matters of educating their children, are emphasized in paragraph 5:

> The family, since it is a society in its own original right, has the right freely to live its own domestic religious life under the guidance of parents. Parents, moreover, have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive. Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly. Besides, the right of parents are violated, if their children are forced to attend lessons or instructions which are not in agreement with their religious beliefs, or if a single system of education, from which all religious formation is excluded, is imposed upon all.[7]

G. Relationship between natural law and civil law

The concept of natural law is disputed and even rejected by many legal scholars today, largely because, in my opinion, they simply misunderstand what we mean by natural law. Saint Thomas asserted plainly that the first principles of natural law, which specify the basic forms of good and evil, and which can be adequately grasped by anyone of the age of reason, are self-evident.[8] That said, Aquinas also recognized that even the most elementary and easily recognizable moral implications of those first principles are capable of being obscured or distorted by individual people and, indeed, by whole cultures, by prejudice, oversight, convention, and the sway of desire for particular gratification. For example, anyone's natural reason can readily that theft is not to be committed, but whole communities of people have failed to see the wrongfulness of theft or stealing.[9]

In the view of Saint Thomas Aquinas, the law consists in part of rules which are "derived from natural law like conclusions deduced from general principles," and for the rest of rules which are "derived from natural law like implementations [*determinationes*] of general directives.[10]

John Finnis, Emeritus Professor of Law at Notre Dame Law School and the University of Oxford, explained the relationship between natural law and positive law in his book, *Natural Law and Natural Rights*, in these words:

> In sum: the derivation of law from the basic principles of practical reasoning has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels. The central principle of the law of murder, of theft, of marriage, of contract . . . may be a straightforward application of universally valid requirements of reasonableness, but the effort to integrate these subject-matters into the Rule of Law will require a judge and legislator countless elaborations which in most instances partake of the second mode of derivation. This second mode, the sheer *determinatio* by more or less free authoritative choice, is itself not only linked with the basic principles of intelligible relationship to goals (such as traffic safety . . .) which are directly related to basic human goods, but also is controlled by wide-ranging formal and other structuring principles (in both first- and second-order form) which themselves are derived from the basic principles by the first mode of derivation.[11]

Perhaps for those who have difficulty understanding or accepting the notion of natural law, we might say that, just as canon law follows theology, secular or civil law follow the secular or civil culture in which it is legislated. This is why it is so important to start with a proper formation of the culture in order to have just and correct laws in accord with natural law, but which are not contrary to divine law.

II. Canon law perspectives on religious liberty

Following the maxim that "law follows theology," there are several canons in the *Code of Canon Law* that codify the supremacy of canon law and divine law over civil law.

A. Canon 22 (sometimes called the "canonization of civil law")

Canon 22 – "Civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law."

B. Canon 1286 – Labor Law and Social Policy

Canon 1286 – "Administrators of goods . . . are to observe meticulously the civil laws pertaining to labor and social policy according to Church principles in the employment of workers."

C. Canon 1290 – Civil laws pertaining to Contracts

Canon 1290 – Civil laws pertaining to contracts "are to be observed in canon law . . . unless the civil regulations are contrary to divine law or canon law makes some other provision."

D. Canon 213 – The Right to Spiritual Assistance, the Word of God & the Sacraments

Canon 213 – "The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments."

E. Canon 214 – The Right to Worship God

Canon 214 – **"**The Christian faithful have the right to worship God according to the prescriptions of their own rite approved by the legitimate pastors of the Church, and to follow their own form of spiritual life consonant with the teaching of the Church."

F. Canon 215 – Freedom of Association

Canon 215 – "The Christian faithful are at liberty freely to found and to govern associations for charitable and religious purposes or for the promotion of the Christian vocation in the world; they are free to hold meetings to pursue these purposes in common."

G. Canon 216 – The Right to Apostolic Action

Canon 216 – "All the Christian faithful, since they participate in the mission of the Church, have the right to promote or to sustain apostolic action by their own undertakings in accord with each one's state and condition; however, no undertaking shall assume the name Catholic unless the consent of competent ecclesiastical authority is given."

H. Canon 221, §1 – The Vindication of Rights

Canon 221, §1 – "The Christian faithful can legitimately vindicate and defend the rights which they enjoy in the Church before a competent ecclesiastical court in accord with the norm of law. "

I. Canon 747, §1 – The right to preach the gospel, independent of any human power

Canon 747, §1 – "The Church, to whom Christ the Lord entrusted the deposit of faith so that, assisted by the Holy Spirit, it might reverently safeguard revealed truth, more closely examine it and faithfully proclaim and expound it, has the innate duty and right to preach to gospel to all nations, independent of any human power whatever, using the means of social communication proper to it."

J. Canon 794, §1 – The Church's Duty and Right to Educate

Canon 794, §1 – "The duty and right of educating belongs in a unique way to the Church which has been divinely entrusted with the mission to assist men and women so that they can arrive at the fullness of the Christian life."

K. Canon 800, §1 – The Church's Right to Establish and Supervise Schools

Canon 800, §1 – "The Church has the right to establish and supervise schools of any discipline, type and grade whatsoever."

L. Canon 807 – The universities

Canon 807 – "The Church has the right to erect and to supervise universities which contribute to a higher level of human culture, to a fuller advancement of the human person and also to the fulfillment of the Church's teaching office."

III. Civil law perspectives on religious liberty

This section of my presentation will now look at a number of issues in civil law that threaten the rights and liberties of the Church and the Christian faithful.

