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Learning from Liberal Theory:  
Process, Procedure, and the  
Common Good

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*Fides et Iustitia*

ARTICLE

**LEARNING FROM LIBERAL THEORY:  
PROCESS, PROCEDURE, AND THE  
COMMON GOOD**

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A precept of Catholic social theology is that public policy must be designed to protect and promote the common good.<sup>1</sup> The common good includes everyone's good, and therefore it shares with liberal political theory a commitment to equality.<sup>2</sup> However, Catholic social theology's understanding of the common good sharply differs from liberal theory's neutrality about the substance of the human good. Because of conflicts about full notions of the human good, liberal theory focuses on procedural justice to find fundamental norms for social cooperation.<sup>3</sup>

Whether liberal theory can adequately define basic principles and structures without a substantive view of the human good remains controverted. Questions in bioethics, especially, seem to require a substantive view about what makes for a long and healthy life. For example, Daniel Callahan argues that we will never begin to have a reasonable allocation of medical resources without such a notion.<sup>4</sup> He judges that lacking a shared view of what constitutes a long and healthy life makes it impossible for us to know when death should be expected and accepted.<sup>5</sup> The result is ever-increasing (but increasingly useless) medical interventions in the last months of life.<sup>6</sup>

I propose, however, to develop a different point, namely that Catholic social teaching and the Catholic Church need to learn from liberal theory's insights about procedural justice's contribution to defining the common

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1. *Catechism of the Catholic Church: Modifications from the Editio Typica* No. 1910 (available at [http://www.vatican.va/archive/ENG0015/\\_\\_\\_P6K.HTM](http://www.vatican.va/archive/ENG0015/___P6K.HTM)).

2. *Id.* at No. 1906.

3. I have in mind John Rawls's work. See John Rawls, *A Theory of Justice* (rev. ed., Harvard U. Press 1999).

4. Daniel Callahan, *False Hopes: Why America's Quest for Perfect Health is a Recipe for Failure* 267 (Simon & Schuster 1998).

5. *Id.* at 130–31.

6. *Id.* at 142–44.

good.<sup>7</sup> This article will first define procedural justice as it is understood in liberal theory. Secondly, it will argue that Catholic politicians' votes on abortion often reflect fidelity to procedural justice, rather than disregard for human life. Because procedural justice is essential in a democratic society that upholds human dignity, the Church should support politicians who work for changes that respect constitutional checks and balances. Finally, this article will use the post-Vatican II inquiry into the Church's policy on contraception for married couples as a case study in missed opportunities. The Church, in disregarding the outcome that emerged from an authentically inclusive process, undermined its own authority with Catholic married couples and thereby hurt the Church's common good.

#### PROCEDURAL JUSTICE IN LIBERAL THEORY

Procedural justice refers to processes (e.g., selection by lot, decision by majority rule, first-come first-serve, presidential nomination plus Senate advice and consent) for achieving a fair or just result. John Rawls's discussion of procedural justice seems to me a helpful starting point. He presents the distributive justice problem of a parent, one last piece of chocolate cake, and two young chocolate cake lovers. Is there a procedure the parent can require the children to use that will insure each child gets a fair share, in this case an equal share? The procedure that seems to insure this outcome gives one child the knife to cut the cake, but the other child the first choice of piece of cake. Rawls suggests this is an example of "perfect procedural justice": we know an equal division is a substantively just division, and we have a procedure for obtaining it.<sup>8</sup>

Two familiar examples of procedural justice are the adversary system of criminal justice, and constitutional democracy in which a written constitution spells out a division of roles, responsibilities, powers, reserved rights, and so forth.

Concerning the adversary system of criminal justice, we know what justice requires: that the guilty are convicted and the innocent go free, but we don't have procedures absolutely guaranteed to accomplish this end.<sup>9</sup>

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7. Pope John XXIII's 1963 encyclical *Pacem in Terris* and the Second Vatican Council's *Declaration on Religious Liberty* (1965) reflect a new appreciation of process and procedure in the form of constitutional democracy, which protects rights by granting them constitutional protection. Pope John XXIII, *Pacem in Terris* (Apr. 11, 1963) (available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html)); Second Vatican Council, *Dignitatis Humanae* [Declaration on Religious Freedom] (Dec. 7, 1965) (available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_1965\\_1207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_1965_1207_dignitatis-humanae_en.html)).

8. Rawls, *supra* n. 3, at 74.

9. I cite the adversary system only by way of example. Cogent criticisms of the shortcomings of our current criminal justice system have been made by many, including the U.S. Catholic bishops. See e.g. U.S. Conf. Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (Nov. 15, 2000) (available at <http://www.usccb.org/sdwp/criminal.htm>).

Rather than insisting that each of the different actors (accused, prosecutor, defense attorney, and judge) directly seek this just outcome, roles and responsibilities are divided, with the hope that justice will more likely be done by the overall process.

The accused is presumed innocent and hires a lawyer, or, if unable to afford a lawyer, is provided one. The defense attorney's role and responsibility is to orchestrate a defense to the charges, one that shows that the defendant did not commit the crime or that there is not evidence "beyond a reasonable doubt" that he or she did. The prosecuting attorney's role is to marshal the evidence and make the case for the defendant's conviction. Prosecutors and police must disclose to the defense attorney evidence they have uncovered that tends to show the defendant is innocent. A judge referees and makes sure that both attorneys follow procedure and rules (of evidence, for example). After the judge instructs the jury on matters of law, the jury decides guilt or innocence based on their assessments of the facts and the law as argued by the two attorneys. Even though a defense attorney may know or believe her client guilty, her assigned role is to organize a defense to the charges. Besides the processes of the actual trial, appeals to higher courts are also provided for. Attorneys for someone convicted in the trial court can make a case that errors of law were made in the course of the trial that justify either a retrial or a reversal of the original conviction and freeing of the defendant. Several levels of appeals courts, ending with a supreme or highest court, exist, and when relief is refused at a lower level, a higher-level court can be appealed to. Achieving justice through the division of roles and responsibilities requires an independent judiciary ruling according to law (and not according to the whims of the ruling power).

