Render Less Unto Caesar?: Denying Communion to Catholic Judges

Article Contents

Introduction

> *I believe in an America where the separation of church and state is absolute, where no Catholic prelate would tell the president, should he be Catholic, how to act, and no Protestant minister would tell his parishioners for whom to vote. . . . I believe in an America that is officially neither Catholic, Protestant nor Jewish; where no public official either requests or accepts instructions on public policy from the Pope . . . ; where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials; and where religious liberty is so indivisible that an act against one church is treated as an act against all.*[1]

So said John F. Kennedy, America's first Catholic President and perhaps the country's most recognized and revered Catholic politician, in a speech that has defined—now for just over fifty years—the common perception of how Catholic public officials should balance their sometimes conflicting fealties to Rome and Washington. For the non-Catholic masses wary to vote for a man who would kiss the Pope's ring, Kennedy gave the answer they wanted to hear. He vowed to avoid privileging the view of his particular confession and, when assuming public office, promised to take into account the needs of the whole body politic, not merely the views proffered by an unelected religious cadre. Catholic politicians from Mario Cuomo to John Kerry have embraced a similar stance, arguing that although they may have a faith that can move mountains, there is a limit to how much they may impose this faith on others.

While Kennedy's soaring rhetoric on the limited role of religion in the public square may have helped win him the presidency, subsequent Catholic politicians have been less successful in invoking the same principle, particularly on the issue of abortion. Indeed, pro-choice Catholic politicians frequently explain their support for abortion rights by declaring that they agree with their Church: they would not recommend that a friend undergo the procedure and consider abortion to be morally wrong. At the same time, they claim that they cannot support restricting

[1] John F. Kennedy, Speech on His Religion, Address Before the Greater Houston Historical Association (Sept. 12, 1960) (transcript available at http://www.npr.org/templates/story/story.php?storyId=16920600).

access to abortion as a matter of public policy. They justify their pro-choice stance by arguing that because they do not perform the abortion itself and leave the option to consent to the procedure in the hands of the woman, their participation in the act does not rise to the level of sinfulness.[2]

Church leaders have continually rejected this argument.[3] More recently, a group of bishops has moved from condemning these politicians to formally censuring them. The movement these bishops have created seeks to deny communion both to pro-choice Catholic politicians[4] and to Catholics who vote for any pro-choice politician, even if those votes are motivated by something other than the politician's position on abortion.[5] The move from

---

[2] Instances of this type of reasoning abound. For one good example, see Mario Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS PUB. POL'Y 13, 20 (1984), in which Cuomo distinguished his duties "[a]s a Catholic" through which he "accepted certain answers as the right ones for myself and my family" from his role "[a]s a governor," through which he was involved in "defining policies that determine other people's rights." *Id*. Cuomo based his argument in favor of abortion rights on the principle that "most Catholics through most of American history have accepted and insisted on: the truth that to assure our freedom we must allow others the same freedom, even if occasionally it produces conduct by them which we would hold to be sinful." *Id*. at 16. The last two Democratic contenders for the White House (one of whom is not even Catholic), have both seemingly embraced this same position. *See* Commission on Presidential Debates. Oct. 8, 2004, Debate Transcript, *available at* http://www.debates.org/index.php?page=october-8-2004-debate-transcript. (noting that while Senator Kerry "deeply . . . respect[ed] the belief about life and when it begins," he could not "take what is an article of faith . . . and legislate it for someone who doesn't share that article of faith, whether they be agnostic, atheist, Jew, Protestant, whatever"); Peter J. Boyer, *Party Faithful*, NEW YORKER, Sept. 8, 2008 (quoting then-Senator Obama as saying that he "would never counsel [his] daughters to have an abortion," but that he supports abortion rights because of his "belief that there's no other actor on earth than the mother who can address this question" and his understanding that "to be pro-choice means that you contemplate that the choice can be the choice in favor of life"). Examples of this type of thinking are not limited to the Democratic party, though there are often suggestions that the Church targets liberals more than conservatives. *See, e.g.*, Patricia Zapor, *Are Republican Catholic Pols Treated Differently from Democrats*, CATH. NEWS SERV., Oct. 1, 2004, *available at* http://www.catholicnews.com/data/stories/cns/0405403.htm (suggesting that pro-choice Republican Catholics, such as Rudolph Giuliani, George Pataki, and Arnold Schwarzenegger, though they hold the same positions on abortion, often receive less episcopal censure than their liberal counterparts).