A. COVID restrictions on freedom of worship

We have all personally experienced the various restrictions that have been mandated over the past year in response to the coronavirus pandemic. In the midst of government's shutdown of many segments of society, including attempts to prohibit people from gathering for worship, I wrote an article entitled, "Social Shutdowns as an Extraordinary Means of Saving Human Life," which was published by the National Catholic Bioethics Center in *Ethics & Medics* newsletter in September 2020. My expanded version of that text was then published in the Autumn 2020 issue of the *National Catholic Bioethics Quarterly*.

In my article, I noted that some government officials have said that access to liquor, cannabis, casinos, and abortion is essential, but going to church and access to the sacraments are not. Governments around the world took the extraordinary and unprecedented step of shutting down a major portion of the economy for the several months, telling people to stay home, not to go to work, and not to go to school. So as we look back at what we have done and consider how we will respond in the future in similar situations, I think it would be helpful to call to mind some Catholic moral principles to help illuminate how to address a pandemic.

Catholic medical ethics has used the standard of ordinary and extraordinary means of preserving life since it was first articulated in these terms by Pope Pius XII in his 1957 address to Catholic physicians and anesthesiologists. While we recognize that our human life is one of our greatest gifts, it is not a moral absolute and in fact is secondary to the eternal life of our

immortal soul. Recognizing that our human life is passing, there are circumstances when it is just to decline medical treatments because they would be considered extraordinary to the situation. These principles of clinical decision-making may be applied analogously to the societal response to a pandemic.

If we had a moral obligation to use every possible means, even extraordinary means, to preserve life, then we should not even get into our cars, since there is a risk that we could be killed, given the fact that over thirty-five thousand people have died nationwide in auto accidents every year since 1951. We do not stop driving, however, and there is no moral imperative to stop driving, because we recognize that it would be an extraordinary burden on everyday life if people could not get to where they need to be for work, school, family, and other obligations to which they must attend. Instead we take safety precautions to minimize the risk, such as using seat belts, installing air bags, and following the rules of the road.

Similarly in the face of a pandemic, do we have a moral obligation to shut down our society, require people to stay at home, put employees out of work, send businesses into bankruptcy, impair the food supply chain, and prevent worshippers from going to church? I would say no. That would be imposing unduly burdensome and extraordinary means. While some people may voluntarily adopt such means, only ordinary means that are not unduly burdensome are morally required to preserve life, both on the part of individuals as well as society as a whole.

One of the major means of response to governmental threats to religious liberty is through litigation in the civil courts. There were several lawsuits and court challenges of executive orders restricting church services around the country during the past year. The initial

lawsuits were not successful, as the courts gave wide deference to executive authorities dealing with a pandemic that was not well understood. For example, in *South Bay United Pentecostal Church v. Gavin*, the United States Supreme Court on May 29, 2020, denied injunctive relief in a 5-4 decision from numerical restrictions limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. In his concurring opinion, Chief Justice John Roberts wrote, "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not ac-countable to the people" [citations omitted].

In his dissenting opinion, Justice Brett Kavanaugh wrote, "California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could 'insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities.' Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship."

On the same day, May 29, 2020, Justice Kavanaugh denied injunctive relief in an Illinois case in *Elim Romanian Church v. Pritzker*. The reason stated for denying injunctive relief was the "Illinois Department of Public Health issued new guidance on May 28. The denial is without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant." The new guidance was precisely that — guidance — and did not impose any mandatory restrictions, thus, injunctive relief was not necessary.

As the pandemic wore on and restrictions continued in various parts of the country, by the end of the year the position of the United States Supreme became less receptive to government restrictions on houses of worship. In the case of *Roman Catholic Diocese of Brooklyn, New York, v. Andrew M. Cuomo, Governor of New York*, the Court on November 25, 2020, granted an injunction enjoining the Governor from enjoined from enforcing his Executive Order which had placed 10- and 25-person occupancy limits on houses of worship. At the same time, the Court also granted injunctive relief in the case of *Agudath Israel of America, et al. v. Cuomo*.

In his concurring opinion, Justice Neil Gorsuch wrote:

> New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a minyan, or a quorum. In "orange zones," it's not much different. Churches and synagogues are limited to a maximum of 25 people. These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds. And the restrictions apply no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.

At the same time, the Governor has chosen to impose no capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. In far too many places, for far too long, our first freedom has fallen on deaf ears.

Thankfully, the United States Supreme Court is now listening to the pleas of the faithful who simply want to exercise their right to the free exercise of religion. I also sent an email to Bishop Nicholas DiMarzio of Brooklyn for filing this lawsuit. His diocese's victory in this litigation has done us all a big favor!