In the year 2000, I happened to be teaching in Zimbabwe when a full-scale attack on the judiciary's independence was launched. It quickly became clear that an independent judiciary was a most fragile flower when confronted by a government that was determined to accomplish its aims and to establish a monopoly on power. This attack and the subsequent manipulation of court cases by government-appointed party loyalists play-acting as independent arbiters reflected the government's utter disdain for any good other than preserving its monopoly of power.<sup>10</sup>

The distribution of roles and responsibilities in a just, adversarial system calls to mind the larger framework of a government composed of different organs with limited but interlinked powers, set down in a constitution. The aspect of the common good achievable by such a frame of government is the limitation and restriction on coercive power within definite boundaries. This leaves open space for other associations including churches, families, and voluntary organizations of all kinds to function.

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10. See Richard Brown, *Zimbabwe: Recent History*, in *Africa South of the Sahara 2005*, at 1254, 1258 (Iain Frame & Katharine Murison eds., 34th ed., Europa Publications 2004).

A somewhat more particularized process or procedure that such a limited government uses to promote the common good is giving constitutional protection to certain rights integral to this good. For example, the First Amendment to the United States Constitution guarantees the right to free exercise of religion, free speech, free press, and free association. Because the Constitution guarantees several rights, these rights can come into conflict; for example, the right of the press to report on crimes often conflicts with the right of an accused to a fair trial.

In a mature constitutional system such as the United States', the precise boundaries of the conflicting constitutional rights are constantly being redrawn as courts resolve conflicts that arise. Conflicts between aspects of the common good are authoritatively resolved, though obviously never to everyone's satisfaction. The people always have recourse to the process of amending the Constitution should they judge the courts to have fatally misinterpreted constitutional rights. This process is an arduous one, as the Constitution is not easily amended. This article makes further reference to amending the Constitution below in discussing the procedural aspects of the abortion controversy.

#### PROCEDURAL JUSTICE IN CATHOLIC SOCIAL TEACHING: CONSTITUTIONALLY PROTECTED RIGHTS

Pope John XXIII's 1963 encyclical *Pacem in Terris* expresses what seems to me a new appreciation and endorsement of a constitutional division of powers as essential means to promote the common good.<sup>11</sup> This encyclical repeats *Mater et Magistra's* definition of the common good as "all those social conditions which favor the full development of human personality."<sup>12</sup> But Pope John goes on to observe that the common good can be translated into protection and promotions of human rights (and concomitant duties): "It is generally accepted today that the common good is best safeguarded when personal rights and duties are guaranteed."<sup>13</sup>

Pope John then points out the link between guaranteeing rights and limiting government powers with a written constitution. His reasoning begins by reiterating the traditional teaching that authority comes from God and is given to the people. But in a major change from Francisco Suarez's<sup>14</sup> view that the people could not exercise this power but only hand it over to rulers, Pope John, in *Pacem in Terris* paragraph 52, proclaims that the people can exercise their God-given authority by choosing their rulers and es-

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11. Pope John XXIII, *supra* n. 7, at Nos. 75–77.

12. *Id.* at No. 58 (quoting Pope John XXIII, *Mater et Magistra*, No. 65 (May 15, 1961)).

13. *Id.* at No. 60.

14. The Renaissance Jesuit theologian and philosopher (1548–1617) who, in his *De Defensio Fidei*, criticized the absolutist claims of James I of England. New Advent Catholic Encyclopedia, *Francisco Suárez*, <http://www.newadvent.org/cathen/14319a.htm> (last updated Oct. 6, 2005).

tablishing a form of government.<sup>15</sup> And the essential act for determining who rules under what form of government, as we have come to recognize, is to design a framework of government that sets out a division of powers, grants specific powers to different officeholders and organs, and employs mechanisms that integrate the functioning of these officers and organs.<sup>16</sup>

Pope John XXIII concludes that this teaching is consistent with democracy, specifically, “any genuinely democratic form of government.”<sup>17</sup> I read paragraph 52 to endorse not just any kind of democracy, but a “constitutional democracy,” where powers are limited and minority rights are protected against overbearing majorities.

In paragraph 69 of *Pacem in Terris*, I infer an appreciation that courts insulated from the popular will are essential to protecting minority rights. Paragraph 69 contains an endorsement of the impartial administration of justice, and especially of judges who are independent and honest: “[S]o too in the courts: justice must be administered impartially, and judges must be wholly incorrupt and uninfluenced by the solicitations of interested parties.”<sup>18</sup>

The Second Vatican Council’s *Dignitatis Humanae* (*Declaration on Religious Freedom*) makes explicit the link between the right to freedom from government coercion in matters of religious belief and practice and its guarantee in a written constitution.<sup>19</sup> The decree, in paragraph 15, makes a de facto link between freedom of religion as “a civil right in most constitutions” and constitutional protection as the precise way this right is assured: “[I]t is necessary that religious freedom be everywhere provided with an effective constitutional guarantee. . . .”<sup>20</sup> This decree recognizes in its very first article that the ordinary means to make effective important individual and group freedoms is through setting limits to the legitimate powers of government in a constitution.