[3] For a full discussion of how the Church rejects this position, see Part II, *infra*.

[4] For a summary of the doctrinal underpinnings and history of the communion-denial movement, see Gregory C. Sisk & Charles J. Reid Jr., *Abortion, Bishops, Eucharist, and Politicians: A Question of Communion*, 43 CATH. LAW. 255 (2004); *and* Amelia J. Uelmen, *The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life*, 43 CATH. LAW. 289 (2004).

[5] *See, e.g.*, DOUGLAS W. KMIEC, CAN A CATHOLIC SUPPORT HIM?: ASKING THE BIG QUESTION ABOUT BARACK OBAMA 15-22 (2008) (recounting how Kmiec was denied communion for endorsing then Senator Barack Obama's candidacy for president, though the priest who took this step was later sanctioned for the denial); Michael Sheridan, Bishop of Colorado Springs, A Pastoral Letter to the Catholic Faithful of the Diocese of Colorado Springs on the Duties of Catholic Politicians and Voters) (May 1, 2004) (transcript available at http://www.ewtn.com/library/BISHOPS/capolvot.htm) (Catholics who "stand for" abortion, stem cell research, or

condemnation to communion denial represents an enormous shift in the thinking of the U.S. Church hierarchy. Indeed, Canon Law 915, which is the basis for the communion-denial regime and countenances communion denial only for those who "obstinately persist in manifest grave sin,"[6] is strong medicine, as it cuts offenders off from the most defining of Catholic rites, a rite that Catholics should perform every week.[7] Moreover, for many politicians, the sanction can affect their prospects of reelection, as fewer voters might be willing to vote for someone labeled as immoral by their own church. Finally, for Catholic public officials whose public actions further pro-choice policies, the prospect of communion denial sets up a choice that none want to make: they can stand for what they genuinely believe is best for their country or they can receive the central sacrament of their faith.

Surprisingly, against the backdrop of the communion-denial movement's attacks on pro-choice politicians, Catholic judges have emerged unscathed, despite the fact that such judges justify their rulings on abortion using principles similar to the ones suggested by pro-choice legislators. Indeed, if politicians cite President Kennedy to defend their pro-choice views, judges

---

euthanasia, "whether candidates for office or those who would vote for them, may not receive Holy Communion until they have recanted their positions and been reconciled with God and the Church in the Sacrament of Penance."). Note that some bishops seem warier to suggest unequivocally that voting for one political party is tantamount to grave sin, as taking such a position could imperil a diocese's 501(3)(c) status as a non-profit. Indeed, after then-Denver Archbishop Charles Chaput suggested that it was sinful to vote for Democratic presidential candidate John Kerry, a pro-choice group of Catholics filed a complaint with the IRS against the Archdiocese and the IRS considered opening an investigation on whether the archdiocese should maintain its 501(3)(c) status. *See Catholics for a Free Choice Files IRS Complaint Against Denver Archdiocese*, CATHOLICSINPUBLICLIFE.ORG, Oct. 25, 2004, http://www.catholicsinpubliclife.org/page28/page17/page4/files/0e3a34a0a98bd1bed7e47f7308d9588d-29.html. Perhaps as a reaction, Chaput now qualifies his public advice on whom to vote for and gives a disclaimer at the beginning of his speeches, his "Litany to the IRS," in which he mentions that he does not want to tell anyone how to vote and offers no political endorsements, but rather speaks as a private citizen and not for the Church. *See, e.g., Archbishop's Address to ENDOW*, ZENIT.ORG, Oct. 17, 2008, http://www.zenit.org/article-23964?l=english [hereinafter *Archbishop's Address*].

[6] CODE OF CANON LAW, Art. 2 § 915, *available at* http://www.intratext.com/IXT/ENG0017/_P38.HTM.