B. Same-sex marriage

The following quote is from a candidate who was running for the Office of the President of the United States a number of years ago: "I believe marriage is between a man and a woman. I am not in favor of gay marriage." In case you are wondering who said that and when, it was Barack Obama, who made this affirmation of traditional marriage during the presidential campaign of 2008.[12] In August 2008, he told Southern California megachurch Pastor Rick Warren his definition of marriage: "I believe that marriage is the union between a man and a woman. Now, for me as a Christian, it is also a sacred union. God's in the mix."[13] His professed belief that "God's in the mix" did not stop President Obama from flip flopping on the issue of same-sex marriage, as just four years later he said, "I've just concluded that for me personally it is important for me to go ahead and affirm that I think same-sex couples should be able to get married."[14]

Actually, it was not as much of a flip flop as it was coming full circle.[15] In 1996, as he ran for Illinois state Senate, Chicago's *Outlines* gay newspaper asked candidates to fill out a questionnaire, in which Obama wrote, "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages."[16]

When Obama ran for the U.S. Senate in 2004, he told the *Windy City Times*, "I am a fierce supporter of domestic-partnership and civil-union laws. I am not a supporter of gay marriage

as it has been thrown about, primarily just as a strategic issue. I think that marriage, in the minds of a lot of voters, has a religious connotation. . . . What I'm saying is that strategically, I think we can get civil unions passed."[17]

My point here is not so much to highlight how politicians tailor their campaign promises to suit their audiences, but to show the political strategy that was employed and how quickly it worked to shape public opinion. Obama was at least honest in admitting that talk of domestic partnerships and civil unions was simply a political strategy. What started as domestic partnerships morphed into civil unions and then settled for nothing less than same-sex marriage.

In Illinois, the "Religious Freedom Protection and Civil Union Act" took effect on June 1, 2011. Despite the title, there is very little religious freedom in the Act. One short paragraph says simply, "Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union."[18] As we will see shortly, that language did not protect Catholic Charities throughout Illinois from being barred from offering foster care or adoption services because of our religious beliefs and practices.

Just three years later, the Illinois "Religious Freedom and Marriage Fairness Act" was signed into law on November 20, 2013. What had previously been called a "domestic partnership" or "civil union" was now to be given legal sanction as "marriage." That same day, November 20, 2013, I led "Prayers of Supplication and Exorcism in Reparation for the Sin of Same-Sex Marriage" at the Cathedral of the Immaculate Conception in Springfield, Illinois. As the title of this presentation is "Responses in Canon and Civil Law to Governmental Threats

to the Church's Freedom to Carry Out Her Mission," I wish to point out that litigation is not the only ecclesial response to governmental threats to the Church's freedom to carry out her mission. We must not forget to use the spiritual weapons at our disposal, the most powerful of which is prayer.

The Prayers for "Supplication and Exorcism Which May Be Used in Particular Circumstances of the Church" are taken from the Appendices to the 2004 Latin edition of the Rite of Exorcism, the introduction to which explains, "The presence of the Devil and other demons appears and exists not only in the tempting or tormenting of persons, but also in the penetration of things and places in a certain manner by their activity, and in various forms of opposition to and persecution of the Church. If the Diocesan Bishop, in particular situations, judges it appropriate to announce gatherings of the faithful for prayer, under the leadership and direction of a Priest, elements for arranging a rite of supplication may be taken from [the texts provided in these appendices]."

While prayers of supplication in reparation for sin may be easily understood as our pleas and entreaties to God for forgiveness of sins and deliverance from temptation, the meaning of the term "exorcism" in the title of this prayer service is not so readily apparent and requires some explanation. Indeed, some have ridiculed our Church's use of this ancient religious practice. We must remember the encouragement of Pope Saint Leo the Great, who said over 1,500 years ago, "The Church is not diminished by persecutions, but rather increased."[19]

Perhaps a large part of the negative reaction is because most people do not know what the Church teaches about exorcism, since they get their misleading information and sensational

ideas on this mainly from Hollywood. The fact is that a "minor exorcism" takes place in every Baptism and Confirmation ceremony when we renounce Satan and all his works and empty promises.

My prayer service and my words were not meant to demonize anyone, but were intended to call attention to the diabolical influences of the devil that have penetrated our culture, both in the state and in the Church. These demonic influences are not readily apparent to the undiscerning eye, which is why they are so deceptive. While the popular tendency may be to identify the devil only with his extraordinary activity, which is diabolical possession, the ordinary work of the devil: deception, division, diversion and discouragement.

The deception of the Devil in same-sex marriage may be understood by recalling the words of Pope Francis when he faced a similar situation as Archbishop of Buenos Aires in 2010. Regarding the proposed redefinition of civil marriage in Argentina, then-Cardinal Jorge Mario Bergoglio wrote on June 22, 2010, "The Argentine people must face, in the next few weeks, a situation whose result may gravely harm the family. It is the bill on matrimony of persons of the same sex. The identity of the family, and its survival, are in jeopardy here: father, mother, and children. The life of so many children who will be discriminated beforehand due to the lack of human maturity that God willed them to have with a father and a mother is in jeopardy. A clear rejection of the law of God, engraved in our hearts, is in jeopardy. . . . Let us not be naive: it is not a simple political struggle; it is an intention [which is] destructive of the plan of God. It is not a mere legislative project (this is a mere instrument), but rather a 'move' of the father of lies who wishes to confuse and deceive the children of God."[20]

The Pope's reference to the "father of lies" comes from the Gospel of John (8:44), where Jesus refers to the devil as "a liar and the father of lies." So Pope Francis is saying that same-sex "marriage" comes from the devil and should be condemned as such.

Another major deception or distortion of marriage is the view that it is not ultimately about generating life, but rather is mainly about a romantic relationship designed for individual (not even mutual) fulfillment. That distorted understanding cuts across opposite-sex marriage and same-sex marriage proponents in our culture. We are all summoned to reflect more deeply on the truth of marriage.

It is also a deception to say that there will be no adverse effects on children being brought up in the household of a same-sex couple.[21]

The division brought about by the Devil due to same-sex marriage may be seen in the way our society, our families and our friendships have become so divided and polarized over this issue.