The appreciation of constitutional democracy that emerges in Pope John XXIII’s *Pacem in Terris* and in the documents of the Second Vatican Council comes, I suggest, from a reading of historical experience, especially the historical experience of Europe and America (North and South)

15. See Quentin Skinner, *The Foundations of Modern Political Thought: The Age of Reformation* vol. 2, 183 (Cambridge U. Press 1978); Pope John XXIII, *supra* n. 7, at No. 52.

16. “The fact that authority comes from God does not mean that men have no power to choose those who are to rule the State, or to decide upon the type of government they want, and determine the procedure and limitations of rulers in the exercise of their authority.” *Id.*

17. *Id.*

18. *Id.* at No. 69; see also *id.* at No. 70 (“There can be no doubt that a State juridical system which conforms to the principles of justice and rightness, and corresponds to the degree of civic maturity evinced by the State in question, is highly conducive to the attainment of the common good.”).

19. Second Vatican Council, *supra* n. 7, at No. 15.

20. *Id.*; compare with *id.* at No. 2 (“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.”).

from the First World War and the post-World War II reconstruction of Europe and Japan. By the 1960s it was evident that constitutional democracy was the most stable and effective form of government, and was best able to protect human rights and the common good.<sup>21</sup>

Successful establishment and preservation of constitutional democracies testified to a certain coming of age of the citizens of these democracies. They were no longer like children needing to be led, but could, in a broad sense, rule themselves. The processes and procedures for such self-rule were spelled out in written constitutions that divided and limited government powers in ways that allowed both for broad freedoms and for the effective exercise of necessary government functions. The growing sense of the dignity of human beings that led the Second Vatican Council to acknowledge their religious freedom in *Dignitatis Humanae* likewise influenced the Church's endorsement of constitutional democracy.

That the dignity of humans justifies constitutional democracy is among the positive reasons for endorsing this form of government. The Church has come to recognize this. I don't find, however, a comparable appreciation of the evils that constitutional democracy seeks to address. Principal among these is the tendency of sinful human beings to abuse power, sometimes for personal gain, and sometimes just for the perverse pleasure of dominating others. The tendency to abuse power constitutes one reason to limit and divide government powers. If the powers and offices are properly divided and linked, ambitious officeholders will serve to check and balance each other.<sup>22</sup> My African students, too many of whom had witnessed at first-hand the absence of constitutional checks and balances on powerful leaders, found Lord Acton's oft-quoted saying, "[P]ower corrupts and absolute power corrupts absolutely,"<sup>23</sup> to be spot on.

The divided-powers form of government, with a strong president, has disadvantages, especially when the citizenry is sharply divided into different ethnic or religious groups. The common good of unity amidst severe and long-standing divisions perhaps requires a rather different frame of government, one in which the different groups are assured a share in power. A large literature on constitutional design addressing such questions developed in the twentieth century. Rather than the U.S. model, the Westminster model—in which a majority of the parliament is required to rule—makes for coalition building, which encourages policies acceptable to the conflicting groups.<sup>24</sup>

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21. *Id.* at No. 15.

22. *The Federalist No. 51* (James Madison).

23. Ltr. from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), in *Essays on Freedom and Power* 335 (Gertrude Himmelfarb ed., Peter Smith 1972).

24. I have in mind the work of political scientist Arend Lijphart. See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale U. Press 1977) and later works.

A severe defect of parliamentary systems with a written constitution subject to amendment by a two-thirds parliamentary majority is the relative ease with which a government with such a large majority can change the constitution. Such constitutional instability has characterized far too many African countries. One such example I am familiar with comes from Zambia. Kenneth Kaunda, the country's founding father ruled from 1964 until 1991.<sup>25</sup> The voters were so disgusted by the government's economic mismanagement and arbitrary rule that it was thrown out of office en masse and replaced by a party that pledged to amend the constitution to allow for the president to serve only two consecutive terms in office.<sup>26</sup> MMD (Movement for Multiparty Democracy), the party led by longtime trades union leader Frederick Chiluba, used its over two-thirds majority to do just that.<sup>27</sup> However, as his second term was coming to an end, Chiluba launched a very serious move to amend the constitution so he could continue in office.<sup>28</sup> Fortunately, civic, business, and church groups were able to unite in a coalition that turned back this attempt.<sup>29</sup>

#### CATHOLIC POLITICIANS AND ABORTION

As we have seen, the United States is a constitutional democracy. The Constitution spells out a variety of elected and appointed offices with particular responsibilities. The offices are so structured that they check and balance each other. Those elected or appointed to particular offices must fulfill the responsibilities of their offices.

Attending to the constitutional division of powers provides a neglected perspective on questions of Catholic politicians who support abortion, a controverted issue in the last presidential election. It seems to me that bishops who held that Catholic officials who supported abortion were so unfaithful to the Church's teaching that they should not receive communion were blind to questions of role, responsibility, and procedure.

Bishop Raymond Burke, then bishop of La Crosse, Wisconsin (now archbishop of St. Louis), decreed in November 2003 that "Catholic legislators, who are members of the faithful of the Diocese of La Crosse and who continue to support procured abortion or euthanasia may not present themselves to receive Holy Communion."<sup>30</sup> Bishop Burke explained that his decree followed private consultations and letters that had failed to persuade the legislators in question to alter their views on abortion. The most promi-

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25. Gregory Mthembu-Salter, *Zambia: Recent History*, in *Africa South of the Sahara 2005*, *supra* n. 10, at 1226–27.