[7] In fact, the drafters of the current version of Canon Law, last revised in 1983, envisioned the rule as being applied to "pimps, prostitutes, fortunetellers, and magicians." John P. Beal, *Holy Communion and Unholy Politics*, AM. MAG, June 21, 2004, *available at* http://www.americamagazine.org/content/article.cfm?article_id=3635. Much as we might like to put all politicians in the same category, many would argue that there is a difference between this class of sinner and the average presidential candidate.

invoke something akin to Chief Justice John Roberts's now famous judge-cum-umpire analogy:[8] they merely call the balls and strikes, regardless of the moral consequences attached to their decisions. In other words, if Mario Cuomo justified his pro-choice votes by trying to draw a distinction between his public and private morality, judges claim that their private morality does not control their decisions as interpreters of the law, including as interpreters of the Constitution.

Nevertheless, the Church seems to reject this separation of private from ex officio positions on abortion, be it espoused by legislators or judges. Indeed, there is good reason to believe that the Church charges both legislators and judges alike with considering the moral consequences of how they treat abortion in their public personas. This is the crux of the analysis presented in this Article, which suggests that Catholic judges could become the next targets of the communion-denial movement. Yet if judges are held to the same standard on abortion as are legislators or voters, there could be tremendous consequences for the U.S. judiciary, from Catholic state-court judges seeking reelection to the (Catholic) Chief Justice of the United States.[9]

To explore the prospect of communion denial for Catholic judges, this Article proceeds in four parts. Part I examines how many prominent Catholic judges—both conservative and liberal—would handle the conflicts between their religious and professional duties on the issue of abortion. This Part will conclude by showing how these judges—employing reasoning similar to their counterparts in the executive and legislative branches—do not attach moral consequence to the way they decide cases involving abortion rights. Part II documents the rise of the

[8] *See Text of John Roberts' Opening Statement*, USA TODAY, Sept. 12, 2005, *available at* http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm).

[9] The stakes in the federal judiciary alone are especially high, given the large number of Catholics occupying these offices. Although there is no precise number of declared Catholics in the federal judiciary, a review of the biographies of the 1151 judges included in the Almanac of the Federal Judiciary for 1995-1996 by Professors John Garvey and Amy Coney revealed that 180 could be confirmed as Catholic and another 109 "may be" Catholic. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 304 n.2 (1998). These two figures together add up to 25.1% of the federal judiciary. *Id*.

communion-denial movement and the problematic standard that this movement applies when considering whether to deny communion to a public official. Part III shows how the Church itself seems to reject the distinction drawn by judges in Part I. Finally, Part IV presents Chief Justice Roberts and Associate Justices Kennedy and Alito as the most prominent examples of how and why, under the standard examined in Part III, many judges, including these devout Catholics, could be denied the sacrament.

Although there is an argument to be made for denying communion to Catholic judges, this Article will conclude by noting that the problems inherent to the current communion-denial regime suggest that the U.S. Conference of Catholic Bishops (USCCB) should change its position on the matter. Indeed, as this Article will show, the USCCB now faces a choice between an inconsistent position on the issue of communion denial, a more stringent and widespread use of the practice, or a need for some sort of compromise on how Catholics can participate fully in a political system that protects access to legalized abortion.

While this Article expressly declines to articulate what such a compromise might be,[10] in concluding, I will suggest, based on my own research, that an overwhelming majority of the USCCB does not adhere to the communion-denial regime and may be eager to end the practice.[11] Nevertheless, adamant supporters of communion denial hold considerable sway in both the U.S. hierarchy and in the Vatican: they can thwart the efforts of those who seek to change the status quo. And, as this Article will show, the communion-denial movement could easily expand its

[10] I will leave that task to the moral theologians. *See, e.g.*, COOPERATION, COMPLICITY, & CONSCIENCE: PROCEEDINGS OF AN INTERNATIONAL CONFERENCE ON PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY (Helen Watt ed., 2005) (providing a variety of perspectives on the question of what constitutes complicity with evil, often referred to in Catholic moral theology as the material cooperation with evil doctrine); M. Cathleen Kaveny, *Catholics As Citizens*, AMERICA MAGAZINE, Nov. 1, 2010, *available at* http://www.americamagazine.org/content/article.cfm?article_id=12531 (providing a good primer on communion denial and the material cooperation with evil doctrine and a critique of the current position articulated by some bishops).