The diversion of the Devil in same-sex marriage may be seen in the fact that so much of our time, energy and resources are being spent in addressing this issue, when there are more pressing needs facing our country and our Church.

The work of discouragement by the Devil in same-sex marriage is apparent in the message being conveyed to defenders of traditional marriage that the universal redefinition of marriage is unstoppable, so we might as well just stop trying. But the legalization of abortion on demand almost half a century ago did not silence those who believe that abortion is contrary to God's law. On the contrary, *Roe v. Wade* only heightened the need for more concerted efforts to protect all human life from conception to natural death. So, too, the legal redefinition of civil

marriage does not put an end to the need for discourse and action to defend natural marriage in accord with God's plan, but only serves to heighten the need for greater efforts in this regard.

Mention of the wrongfully decided case of *Roe v. Wade* is apt, as we now have a similarly erroneous decision in the case of *Obergefell v. Hodges*, by which the United States Supreme Court on June 26, 2015 held that the Fourteenth Amendment of the United States Constitution requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.[22]

As was often the case, the dissenting opinion of the late Justice Antonin Scalia in *Obergefell v. Hodges* is not only informative, but entertaining. I encourage you to read it in full, but I call your attention to this particularly salient passage:

> Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers18 who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans19), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; they say they are not. And to allow

> the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.[23]

More recently, the United States Supreme Court extended its judicial folly in the case of *Bostock v. Clayton County*, decided on June 20, 2020, that an employer who fires an individual for being homosexual or transgender fires violates Title VII of the Civil Rights Act of 1964. Delivering the opinion of the Court on behalf of his Harvard and Yale elite colleagues, Justice Neil Gorsuch offered what might at best be called an understatement when he wrote, "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result."[24]

Unfortunately, Justice Scalia is no longer with us, and so we can only imagine the scathing dissent that he might have written. Nevertheless, Justice Samuel Alito did provide us with a lengthy and perspicacious dissent. It is also clear that Justice Alito was making much the same argument that Justice Scalia made in *Obergefell*. In his dissenting opinion in *Bostock*, Justice Alito wrote:

> There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses. Last year, the House of Representatives passed a bill that would amend Title VII by defining sex

> discrimination to include both "sexual orientation" and "gender identity," H. R. 5 . . . Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.[25]

Erroneous judicial decisions contrary to divine law such *Roe v. Wade*, *Obergefell v. Hodges*, and *Bostock v. Clayton County* pose a difficult challenge for Christians who not only want to be good citizens who follow the law of the United States, but also seek to be faithful citizens of God's Kingdom. As I explained at the beginning of this presentation, the teachings of Jesus and the *Acts of the Apostles* show us that Christians should generally comply with civil authority, however, that compliance is not absolute, but is conditioned on civil authority being subservient to the divine law.

C. Foster care and adoption services

As mentioned in the previous section, when Illinois passed the "Religious Freedom Protection and Civil Union Act" in 2011, a direct result of that law was that the Illinois Department of Family and Children's Services (DCFS) forced Catholic Charities out of foster care and adoption services in Illinois, despite the fact that Catholic Charities in Illinois was rated among the State's most effective foster care agencies. Catholic Charities of the Diocese of Springfield in Illinois has been operating for close to 100 years and provides an extensive range of social services. Our mission is to "extend to all the healing and empowering presence of

Jesus." From 1965 to 2011 it acted as a foster care agency and, in that capacity, cared for thousands of distressed Illinois children. In 2011, while performing superior service on behalf of about 325 foster children, the State of Illinois abruptly terminated its foster care services following enactment of Illinois Religious Freedom and Civil Union Act. The reason given was that Catholic Charities of Springfield, on religious grounds, declined to agree to assess and qualify same-sex couples as foster parents, although we agreed to refer such applicants to the many DCFS field offices which could provide those services or offer information about private agencies that could do the same.

Same-sex couples could already access a highly capacitated system of over 100 DCFS field offices and alternative foster care agencies in Illinois to seek assessment and qualification as foster parents. In the 2011 litigation brought against the State in *Catholic Charities of the Diocese of Springfield in Illinois v. State of Illinois*, the four Catholic Charities organizations who sued argued, among other points, that the State could not cite a compelling reason why it could not accept Catholic Charities' proposal to refer applicants whom they could not, consistent with Catholic doctrine, assess and qualify as foster parents to other agencies who could. However, in August 2011, the lawsuit was rejected by the Sangamon County Circuit Court on summary judgment. Without addressing the religious freedom issue, the court decided that plaintiffs had no property interest in continued contracts with the State and thus had no remedy when the State discontinued contracting with them.[26] An appeal was filed, but DCFS had sent a follow-up letter to agencies who challenged the new law, including Catholic Charities, identifying the different foster care agencies to which it planned immediately to transfer their existing cases *en masse*. In addition, DCFS said it would no longer license foster

care applicants recommended by Catholic Charities, effectively snuffing out their ability to perform as foster care agencies. After deliberating, the four litigating Catholic Charities organizations decided to abandon their appeal and to cease foster care services.[27]

Ten years later, the United States Supreme Court decided the case of *Fulton v. Philadelphia* on June 17, 2021, in which the Court held that the refusal of the City of Philadelphia to contract with Catholic Social Services (CSS) of the Archdiocese of Philadelphia for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment.[28]

Although the unanimous 9-0 decision would appear to be a resounding victory, apparently unanimity was achieved by limiting the scope of the decision. In his concurring opinion, Justice Alito explains the conundrum posed by this decision:

> One of the questions that we accepted for review is "[w]hether *Employment Division v. Smith* should be revisited." We should confront that question. Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City's standard annual contract with foster care agencies. Smith's holding about categorical rules does not apply if a rule permits individualized exemptions, and the majority seizes on the presence in the City's standard contract of language giving a City official the power to grant exemptions. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, but the majority reverses the decision below because the contract supposedly confers that never-used power. This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, *voilà*, today's decision will vanish—and the parties will be back where they started. The City will claim that it is

> protected by Smith; CSS will argue that Smith should be overruled; the lower courts, bound by Smith, will reject that argument; and CSS will file a new petition in this Court challenging Smith. What is the point of going around in this circle? Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. From 2006 to 2011, Catholic Charities in Boston, San Francisco, Washington, D.C., and Illinois ceased providing adoption or foster care services after the city or state government insisted that they serve same-sex couples. Although the precise legal grounds for these actions are not always clear, it appears that they were based on laws or regulations generally prohibiting discrimination on the basis of sexual orientation. And some jurisdictions have adopted anti-discrimination rules that expressly target adoption services. Today's decision will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glitch as the Philadelphia contractual provision on which the majority's decision hangs.[29]

As a result, it should come as no surprise that our Catholic Charities in Illinois unfortunately will not be jumping back into foster care and adoption services any time soon, at least until the ambiguity inherent in *Fulton* is clarified and rectified.

D. Abortion, contraceptive and abortifacient mandates

The challenges posed by the tendency of the United States Supreme Court to render inconclusive decisions that leave difficult questions unresolved can also be seen in the case of the *Little Sisters of the Poor v. Pennsylvania*. Despite a 2016 victory at the U.S. Supreme Court, an Executive Order, and a new rule that protects the Little Sisters of the Poor and other non-profit religious groups from the unconstitutional HHS contraception and abortifacient mandate, the Little Sisters are still in court. In November 2017, after the federal government issued their new

rule protecting religious groups from the mandate, the Commonwealth of Pennsylvania and several other states sued in federal court to take away the nuns' hard-won religious exemption. The Becket Fund for Religious Liberty intervened on behalf of the Little Sisters, arguing that the states have no right to challenge the new rule. Oral argument was held on March 23, 2018, to decide whether the Sisters will be allowed to intervene in the case, and on April 24, 2018, the Little Sisters' motion for intervention was granted.

On July 12, 2019, the Third Circuit ruled against the Little Sisters. On October 1, 2019, the Little Sisters of the Poor asked the Supreme Court to protect them from the HHS contraceptive mandate again and end their legal battle once and for all. On July 8, 2020, the Supreme Court ruled 7-2 in favor of the Little Sisters of the Poor, allowing them to continue serving the elderly poor and dying without threat of millions of dollars in fines.[30]

Writing for the Court, Justice Thomas said that "For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. . . . But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision— have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs." The Court held that the federal government was right to protect those beliefs.[31]

Unfortunately, this long legal saga may not yet be over for the Little Sisters of the Poor and other Catholic entities that are similarly situated, as President Biden has pledged to end the contraception exemption for the Little Sisters.[32]

The Little Sisters' case is reminiscent of the late Joseph Scheidler, founder of the Pro-Life Action League, and his legal battles with the National Organization of Women (N.O.W.), which had filed suit alleging that pro-life protests at abortion facilities were a violation of the Racketeer Influenced and Corrupt Organizations Act, known as RICO.[33] Thanks to this lawsuit, Mr. Scheidler's allies and adversaries alike called him the "godfather" of the pro-life movement.[34] In 1994, the suit filed by the National Organization for Women, *N.O.W. v. Scheidler*, resulted in a unanimous Supreme Court decision finding that federal racketeering laws could be used against anti-abortion protesters, though the court sent the case back to a lower court for a decision on the suit itself. Mr. Scheidler refused to settle, and his lawyer, Thomas Brejcha, who had been working *pro bono*, founded the Thomas More Society, a nonprofit law firm, to raise money for his legal defense. The *N.O.W. v. Scheidler* case found its way back to the Supreme Court two more times. In 2003 the court reversed its earlier decision, and in 2006 it finally closed the case, ruling unanimously in Mr. Scheidler's favor.[35]

My point is that it took three trips to the United States Supreme Court over more than twenty years for Joseph Scheidler to get a definitive decision that finally closed his case.

Another pro-life client currently being represented by the Thomas More Society is David Daleiden, who is being prosecuted for his undercover reporting that exposed evidence of infants being born alive and vivisected for their organs, illegal partial birth abortions, and a host of financial and ethical violations relating to the illegal trafficking in aborted baby body parts. Five legal cases involving Mr. Daleiden are still pending in various courts.[36]

The pro-life movement received a setback last year when, on June 29, 2020, the U.S. Supreme Court decided *June Medical Services v. Russo*, which held that Louisiana's Unsafe

Abortion Protection Act, requiring doctors who perform abortions to have admitting privileges at a nearby hospital, was unconstitutional.[37] In his dissenting opinion, Justice Clarence Thomas declared:

> Today a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction. As is often the case with legal challenges to abortion regulations, this suit was brought by abortionists and abortion clinics. Their sole claim before this Court is that Louisiana's law violates the purported substantive due process right of a woman to abort her unborn child. But they concede that this right does not belong to them, and they seek to vindicate no private rights of their own. Under a proper understanding of Article III, these plaintiffs lack standing to invoke our jurisdiction.[38]

Justice Alito was even more pointed in his dissent:

> Today's decision claims new victims. The divided majority cannot agree on what the abortion right requires, but it nevertheless strikes down a Louisiana law, Act 620, that the legislature enacted for the asserted purpose of protecting women's health. To achieve this end, the majority misuses the doctrine of *stare decisis*, invokes an inapplicable standard of appellate review, and distorts the record.[39]

Justices Gorsuch and Kavanaugh wrote similar dissents.