26. *Id.* at 1227.

27. *Id.*

28. *Id.* at 1230.

29. *Id.* at 1230–31.

30. Raymond Burke, *Notification* (Nov. 23, 2003) (available at <http://www.ewtn.com/library/bishops/burkenot.htm>).

ment of the three legislators sanctioned was David Obey, representative from Wisconsin. Representative Obey gave an extended account of his views in "My Conscience, My Vote."<sup>31</sup>

Taking account of a Catholic legislator's role and responsibilities allows for an interpretation of votes supporting abortion rights that does not immediately impute moral approval of abortion. If the legislator is a member of the lower house of Congress (the House of Representatives), as was Rep. Obey, or the lower house of a state legislature, her role is precisely to represent her constituents' views.<sup>32</sup> I would venture to say that such a representative is duty bound by reason of her elected office to represent faithfully the interests (and strong preferences) of her constituents. This does not mean that a representative may not for compelling moral reasons vote against her constituents' wishes. But such a vote will be rare as a matter of right and of fact: rare as a matter of right because a representative's duty is to represent constituent interests; rare as a matter of fact because a representative unresponsive to constituents' interests will be voted out of office.

When Father Robert Drinan represented a district whose voters were strongly against the Vietnam War and strongly in favor of aid to Israel, he rightly and vigorously represented both views.<sup>33</sup> His New England Jesuit brothers, who had had many years of experience in the Middle East working with Arabs, objected to those who so one-sidedly, in their opinion, supported Israel.<sup>34</sup> According to my logic, Father Drinan did precisely what he was elected to do. However, I thought at the time and still do, that such partisan advocacy of one side of a complex issue is inconsistent with the priestly office, which requires priests to offer moral advice on complex issues from above the fray. Father Drinan's religious superiors asked him to withdraw from electoral politics as a U.S. representative and he left Con-

31. David R. Obey, *My Conscience, My Vote*, 191:4 *America* 8 (Aug. 16, 2004). The Oct. 18 issue contained several letters replying to the initial article. Dennis O'Brien et al., *Letters*, 191:11 *America* 27, 28–29 (Oct. 18, 2004).

32. I don't mean to imply that this was Representative Obey's own defense of his votes on abortion. His actual voting record shows him to be a most conscientious and principled legislator. He notes in his *America* apologia that he has voted "well over 60 times for limitations of one kind or another on a woman's right to choose abortion." Obey, *supra* n. 31, at 9.

33. For Drinan's support of Israel, see 121 Cong. Rec. H14137 (daily ed. May 13, 1975) (co-signer of resolution urging new jet fighters, "electronic counter measures, and other sophisticated weapons necessary to insure the continued viability of Israel"), 121 Cong. Rec. H23192 (daily ed. July 16, 1975) (objecting to sales of missiles to Jordan), and 121 Cong. Rec. S27406 (Sept. 3, 1975) (speech objecting to efforts to expel Israel from the United Nations).

34. The *SJNews* of September 1971 contains an open letter signed by "[s]eventy New England Jesuits with Middle East experience," protesting a Jan. 11, 1970, speech by Fr. Charles Casassa, SJ, Chancellor of Loyola University, Los Angeles, about his recent visit to Israel. The introduction to the letter observes, "Fr. Casassa spoke in glowing terms of what he saw and heard in Israel. The speech betrayed a pathetic ignorance of the Arab-Israeli conflict and an uncritical acceptance of Israeli propaganda." *Mission to Islam*, 1 *SJNews* (mthly. newsltr. of the New Eng. province) 12 (Sept. 1971).

gress in 1980.<sup>35</sup> Once we attend to a representative's role in our constitutional system and its division of powers and responsibilities, we should hesitate to conclude on the basis of a vote on abortion (perhaps even for federal or state funding for them) that the legislator is either for or against abortions, which indeed unjustly and inhumanely kill innocent human beings.<sup>36</sup>

Traditional Catholic moral theology makes careful distinctions with regard to "cooperation" in evil.<sup>37</sup> The question of whether Catholics can vote for a so-called "pro-choice" candidate is clarified by recalling the distinction between "formal" and "material" cooperation.<sup>38</sup> Voting for a candidate precisely because he was in favor of abortion was judged to be "formal" cooperation and as such wrong. But voting for a pro-choice candidate for other reasons was judged to be remote "material" cooperation and, as such, permissible for sufficiently weighty reasons, presumably in this case the candidate's positions in favor of policies that promoted social justice (health insurance for the poor, increased foreign aid, and so forth).<sup>39</sup>

The same distinction should be applied to appointed or elected officials, who are sworn to uphold the law. Father Henry Davis, in his moral theology manual, treats the case of Catholic judges and lawyers involved in divorce cases as instances of material cooperation in the sin of adultery (divorced parties will legally be able to marry, but in God's eyes will be committing adultery).<sup>40</sup> Fr. Davis judges the cooperation to be remote and justified by the value of having conscientious Catholic judges and lawyers. He writes, "A judge, who is merely a mouthpiece of the legislator and ad-

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35. Wikipedia Online Encyclopedia, *Robert Drinan*, [http://en.wikipedia.org/wiki/Robert\\_Drinan](http://en.wikipedia.org/wiki/Robert_Drinan) (accessed Nov. 8, 2005).