[11] *See* Tbls. 1 & 2, *infra*; *see also* Part IV.B., *infra* (discussing the statistics compiled in Tables 1 and 2).

fight into the judiciary. Thus, the principal unanswered question—and the one that this Article is ultimately designed to highlight—is whether the communion deniers or the moderates will win the battle to steer Church policy on abortion in the coming years. For the sake of preventing schism in the U.S. Catholic Church and backlash against its flock, the author of this Article prays that the moderates carry the day.

I. Separating Religious and Judicial Duties: The Scalian View

Can a Catholic judge uphold a law that contravenes Church teaching on abortion yet remain within the Church? Perhaps the best way to respond to this question is by asking another: why will you never see Justice Antonin Scalia at the University of Chicago Law School? Both questions are answered in reviewing Justice Scalia's reasoning for his ruling in *Gonzales v. Carhart*,[12] where he voted with the Court's majority to uphold the Partial Birth Abortion Act of 2003[13] and defended his position on wholly secular grounds.

The fireworks surrounding this ruling began to fly just after the Court handed it down in April of 2007, when Geoffrey Stone, a law professor and former colleague of Justice Scalia's at the University of Chicago Law School, wrote a scathing critique of the Court's opinion. In his opinion piece, lambasting "our faith-based Justices," Stone concluded:

> Here is a painfully awkward observation: All five justices in the majority in *Gonzales* are Roman Catholic. The four justices who are not all followed clear and settled precedent. It is distressing to have to point this out. But it is a fact that merits attention. . . . Of course, that all of the Catholic justices voted as they did in *Gonzales* might have nothing to do with their personal religious beliefs. But given the nature of the issue, the strength of the relevant precedent, and the inadequacy of the court's reasoning, the question is too obvious to ignore.[14]

[12] 550 U.S. 124 (2007).
[13] Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2006)).
[14] Geoffrey R. Stone, Op-Ed., *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at C19.

Stone's article became part of an opening salvo of polemics launched as a result of the *Carhart* decision.[15] Most tellingly, however, in an interview for a biography of his life, Justice Scalia took personal affront to Stone's critique. Calling it a "damn lie" to insinuate that his Catholicism influenced his vote in *Carhart*, Scalia inveighed against Stone for suggesting that the ruling was motivated by anything other than Scalia's view that the Constitution does not protect the right to abortion.[16] Scalia commented that Stone's piece "got me mad . . . so mad I will not appear at the University of Chicago until he is no longer on the faculty."[17] Notably, Scalia was particularly "annoy[ed]" by Stone's piece because he "had been very pleased and sort of proud that Americans didn't pay any attention to [the religious affiliation of the Justices]."[18] As Scalia said, "It isn't religion that divides us anymore. . . . It didn't bother anybody, but it has to bother this great liberal Geof Stone."[19]

Perhaps Justice Scalia was most irked by Stone's allegations because Scalia himself has gone to great pains to distinguish his duties as a Justice from his faith as a Catholic. Scalia most prominently addressed the way he squared his faith with his abortion jurisprudence in *First*

---

[15] For critique of Stone's piece, see, for example, John Yoo, Op-Ed., *Partial-Birth Bigotry: The Know-Nothing Left Blames the Latest Abortion Ruling on Catholicism*, WALL ST. J., Apr. 29, 2007, *available at* http://www.aei.org/article/26054; *and* Richard John Neuhaus, *The Supreme Court and Reasonable Hope*, ON THE SQUARE BLOG, Apr. 20, 2007, http://www.firstthings.com/onthesquare/2007/04/the-supreme-court-and-reasonab (noting that critiques like Stone's are reminiscent of the anti-Catholic rhetoric of the Know-Nothing party). For others who supported Stone's position, see, for example, Robin Toner, *The Supreme Court's Catholic Majority*, ON THE RECORD: N.Y. TIMES, April 25, 2007, http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?_r=1 (noting the fraying of the once-existent "bright line" between the "private beliefs" and the "public duties" of Catholic public officials). *See also* Robert Barnes, *Did Justices' Catholicism Play Part in Abortion Ruling?*, WASH. POST., Apr. 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/29/AR2007042901270.html (offering both perspectives on the debate Stone's op-ed created).