Another case still pending that is being closely watched is *Dobbs vs. Jackson Women's Health Organization*, which involves a law passed by the State of Mississippi in 2018 that bans abortion after 15 weeks gestation, with a few limited exceptions, calling into question the viability standard of *Roe v. Wade*. The U.S. Supreme Court granted *certiorari* on May 17, 2021. Oral arguments are expected to take place during the 2021–22 Supreme Court term.[40]

In addition to litigation in the courts, the canonical response to the sin of abortion must take into account canons 915 and 916. His Eminence, Raymond Cardinal Burke, will give us an in-depth presentation tomorrow on canon 915 and the non-admission to Holy Communion of those who obstinately persist in manifest grave sin. I do want to call your attention, however, to an article on "Eucharistic Coherence" I wrote that is published in this month's edition of *First Things* magazine.[41]

In my article, have been asked many times over the past eleven years about the matter of Holy Communion for Senator Richard Durbin, whose home is in Springfield. In April 2004 Senator Durbin's pastor, then-Monsignor Kevin Vann (now Bishop Kevin Vann of Orange, California), said he would decline to give Senator Durbin Holy Communion because his pro-abortion position placed him outside of unity with the Church's teachings on life. My predecessor, now Archbishop George Lucas of Omaha, said that he supported Monsignor Vann's decision. I have maintained that position.

This determination is based on Canon 915 of the Catholic Church's Code of Canon Law, which states that those "who obstinately persist in manifest grave sin are not to be admitted to Holy Communion." In our 2004 Statement on Catholics in Political Life, the Bishops of the United States said, "Failing to protect the lives of innocent and defenseless members of the human race is to sin against justice. Those who formulate law therefore have an obligation in conscience to work toward correcting morally defective laws, lest they be guilty of cooperating in evil and in sinning against the common good." Because his voting record in support of abortion over many years constitutes "obstinate persistence in manifest grave sin," the determination continues that Senator Durbin is not to be admitted to Holy Communion until

he repents of this sin. This provision is intended not to punish, but to bring about a change of heart. Senator Durbin was pro-life when he started out in politics in central Illinois. The denial of Holy Communion is a medicinal remedy that seeks to foster a change of heart and encourage him to repent and return to being pro-life.

Senator Durbin's case has particular relevance since the election of a baptized Catholic, Joseph R. Biden, Jr., as president of the United States of America. On the day of Biden's inauguration, the Most Reverend José Gomez, president of the USCCB, issued a statement:

> I look forward to working with President Biden and his administration, and the new Congress. As with every administration, there will be areas where we agree and work closely together and areas where we will have principled disagreement and strong opposition. . . . As pastors, the nation's bishops are given the duty of proclaiming the Gospel in all its truth and power, in season and out of season, even when that teaching is inconvenient or when the Gospel's truths run contrary to the directions of the wider society and culture. So, I must point out that our new President has pledged to pursue certain policies that would advance moral evils and threaten human life and dignity, most seriously in the areas of abortion, contraception, marriage, and gender. Of deep concern is the liberty of the Church and the freedom of believers to live according to their consciences.

In response, Cardinal Blase Cupich, archbishop of Chicago, said that "there is seemingly no precedent" for a USCCB president's making such a statement. There is indeed no precedent for a Catholic president of the United States of America who is virulently pro-abortion in his policies.

On his campaign website and in various public statements, Biden has made clear that he seeks legal protection for the killing of unborn human beings through abortion, and that he

seeks to fund this killing at taxpayer expense. Biden has said that he would seek to codify into federal law the abortion license of *Roe v. Wade* if the Supreme Court were to overturn that decision, and that he supports repeal of the Hyde Amendment, which prohibits federal funding for abortion. Shortly after his election, President Biden issued an executive order rescinding the Mexico City Policy, thereby allowing U.S. taxpayer dollars to support abortion overseas. He has pledged to reinstate the contraceptive and abortifacient mandate originally issued under Obamacare.

Proposing and voting for legal measures that promote an intrinsic evil raises the question of cooperation with evil. On this question, Catholic moral theology distinguishes between formal and material cooperation. Formal cooperation occurs when a person shares the evil intent of the wrongdoer or agrees with, condones, or approves of the wrongdoer's action, at least to some degree. Formal cooperation in wrongdoing is always wrong.

Material cooperation, by contrast, occurs when a person does not share the intent of the wrongdoer, but is in some way involved in the wrongdoing. Material cooperation is considered immediate when the cooperator's act assists in the performance of the wrongdoing in an essential way. It is considered mediate when there is a degree of causal separation between the wrongdoing and the cooperator's act. According to the degree of causal separation, mediate material cooperation may be either "proximate" or "remote." Absent a proportionately grave reason, one may not materially cooperate with an evil act. The more proximate the cooperation, the more grave must the reason be in order for the action to be justified.