36. As Louis Gasper, long-time congressional staffer and now director of the Center for Business Ethics at the University of Dallas, commented, this formulation of a representative's relation to constituents is much too simple, since members of Congress conceive of their role as leaders. Conversation with Louis Gasper, *The Catholic Intellectual Tradition and the Good Society*, Terrence J. Murphy Institute Conference (April 9, 2005). They do not see themselves simply as spokespersons for their constituents' views. However, he conceded my main point that one cannot attribute to a legislator any particular moral view on the basis of any particular vote. How she votes, especially on a controversial issue such as abortion, results from weighing many competing considerations, including moral ones. *Id.*

37. Henry Davis, *Moral and Pastoral Theology* vol. 1, 341 (5th ed., Sheed & Ward 1946).

38. *Id.*

39. Cardinal Joseph Ratzinger, *Worthiness to Receive Holy Communion, General Principles*, <http://www.defide.com/documentation.html> (accessed Nov. 20, 2005). This document was sent as a private communication to the head of the National Conference of Catholic Bishops in June 2004. Cardinal Ratzinger's letter referred to the grave evil of "formal cooperation" in abortion or euthanasia. The letter contained a note explaining the difference between formal and material cooperation. The note comments, "When a Catholic does not share a candidate's stand in favour of abortion and/or euthanasia, but votes for that candidate for other reasons, it is considered remote material cooperation, which can be permitted in the presence of proportionate reasons." *Id.*

40. Davis, *supra* n. 37, at 349.

ministers law ready-made, may often cooperate in administering an unjust law, for otherwise he would have to resign his office.”<sup>41</sup>

The focus on the abortion views of legislators may also involve a failure to attend to the divisions of powers and responsibilities established by the Constitution. Legislators in their normal course of lawmaking cannot undo the Supreme Court’s decision in *Roe v. Wade* (1973) overturning state laws against abortion. (Of course they have successfully legislated such matters as parental notification, which qualifies a minor’s right to an abortion. But the Supreme Court has only upheld regulations that maintain the basic right to an abortion.) The Supreme Court’s exercise of judicial review ensures the supremacy of its interpretation of the Constitution, a concept established long ago by John Marshall in *Marbury v. Madison* (1803).

Representative Obey wrote in his *America* article that Archbishop Burke objected to his refusal to oppose embryonic stem-cell research and to vote to deny female military personnel the right to have abortions in military hospitals.<sup>42</sup> He gave as his reason for the latter position that he opposed limiting U.S. service women’s right to any military hospital services.<sup>43</sup>

Granted, very good arguments have been made by both proponents and opponents of abortion that the Court in *Roe v. Wade* failed to restrain itself within its proper boundaries as interpreter of the Constitution. However regrettable this decision may have been, it has become part of the supreme law of the land, which all government officeholders pledge to uphold when they take their oath of office.

Of course, the people are not left without recourse if they want to reverse a Supreme Court decision. The Constitution provides for a way for the people to amend it. One proposed amendment would return the issue to the states to decide.<sup>44</sup> I am confident that were such an amendment to pass, the wills of the majority would be different in different states: abortion would be made illegal by some states, but others would allow it (though perhaps it would be regulated much more tightly and carefully than it is now). In the American government framework of division of powers, overturning *Roe v. Wade* by amending the Constitution is the proper procedure for making possible legal protections for the unborn.

Members of Congress and/or state legislatures (who could by a two-thirds vote call for Congress to call a convention) would be responsible for proposing a constitutional amendment (which would then go to the state legislatures for approval). In the process of proposing and ratifying an

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41. *Id.*

42. Obey, *supra* n. 31, at 10.

43. *Id.*

44. See Natl. Comm. Human Life Amend., *Human Life Amendments: Major Texts*, <http://nchla.org/datasource/ldocuments/HLAmajortexts.pdf> (last updated Feb. 2004). Proposed amendments to return power to the states to restrict or allow abortions were H.R. Jt. Res. 427, 93d Cong. (Mar. 13, 1973) and Sen. Jt. Res. 91, 94th Cong. (June 6, 1975).

amendment to overturn *Roe v. Wade*, federal and state legislators would be exercising their legitimate constitutional roles. At this point, what was noted earlier about appreciating the legitimate role of lower-house members representing their constituents' views would apply to a legislator's vote for or against proposing and/or ratifying such an amendment.

In the recent presidential election, the Republican Party proposed a much more direct way to overturn *Roe v. Wade*: elect a president committed to filling any Supreme Court vacancies that might occur with appointees pledged to overturn this decision. To invoke "proper procedures" as an objection to such a strategy may seem to be legalism at its worst: all process and no substance. According to advocates of the Republican Party's strategy, the protection of unborn lives requires quick and bold action to stop the killings going on now. The unborn can't wait for a constitutional amendment, which may never come.

The argument that processes and procedures are important means to achieving the common good suggests that this more direct strategy for overturning *Roe* sets a very unfortunate precedent. Granted, it's not just cynics who have questioned how frequently Supreme Court justices have been calm, above-the-fray, impartial interpreters of our Constitution. However, the ideal of a court that is insulated from ordinary politics seems to me to be an ideal worth upholding, especially in the name of protecting the constitutional rights of unpopular minorities such as prisoners, aliens, irregular combatants, adherents of unpopular religions, and so forth. As Pope John XXIII explained in *Pacem in Terris*, protecting such rights is an important element of the common good.<sup>45</sup>

Archbishop Levada, the chair of the United States Conference of Catholic Bishops' Committee on Doctrine, fails to appreciate this point. In his position paper delivered to the bishops' June 2004 meeting, he responded to the Catholic Congress members' appeal to *Roe v. Wade* by observing that Supreme Court decisions can be changed. He gave the telling example of *Dred Scott v. Sanford* as a decision that was reversed, and made it sound as though Supreme Court decisions are often changed: "But Supreme Court decisions are not infrequently changed or reversed."<sup>46</sup> Archbishop Levada seems to forget or overlook that it took a bloody civil war and constitutional amendments (the Thirteenth and Fourteenth) to overturn *Dred Scott*.