[16] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 204 (2009).

[17] *Id.*

[18] *Id.*

[19] *Id.*

Things, a conservative Catholic monthly, in an article that gained him greater notoriety for what he said about the death penalty than what he said about abortion.[20]

Scalia began that discussion of abortion with an unsurprising reiteration of his position that he does "not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion."[21] Yet he then added the following hypothetical, suggesting:

> [I]f a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.[22]

Scalia's reasoning here merits close consideration because it shows how he interprets his vote in *Carhart* as having nothing to do with adhering to his religious beliefs. To illustrate where the distinction from his Catholicism arises, imagine a universe where *Roe v. Wade*[23] was not the law of the land and a pro-choice state legislature passed legislation that would allow for, in Justice Scalia's words, "abortion on demand." Imagine further that this bill was found unconstitutional by a pro-life federal district and appeals court, on the grounds that the U.S. Constitution endows a fetus with a due process right to life from the moment of conception. In such a world, if this case came before him, Justice Scalia would strike down the lower court ruling by arguing that the Constitution does not forbid abortion on demand, just as it does not allow for a constitutional right to abortion.

This result may seem as unremarkable as it is unlikely, until one considers the consequences of a Catholic making such a ruling "in good conscience." In this hypothetical, where Justice Scalia could serve as the only obstacle to greater access to abortion, he would

---

[20] Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, *available at* http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32.In this same article, Justice Scalia critiqued the Church's position on use of the death penalty as "wrong." *Id*.

[21] *Id*.

[22] *Id*.

[23] 410 U.S. 113 (1973).

place his duty to uphold the Constitution above what his Church might dictate. In other words, on Justice Scalia's understanding of his ethical duties as a member of the judiciary, not only does a judge "bear[] no moral guilt for the laws society has failed to enact,"[24] neither does he or she bear guilt in striking down lower-court rulings which might directly restrict the use of abortion.

For similar reasons, Justice Scalia does not seem to attach any moral consequence to other judges' decisions to uphold abortion rights on the grounds laid out in *Roe*. As Scalia noted in a recent interview with a local Catholic newspaper, "[i]f I genuinely thought the Constitution guaranteed a woman's right to abortion, I would be on the other [side of the issue]."[25] Yet while he would take this position contrary to Church teaching, for Scalia, "[i]t would do nothing with my religion. It has to do with my being a lawyer."[26]

In the end, then, Scalia suggests that advocating for constitutionally protected abortion rights could earn an advocate ridicule from the bench but not censure from the pulpit, as long as the advocate believed that she was offering a genuine interpretation of the Constitution. Indeed, as Scalia notes, a ruling on abortion is an issue distinguished from one's "religion" because it is related to one's profession as a lawyer. These worlds are separated in Scalia's universe, as they would presumably be in the mind of many judges, who might even be "personally opposed" to abortion but recognize their professional duty in protecting the Constitutional right. In light of these positions espoused by Justice Scalia, one can understand his exasperation about his supposedly Catholic vote in *Carhart*. For this Justice, the ruling was congruent with Church

[24] Scalia, *supra* note 20.
[25] George P. Matysek Jr., *Justice Scalia Urges Christians To Have Courage*, CATH. REV., Oct. 25, 2010, *available at* http://www.catholicreview.org/subpages/storyarchnew.aspx?action=8965. Judge Noonan has adopted a similar position on abortion rights. Indeed, discussing Justice Brennan's support of the *Roe* majority, Noonan suggested that while he would have had trouble "conscientiously" taking the same stance, he believed that "obviously Catholic consciences differ. Brennan in *Roe* showed that they can differ on abortion. It is not, I think the business of anyone to judge the conscience of another." John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 TULSA L. REV. 761, 763 (2007).
[26] Matysek, *supra* note 25.

teaching but in no way caused by it. More tellingly, his strong reaction against insinuations to the contrary suggests an ardent desire to privilege his genuine interpretation of the Constitution over a view that would more directly protect Catholic interests.