Applying these principles to the question at hand, we find that the formal, political act of a public official (such as voting in the Senate, or signing a law or executive order as president) constitutes at least material cooperation with a gravely evil act. If undertaken with the intent to support or promote access to abortion, the act would in fact constitute formal cooperation, which is always gravely sinful.

It may be argued that cooperation is mediate when a person's actions, such as casting a vote or signing an executive order, are not directly essential to the procurement of an abortion. But mediate cooperation in a grave evil requires a proportionately grave reason in order to be justified. More than 860,000 abortions took place in 2017, the latest year for which data is available as reported by the Guttmacher Institute. For a politician to justify promoting or voting for pro-abortion legislation or opposing pro-life legislation, he would need a reason grave enough to outweigh the killing of 860,000 babies per year.

Some argue that their positions consistent with Catholic teaching on other moral issues outweigh their support for abortion. Senator Durbin, for example, after being denied Holy Communion in 2004, released a report titled, "Evaluating the Votes and Actions of Public Officials from a Catholic Perspective." The report ranked the twenty-four U.S. Catholic senators based on their votes in three areas: domestic, international, and pro-life. Commenting on this "scorecard," the Catholic League for Religious and Civil Rights issued a statement: "To say that a senator votes better on Catholic issues because he has voted to increase the minimum wage while voting against a ban on killing a baby who is 80 percent born is ludicrous." It entails "lumping together policy issues that do not have the same moral weight."

One of the issues that is frequently proposed as morally equivalent to abortion is the death penalty. But capital punishment is not in the same moral category as abortion. Whereas abortion is an intrinsic evil, the death penalty has been called "inadmissible" by Pope Francis—a different moral judgment, reflecting a kind of a prudential judgment about the penalty's efficacy.

Others try to use the "consistent ethic of life" attributed to the late Cardinal Joseph Bernardin, archbishop of Chicago—often called the "seamless garment" approach—as justification for downplaying abortion while promoting other social issues. I served as Cardinal Bernardin's Chancellor from 1992 until his death in 1996, and I can attest that he did not approve of this misinterpretation of the "consistent ethic of life." In an interview with the National Catholic Register in 1988, Cardinal Bernardin said,

> I know that some people on the left, if I may use that label, have used the consistent ethic to give the impression that the abortion issue is not all that important anymore, that you should be against abortion in a general way but that there are more important issues, so don't hold anybody's feet to the fire just on abortion. That's a misuse of the consistent ethic, and I deplore it.

As Bishop of the Capital of the State of Illinois, I have also had to deal with several Catholic legislators in the Illinois General Assembly who obstinately persisted in promoting the abominable crime and very grave sin of abortion by facilitating the passage of and/or voting for the Act Concerning Abortion of 2017 (House Bill 40), which among other things, provides for taxpayer funding of abortion, as well as for the Reproductive Health Act of 2019 (Senate Bill 25), which, among other things, purports to declare abortion to be a fundamental

right, while also declaring that an unborn baby does not have independent rights under the laws of this state.

On June 2, 2019, I issued a "Decree Declaring that Illinois Legislative Leaders who Promoted and Voted for the Act Concerning Abortion of 2017 (House Bill 40) and the Reproductive Health Act of 2019 (Senate Bill 25) Are Not to be Admitted To Receive Holy Communion, and Catholic Legislators who Voted for Pro-Abortion Legislation Are Not to Present Themselves for Holy Communion per Canons 915 and 916 of the *Code of Canon Law*."

Though we cannot judge people's consciences, we can judge external situations to determine whether they are manifestly gravely sinful and whether the person exhibits obstinate persistence. Likewise, the reception of Holy Communion is an external, public act. Nevertheless, the question of the proper disposition of the soul while receiving Holy Communion is eminently pastoral. It has long standing in the Church, going back to the early centuries.

The Bible clearly teaches about the proper disposition to receive Holy Communion. In the First Letter to the Corinthians, Saint Paul writes: "Whoever eats the bread or drinks the cup of the Lord in an unworthy manner will be guilty of profaning the body and blood of the Lord. Let a man examine himself, and so eat of the bread and drink of the cup. For anyone who eats and drinks without discerning the body eats and drinks judgment upon himself" (1 Cor 11:27-29). This biblical teaching is reflected in canons 915-16 of the Catholic Church's Code of Canon Law. Canon 915 addresses the minister of Holy Communion, who is not to admit individual persons to the Sacrament under the circumstances clearly defined in that canon. Canon 916 is addressed to the person who is "conscious of grave sin." Thus, whereas canon 915 puts the

burden of discernment on the minister of Holy Communion, canon 916 places responsibility for self-discernment on the person who desires to receive the Sacrament. These principles for the proper disposition for being admitted to Holy Communion are in keeping with the maxim that "law follows theology"—that is, that the laws of the church are not created in a vacuum, but are practical applications of biblical and theological truths in actual situations.

In seeking Eucharistic coherence in an incoherent era, we must remember that our goal is conversion and readmission to communion, not exclusion and permanent expulsion from the community of faith. Even when a difficult decision must be made not to admit someone to Holy Communion until there has been repentance and reconciliation, such discipline does not contradict the love by which it is motivated.