The effective protection of constitutionally guaranteed minority rights has proven a challenge for majoritarian politics. The extent to which minorities have been able to enjoy protection of their rights has depended in great measure on intervention by a Supreme Court insulated from legislative majorities. Without an effective organ that at critical moments can block op-

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45. Pope John XXIII, *supra* n. 7, at No. 58.

46. Theodore McCarrick et al., *Interim Reflections of the Task Force on Catholic Bishops and Catholic Politicians*, 34 *Origins* 100, 104 (July 1, 2004).

pressive majorities, minority rights may be denied. A governmental system that aims to protect and promote the common good must develop procedures to ensure the protection of minority rights. In the American frame of government, the Supreme Court, which aims to be above politics (though perhaps this is an ideal not always realized), ensures that minority rights receive protection.<sup>47</sup>

#### COMMISSIONS OF INQUIRY AND THE PAPAL BIRTH CONTROL COMMISSION

##### a. *Commissions of Inquiry*

Interpretation of the fundamental law of a constitution, as we have seen, is entrusted to a supreme court, while particular policy proposals and decisions are made by the executive and the legislative branches. On matters of particular moment, typically major governmental failures or pressing but highly complicated policy decisions, the executives and/or legislators have established independent and impartial commissions of inquiry.<sup>48</sup> Such commissions gather information and hear testimony from authorities with expert knowledge of the matters in question. Both space shuttle losses (*Columbia* in February 2003 and *Challenger* in January 1986) were thoroughly investigated by commissions of inquiry that drew on expert testimony and testing to uncover what had gone wrong and to make recommendations to correct the fatal flaws.<sup>49</sup>

Commissions of inquiry marshal experts' best knowledge and views on issues, many times on difficult policy questions such as the 2005 discussion about Social Security's long-term financial soundness in light of trends toward smaller families and the expected large number of baby boomers who will eventually be dependent on Social Security.<sup>50</sup> On controversial issues, such commissions aren't likely to develop a complete consensus, but

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47. As John Finnis commented, Archbishop LeVada is correct in one sense. Many earlier Supreme Court decisions have been overruled by later decisions—for example, the 1930s decisions overturning New Deal economic legislation. He observed, however, that to undo *Roe v. Wade*, 410 U.S. 959 (1973), by appointing judges pledged to overturn it is, in his own words, “a high risk strategy.” Conversation with John Finnis, *The Catholic Intellectual Tradition and the Good Society*, Terrence J. Murphy Institute Conference (April 9, 2005). I argue there is as much at stake in preserving a Supreme Court that in principle impartially interprets the Constitution, thus I judge the risk too great. If the people really want to overturn *Roe*, they should amend the Constitution. If the people do not want to amend the Constitution, the success of the “high risk strategy” will generate intense acrimony and division. A later president with pro-choice views may be tempted to reverse the undoing by a similar strategy. The role of a supreme court as impartial arbiter will have been fatally compromised. Such a change risks untold damage to minority rights and the common good.

48. Stuart Hampshire, *Justice Is Conflict* 8–10 (Princeton U. Press 2000).

49. See Shannon Jones, *The Columbia Shuttle Tragedy: Lesson of the Challenger Inquiry*, <http://www.wsws.org/articles/2003/may2003/chal-m06.shtml> (May 6, 2003).

50. See generally President's Comm. to Strengthen Soc. Sec., *Guiding Principles*, <http://www.csss.gov/> (accessed Nov. 20, 2005).

they may be able to identify some agreed positions, and the commissions also allow for dissenting voices and votes.<sup>51</sup>

The Papal Birth Control Commission (1963–1966), which was tasked to investigate the then-controverted issue of whether artificial means of birth control (specifically the anovulant pill) were morally permissible,<sup>52</sup> had some features in common with such governmental commissions of inquiry. The brief history of this commission, whose recommendations were rejected by Pope Paul VI, shows by way of negative example how such a process and procedure might strengthen the Church's teaching mission.<sup>53</sup>

*b. The Papal Birth Control Commission*

I don't know what educated laypersons and experts such as you my readers and hearers may know about the extended work of this commission. But I believe a brief recounting of its history has much to teach the Church about the importance of process and procedure for the credibility of its teaching in the modern world as characterized by Pope John XXIII's *Pacem in Terris*.<sup>54</sup>

Pope Pius XII had opened the way for Catholic couples to limit the size of their families when he endorsed as morally permissible the so-called "rhythm method" of abstaining from sexual intercourse during the wife's limited fertile period each month.<sup>55</sup> The precise question at issue in the late 1950s and early 1960s was whether the newly invented anovulant pill was also a licit means for couples to limit births.