The Scalian view on upholding the law when it conflicts with one's faith was similarly articulated by Judge William Pryor, a Catholic judge on the Eleventh Circuit Court of Appeals.[27] Pryor, as Alabama's Attorney General, was famously forced to intervene when Roy Moore, Chief Justice of the Alabama State Supreme Court, refused to remove a Ten Commandments statue in the Alabama Court House. Later, Pryor's faith became a central element of his confirmation hearing for a seat on the Eleventh Circuit, when Senator Charles Schumer suggested that Pryor's "deeply held" religious beliefs could present a problem if he was placed on the federal bench.[28] By Senator Schumer's estimation, holding such beliefs would be "inconsistent" with the prevailing doctrine of "separation of church and state."[29]

Reflecting on his confirmation hearings and his battle with Justice Moore, Judge Pryor contributed a piece to the *Yale Law and Policy Review*.[30] Judge Pryor made the piece in part a response to an earlier article written by Yale Law School Professor Stephen Carter, in which Carter had argued that "the religiously devout judge ought to be free to rest her moral knowledge on her religious faith."[31] Indeed, Professor Carter identified the liberal ideal for a judge—one who does not allow religious belief to enter into his or her decision-making—as little more than a "ghost" that "refuses to go away."[32] Carter asserted that legal scholars should see the model of the objective judge for the fiction that it is and adopt the "widely shared expectation that judges

---

[27] *See* William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 349 (2006).
[28] *Confirmation Hearing on the Nomination of William H. Pryor, Jr. to be Circuit Judge for the Eleventh Circuit Before the S. Comm. on the Judiciary*, 108th Cong. 11-13 (2003) (statement of Sen. Charles Schumer).
[29] Pryor, *supra* note 27.
[30] *Id.*
[31] Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989).
[32] *Id*. at 944.

will rely on personal moral knowledge" in certain cases and that sometimes this moral knowledge will "have an explicitly religious basis."[33]

Responding to this argument, Judge Pryor resurrected—so to speak—the ghost of the objective judge that Professor Carter had tried to put to rest. In adopting a position similar to that of Justice Scalia, Pryor argued, "[m]y perspective is that faith properly informs me to take my judicial duty seriously, but that religion should not be applied as a source of authority in judging."[34] Indeed, for Pryor, the influence of his religion is merely "motivational" in that it only concerns his "duty to perform his work well" and does not "involve[] using religious doctrine to decide a case in conflict with the law."[35] Therefore, Pryor concluded, in terms more explicit than those used by Justice Scalia, "a federal judge has no authority to use natural law [i.e., law prescribed by the Church] to subvert the clear commands of the positive law."[36]

Furthermore, the Scalian view on judging is not limited to more conservative judges such as Scalia and Pryor. From the other side of the political aisle, Justices Brennan and Blackmun provide instructive examples of so-called liberal judges who justified their abortion jurisprudence on grounds similar to those of Justice Scalia. Justice Brennan reasoned that "I might do as a private citizen what a Roman Catholic does, and that is one thing" yet if these

---

[33] *Id*. at 935.
[34] *Id.*
[35] Pryor, *supra* note 27, at 349.
[36] *Id*. Pryor does mention that in the context of abortion, a judge may need to recuse himself in certain situations, such as if he or she needs to provide a judicial bypass to allow a minor to have an abortion. *Id*. at 360; *see also* William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1, 8 (2004) (suggesting that there are certain circumstances under which Judge Pryor would resign rather than fulfill a federal order but not providing specific the circumstances where this scenario would apply). Nevertheless, Pryor recognizes few situations where recusal would be necessary in the federal judiciary. *Id*. at 361. It should also be noted that Pryor, in his analysis, relied upon an earlier article written by James L. Buckley, a Catholic judge on the D.C. Circuit who now enjoys senior status. *See* James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, http://www.firstthings.com/article/2008/01/002-the-catholic-public-servant-22. Buckley has noted that "[as] an unelected official," a judge "can claim no mandate to reconstruct public policy." *Id*. Rather, for Buckley, "it is [a judge's] job to give force and effect to the law, whether he agrees with it or not . . . . And if I consciously deviate from that body of law to do justice as I see it, I violate my oath of office and undermine the safeguards embodied in the Separation of Powers." *Id*.