Conclusion

I hope this presentation has been helpful for you in describing some of the responses in canon and civil Law to governmental threats to the Church's freedom to carry out her mission. I am grateful for the highly competent legal assistance being provided to protect religious liberty by the Becket Fund for Religious Liberty (Washington, D.C.), the Alliance for Defending Freedom (Scottsdale, Arizona), the Thomas More Society Public Interest Law Firm (Chicago), and the Notre Dame Law School's Religious Liberty Initiative. I close with the words from the Second Inaugural Address of the most famous citizen of Springfield, Illinois, our nation's Sixteenth President, Abraham Lincoln: "With malice towards none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive to finish the work we are in."[42]

May God give us this grace. Amen.

[1] St. Thomas Aquinas, *Summa Theologiae*, 2-2.10.8.

[2] For an analysis of the teaching of St. Thomas Aquinas with respect to heretics, see Michael Novak, "Aquinas and the Heretics," *First Things*, December 1995, accessed online at: https://www.firstthings.com/article/1995/12/aquinas-and-the-heretics.

[3] *Encyclopedia Britannica*, "St. Thomas Becket," accessed online at: https://www.britannica.com/biography/Saint-Thomas-Becket.

[4] "Religious Liberty: St. Thomas More and St. John Fisher," United States Conference of Catholic Bishops, accessed online at: https://www.usccb.org/committees/religious-liberty/st-thomas-more-and-st-john-fisher.

[5] Pope St. Paul VI and the Second Vatican Council, "Declaration on Religious Freedom," *Dignitatis Humanae*, "On the Right of Persons and Communities to Social and Religious Freedom in Matters Religious," December 7, 1965, n. 2, accessed online at https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

[6] Pope St. Paul VI and the Second Vatican Council, *Dignitatis Humanae*, n. 3.

[7] Pope St. Paul VI and the Second Vatican Council, *Dignitatis Humanae*, n. 5.

[8] St. Thomas Aquinas, *Summa Theologiae*, 1-2.94.2, 1-2.91.3, and 1-2.58.4c and 5c.

[9] St. Thomas Aquinas, *Summa Theologiae*, 1-2.100.1c, and 1-2.94.4c and 6c.

[10] St. Thomas Aquinas, *Summa Theologiae*, 1-2.95.2c.

[11] John Finnis, *Natural Rights and Natural Reason* (Oxford: Clarendon Press, 1980), p. 289.

[12] http://www.mtv.com/news/1598407/barack-obama-answers-your-questions-about-gay-marriage-paying-for-college-more/

[13] https://justfacts.votesmart.org/public-statement/658545/full-transcript-saddleback-presidential-forum-sen-barack-obama-john-mccain-moderated-by-rick-warren/

[14] https://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043

[15] https://www.politifact.com/factchecks/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/

[16] https://windycitytimes.com/images/publications/wct/2009-01-14/current.pdf

[17] http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=3931

[18] Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/15, Sec. 15., accessed online at https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3294&ChapterID=59.

[19] From a sermon by Saint Leo the Great, Pope, *Liturgy of the Hours,* Office of Readings for the Memorial of the Dedication of the Basilicas of Saints Peter and Paul.

[20] http://rorate-caeli.blogspot.com/2013/03/letter-of-cardinal-bergoglio-to.html.

[21] [21] See the New Family Structures Study of the University of Texas, 2011, http://www.familystructurestudies.com/.

[22] *Obergefell v. Hodges*, United States Supreme Court, 576 U.S. 644, 135 S.Ct. 2071, 191 L. Ed. 2d 953 (2015), accessed online at https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

[23] *Obergefell v. Hodges*, slip opinion at 5-6.

[24] *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731; 207 L. Ed. 2d 218 (2020), accessed online at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

[25] *Bostock v. Clayton County*, slip opinion at 2-3.

[26] See Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan*, et al., No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011).

[27] See "Brief for *Amici Curiae*, Catholic Charities of the Diocese of Springfield in Illinois, and Catholic Charities of the Diocese of Joliet, Inc., in Support of Petitioners," *Fulton v. Philadelphia*, filed No. 19-123 in the Supreme Court of the United States; accessed online at https://www.supremecourt.gov/DocketPDF/19/19-123/144818/20200603170631374_19-123%20Amici%20Curiae%20Brief.pdf.

[28] *Fulton v. Philadelphia*, 593 U.S. _ (2021); accessed online at https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf.

[29] *Fulton v. Philadelphia*, slip opinion at 7-10.

[30] See https://www.becketlaw.org/case/commonwealth-pennsylvania-v-trump/

[31] *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U. S. ____ (2020), slip opinion at 26; accessed online at 19-431 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania (07/08/2020) (supremecourt.gov).

[32] "Biden plans to end contraception exemption for Little Sisters," CNA Staff, Jul 9, 2020; accessed online at Joe Biden plans to end contraception exemption for Little Sisters of the Poor (catholicnewsagency.com).

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[37] *June Medical Services L.L.C. v. Russo*, 591 U.S. ___ (2020), accessed online at https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf.

[38] *June Medical Services L.L.C. v. Russo*, Thomas, J., dissenting; slip opinion at 1.

[39] *June Medical Services L.L.C. v. Russo*, Alito, J., dissenting; slip opinion at 2.

[40] https://law.justia.com/cases/federal/appellate-courts/ca5/19-60455/19-60455-2020-02-20.html.

[41] Thomas J. Paprocki, "Eucharistic Coherence," *First Things*, August 2021; accessed online at https://www.firstthings.com/article/2021/08/eucharistic-coherence.

[42] Abraham Lincoln, quoted in Ronald C. White, Jr., *Lincoln's Greatest Speech: The Second Inaugural* (New York: Simon & Schuster Paperbacks, 2002), p. 19.