The official title of the commission was the "Pontifical Commission for the Study of Population, Family, and Births." It was formed in March 1963 by Pope John XXIII at the suggestion of the Belgian Cardinal Suenens.<sup>56</sup> The commission grew from an initial six members (four married laymen, two priests, but no professional theologians) to thirteen in April 1964 when Pope Paul VI, who had been elected to succeed John XXIII, added seven new members, including five theologians (Redemptorists Bernard Haring and Jan Visser, Jesuits Joseph Fuchs and Marcelino Zalba, and Pierre de Locht, a diocesan priest) and two lay sociologists (Bernard Co-

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51. See e.g. President's Council on Bioethics, <http://www.bioethics.gov/> (accessed Nov. 20, 2005). For a history on past bioethics commissions, see The President's Council on Bioethics, *Former Bioethics Commissions*, [http://www.bioethics.gov/reports/past\\_commissions/index.html](http://www.bioethics.gov/reports/past_commissions/index.html) (accessed Nov. 20, 2005).

52. Two book-length accounts of this commission are Robert Blair Kaiser, *The Politics of Sex and Religion* (Leaven Press 1985), and Robert McClory, *Turning Point* (Crossroad Publ. Co. 1995).

53. Of course the Roman Catholic Church meets periodically in solemn ecumenical councils, frequently enough in synods, and consultative bodies of all kinds function at all levels, from national bishops' conferences to parish councils.

54. See Pope John XXIII, *supra* n. 7, at Nos. 40–45.

55. John Noonan, *Contraception* 445–47 (Harvard U. Press 1965).

56. Kaiser, *supra* n. 52, at 39.

lombo of Italy and Thomas Burch of the USA).<sup>57</sup> Two additional priests were added in June 1964 (Italians Tullo Goffi and Ferdinando Lambruschini).<sup>58</sup> Henri de Riedmatten, Swiss Dominican and roving Vatican ambassador and observer (at the UN in Geneva), served throughout as executive secretary.<sup>59</sup>

Later in 1964, the commission was greatly expanded when forty-three members were added, including three married couples. Two of the couples were doctors; the only couple serving solely to represent married couples was Patrick and Patty Crowley, joint heads of the worldwide Catholic Family Movement. The expanded commission included thirty-four laypersons, twenty-two priests, and two bishops.<sup>60</sup>

Robert McClory's account focuses on the role of Patty Crowley. As the leaders of the Catholic Family Movement, the Crowleys had extensive contact with Catholic married couples throughout the world. Their contribution was to bring to the commission the voice of married couples, especially about the adequacy of the rhythm method.

Catholic couples' experience with the rhythm method was essential evidence for the commission's deliberation. Once the Church came to understand marital love between the couple as the inclusive aim of marriage as God had designed it,<sup>61</sup> the consistency between expressions of marital love and the method of birth control became a live issue. I assume that if the rhythm method had proven to be both effective and generally consistent with the sexual expressions of couples' married love, the permissibility of the anovulant pill would not have become such a live issue for Catholic couples. On the other hand, if the rhythm method did in fact frequently frustrate a couple's sexual love, this was telling evidence against its appropriateness as a birth control method for couples. The logic of the Church's new understanding of marital love's primacy implied that the method of fertility limitation had to be at least consistent with expressing marital love or, preferably, an enhancer of it. Married couples were the authorities on whether (or how well) the rhythm method fit with the sexual expressions of their love.

The Crowleys gathered survey data and testimonies about rhythm from over three thousand Catholic married couples. Patty Crowley reported the

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57. *Id.* at 42–43.

58. *Id.* at 54.

59. McClory, *supra* n. 52, at 39.

60. *Id.* at 62.

61. This understanding is implicit in Pope Pius XII's acceptance of married couples' right to limit the number of their children, and in the limited fertile period in women's monthly cycles. Ironically, a clear and full account of this understanding of marriage is given in Paul VI's *Humanae Vitae* (see especially Nos. 8–11), which rejected the commission's recommendations and reiterated that rhythm is the only morally acceptable form of birth control. Pope Paul VI, *Humanae Vitae* (July 25, 1968) (available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html)).

results of their inquiries at the final meeting of the commission in 1966. She reported that, overall, the couples surveyed found rhythm to be inimical to their union as couples:

Is there a bad psychological effect in the use of rhythm? Almost without exception, the responses were yes, there is.

Does rhythm serve any useful purpose at all? A few say it may be useful for developing discipline. Nobody says it fosters married love.

Does it contribute to married unity? No. That is the inescapable conclusion of the reports we have received. . . .

Is rhythm unnatural? Yes—that's the conclusion of these reports. . . . Over and over, respondents pointed out that nature prepares a woman at the time of ovulation to have the greatest urge to mate with her husband. Similarly, at that time her husband wants to respond to his wife. She craves his love. Yet month after month she must say no to her husband because it is the wrong date on the calendar or the thermometer reading isn't right.<sup>62</sup>

She ended her presentation with a call for a change in the Church's teaching on birth control:

We think it is time that this Commission recommend that the sacredness of conjugal love not be violated by thermometers and calendars. . . .

We sincerely hope and do respectfully recommend that this Commission redefine the moral imperatives of fertility regulation with a view toward bringing them into conformity with our new and improved understanding of men and women in today's world.<sup>63</sup>

Similar views were presented by Colette Potvin, another of the three married women. The sincerity and clarity of the lay women's testimonies had a strong impact on those who heard them. The chair of the commission, Riedmatten, was moved to comment that such powerful personal testimonies vindicated the decision to invite married couples to be members of the commission.