religious requirements conflict with what "I think the Constitution means and requires, then my religious beliefs have to give way."[37] Applying this principle to his abortion jurisprudence, Brennan concluded that while "I wouldn't under any circumstances condone an abortion in my private life," such a decision would have "nothing to do with whether or not those who have different views are entitled to have them and are entitled to be protected in their exercise of them. That's my job in applying and interpreting the Constitution."[38] Thus, when prompted to discuss how his faith should influence his abortion jurisprudence, including his vote with the majority in *Roe v. Wade*, Brennan responded that the issue "never crossed my mind—never, not the slightest—that my faith had a damn thing to do with how I decided the abortion case."[39]

Perhaps more surprisingly, Justice Blackmun, the author of *Roe v. Wade*, albeit not a Catholic, indulged in the same justification for his abortion jurisprudence, when prompted by a letter from a Catholic priest and personal friend, who was disturbed by Justice Blackmun's abortion rulings. In response to his Catholic friend, Blackmun penned a letter that could easily be attributed to a number of Catholic judges: "[t]he Court's task is to pass only upon the narrow issue of constitutionality. We did not adjudicate that abortion is right or wrong or moral or immoral. I share your abhorrence for abortion and am personally against it."[40]

Producing an exhaustive list of Catholic judges who adhere to the Scalian view on separating religious belief from judicial duties is not the purpose of this Article.[41] Nevertheless,

---

[37] MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 9 (1998).
[38] SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 372 (2010).
[39] *Id*. at 372. Notably, Brennan did receive some unofficial Church censure for his pro-choice rulings. This came in the form of picketers outside of the annual Red Mass for Washington's lawyerly elite, angry letters from many Catholics, and "sporadic" calls for his excommunication. *Id*. at 376. No church official, however, recommended that he be denied communion. *Id*.
[40] LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 135 (2005).
[41] While producing this list is not the purpose of this paper, it should be noted that there are plenty of other interesting Catholic legal riffs on the Scalian view of separating ex officio from personal positions on matters before a court. *See, e.g.*, Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1520 (2011) ("[T]here is nothing contradictory about believing in natural law, on the one hand, but rejecting

in concluding this analysis, two final jurists merit consideration mainly because their similar positions on this issue were received with very different reactions. The first to consider is Justice Stephen Breyer, who, although he is not Catholic, suggested at his confirmation hearing that "if a judge has strong views on a matter such as the death penalty" that "might affect his decision in such a case," the judge might take "[himself] off of the case."[42] In a second instance, Breyer posited that if the law dictates one answer and your "subjective belief" dictates another, and "you cannot follow what you believe the law to be because of [this subjective belief], then don't try, don't try. You can remove yourself from the case."[43] Interestingly, Justice Breyer made these comments without raising the blood pressure of anyone among America's secular-minded intelligentsia, despite the fact that he noted that there could be a class of case from which he might remove himself as judge based on nothing more than some subjective belief.

While Justice Breyer was free to take one stance on conscience-based recusals for judges, the next Justice to face the scrutiny of the Senate Judiciary Committee discovered that his Catholic faith required him to give a very different answer. Chief Justice John Roberts, then an appeals court judge, learned this lesson the hard way after witnessing the controversy that emerged when Jonathan Turley, a law professor at George Washington University, wrote an opinion piece just before Roberts's confirmation hearings.[44] In his piece, Turley claimed that during a conversation with Senator Richard Durbin, Roberts "briefly lifted the carefully

---

judicial authority to enforce it, on the other."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Alito, J., Judge for the Third Circuit Court of Appeals) [hereinafter *Alito Statement*] ("[M]y obligation as a judge is to interpret and apply the Constitution and the laws of the United States and not my personal religious beliefs or any special moral belief that I have. . . . I have a particular role to play as a judge. That does not involve imposing any religious views that I have or moral views that I have on the rest of the country."); Noonan, *supra* note 25.

[42] *Excerpts from Senate Hearings on Supreme Court Nominee*, N.Y. TIMES, July 13, 1994, at A16.

[43] *Supreme Court Confirmation Hearing for Judge Stephen G. Breyer*: *Hearings Before the S. Judiciary Comm.*, 103rd Cong. (1994) (statement of Breyer, J.).