The theologian members on the commission voted 15–4 in their concluding and decisive vote, first that the teaching of *Casti Connubii* was not irreformable, and second that contraception was not intrinsically evil according to natural law. The theologians drafted a report (which was leaked to the *National Catholic Reporter* in 1967)<sup>64</sup> that proposed that the unity of love and procreation essential to marriage be understood somewhat differently from how it had been taught by Pope Pius XI in *Casti Connubii*. Pope Pius XI had understood the unity of love and procreation in marriage to

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62. McClory, *supra* n. 52, at 103–04.

63. *Id.* at 105.

64. *Id.* at 3.

mean that any action intended to separate love and procreation in any sex act (e.g., coitus interruptus, use of a condom) was intrinsically wrong. The theologians on the commission instead proposed that the unity of love and procreation must be preserved in the totality of the married couple's acts of sexual intercourse, but not necessarily in any given sex act. Couples who had good reasons for limiting the size of their families could licitly choose from a variety of birth control measures, including the anovulant pill, as long as they did not permanently exclude having children. The use of rhythm endorsed by Pope Pius XII was thus not the solely acceptable form of birth limitation. The fifteen bishops who had been chosen to make the final determination received this report and voted by a significant majority (nine solidly for and six split between negative votes and abstentions) to accept its recommendations. They sent this statement on to Pope Paul VI as the commission's final recommendations.<sup>65</sup>

Many things have been written about Paul VI's final decision in *Humanae Vitae* (1968) to reject the commission's recommendation for change in the Church's teaching on birth control. *Humanae Vitae* reiterated the teaching that rhythm is the only morally permissible means for couples to limit the size of their families. The encyclical explicitly rejected reinterpreting the inseparable union of love and procreation in marriage in terms of the totality of sexual acts within marriage.

What might be said from a process/procedure perspective? First, and most obviously, Paul VI felt compelled to reject the commission's recommendation for a change in Church teaching. To oversimplify: he came to believe that the traditional teaching could not be changed without undercutting the legitimacy of the Church's teaching authority in the eyes of the faithful. Unfortunately, Pope Paul failed to appreciate the important role process and procedure play in constituting an authority's legitimacy. The question whether couples' use of the birth control pill was morally permissible was a new question. The answer was not obvious. The commission process drew a wide range of Church members—bishops, theologians, doctors, sociologists, and married couples. Members presented position papers, reports, survey data, and so forth. Members changed their minds in view of the evidence, especially the authoritative witness of couples about the damaging effects of rhythm on their conjugal relationship. The final report, recommending an endorsement of the legitimacy of the pill, represented the outcome of a several-years-long process of research, study, debate, and discussion.

Such a process is the human means, in widespread use in our day, by which societies of all kinds address new questions while drawing on their

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65. This is my very compressed summary of the main results of the commission's final session in May and June of 1966 drawn from McClory's chapters 12 and 13. For the bishops' final votes, see especially *id.* at 127–28. For Kaiser's account of this vote, see Kaiser, *supra* n. 52, at 174.

core values embodied in their authoritative texts and traditions. The widespread use and usefulness of such commissions of inquiry explains in some measure the broad dissent provoked by *Humanae Vitae*'s reiteration of the traditional prohibition of artificial means of birth control. As commonly noted, Paul VI's conviction that the traditional teaching on birth control could not be changed lest the Church's teaching authority be undermined produced in many the exact opposite effect. It turned out that failure to change after an extensive process of inquiry and debate undercut the credibility of the Church's traditional teaching on birth control. The refusal to trust the process of the commission's inquiry and deliberations and to endorse its recommendation hurt the Church's teaching authority.

#### CONCLUSION

I have argued in this paper that the Catholic Church needs to learn from liberal political theory's emphasis on procedural justice. In particular, it can learn the importance of process and procedure in exercising its own teaching authority. Two historical examples appeared to me to be symptomatic of the failure to appreciate procedural justice.

The first example concerns the approach of some Catholic bishops to the issue of abortion as it played out in the 2004 presidential election. Certain Catholic elected officials were sanctioned for their alleged support of abortion. Legislators' votes on abortion were interpreted as public advocacy of its moral permissibility. Such an interpretation, I have tried to show, fails to appreciate how a constitution gives specific responsibilities to elected and appointed officials. For example, because an elected representative has the responsibility to represent constituents' interests, no vote in favor of a particular measure should be presumed to be a moral endorsement of it. Also, support for the Republican strategy of appointing justices committed to overturning *Roe v. Wade* risks undermining the judiciary's independence from majoritarian politics, which has been historically so important for protecting minority rights.

The second example I examined was the post-Vatican II history of the birth control controversy. The commission of inquiry established by Pope Paul VI studied the issue carefully and debated the substantive moral and theological issues, including the critical question of whether the traditional teaching could be changed. The views of married couples that had tried to be faithful to the rhythm method, the only technique allowed, were gathered. After years of discussion and debate, the commission found cogent and compelling reasons for a change in the Church's traditional rejection of artificial means of contraception. Such a process, in which all voices are heard and discussed and the pros and cons of relevant views are assessed, is the ordinary means by which organizations decide difficult policy questions. Pope Paul VI was rightly concerned that a change in Church teaching

on the question of contraception would raise questions about the Church's authority. Unfortunately, he overlooked the liberal insight that to have followed the result of the established process might well have buttressed the Church's authority and not undercut it. The Pope's rejection of the result of the process in the name of preserving the Church's authority had the ironic result of undermining this very authority in many married couples' eyes. Rejecting the conclusions of the commission of inquiry was doubly ironic in view of papal and conciliar teaching being articulated at this time about the clear advantages of constitutional democracy's policies and procedures for achieving the common good.