[44] Jonathan Turley, Op-Ed., *The Faith of John Roberts*, L.A. TIMES, July 25, 2005, *available at* http://articles.latimes.com/2005/jul/25/opinion/oe-turley25.

maintained curtain over his personal views" and "raised a question that could not only undermine the White House strategy for confirmation but could raise a question of his fitness to serve as the 109th Supreme Court justice."[45]

What was the controversial issue about which Roberts divulged too much? Although there were later disputes as to what was exactly said,[46] Turley claimed that, in a meeting with Senator Richard Durbin, Roberts was asked "what he would do if the law required a ruling that his church considers immoral."[47] Roberts, whom Turley described as "a devout Catholic," was apparently "nonplused" by the question and "according to sources in the meeting, answered after a long pause that he would probably have to recuse himself."[48] Turley flatly stated that Roberts's response was "the wrong answer" given that "[i]n taking office, a justice takes an oath to uphold the Constitution and the laws of the United States" and that therefore "[a] judge's personal religious views should have no role in the interpretation of the laws."[49] With these provocative conclusions, Turley opened a Pandora's Box of accusations and counter-accusations that revealed the intense debate that prevails on this matter.[50]

The controversy subsided after Roberts met with Senator John Cornyn, who asked Roberts about Turley's op-ed. After an interview with Roberts, Cornyn said, with regard to

---

[45] *Id.*

[46] In an editor's note published two days after Turley's op-ed, the *Los Angeles Times* asserted that "[a]ides acknowledged that a question about faith and public policy had been asked, and that Roberts had discussed recusals—but they said that the recusal answer wasn't in response to the question about faith." *Editor's Note*, L.A. TIMES, July 27, 2005, at B13, *available at* http://articles.latimes.com/2005/jul/25/opinion/oe-turley25/3. Turley, however, responded to the note and claimed that "it was [Senator] Durbin who gave him the original information in an on-the-record conversation." *Durbin Was Source for Column About Roberts*, WASH. TIMES, July 26, 2005 [hereinafter *Durbin Was Source*], *available at* http://www.washingtontimes.com/news/2005/jul/26/20050726-113120-2700r/. Turley then claimed that he confirmed this information with another source who had been present at the meeting. *Id.*

[47] Turley, *supra* note 44.

[48] *Id.*

[49] *Id.*

[50] For a summary of the controversy created by Turley's opinion piece, see David D. Kirkpatrick, *Skirmishes Over a Query About Roberts's Faith*, N.Y. TIMES, July 26, 2005, *available at* http://www.nytimes.com/2005/07/26/politics/politicsspecial1/26roberts.html.

ruling on cases that would force Roberts to contradict his faith, "[t]here is no conflict for Judge Roberts . . . He assured me that he would not have any difficulties ruling on such issues."[51] Roberts further assuaged Turley's concerns by testifying before the Senate Judiciary Committee that "[m]y faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don't look to the Bible or any other religious source."[52] With this polished bit of Senate testimony, Chief Justice Roberts provided what is likely to become the stock answer for any future Catholic judge elected to the federal bench.[53] If we take the Chief Justice at his word, it would appear that, unlike Justice Breyer, he falls into the same camp as jurists from Justice Brennan to Justice Scalia who privilege a duty to the Constitution over a duty to the Church.[54] Nevertheless, as will be discussed in the next Part, such a separation of religious and ex officio duties is unacceptable to the communion-denial movement, which puts the onus on judges and legislators to circumscribe the right to abortion.

[51] *See Durbin Was Source*, *supra* note 41.

[52] *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, (statement of John Roberts, Judge Court of Appeals for the District of Columbia) 109th Cong. (2005). Note that in contrast to Senator Cornyn's statement, Roberts does not explicitly state whether he would have trouble ruling on certain issues or whether he would recuse himself in certain situations; he only notes that when he does rule, he will not rely on religious authorities.

[53] Justice Alito seemed to have taken note and adhered to this type of response at his confirmation hearings. *See Alito Statement*, *supra* note 41.

[54] Granted, the analogy between Justice Breyer and Chief Justice Roberts is not perfect. It would fit better if Breyer had said something like "I will definitely recuse myself if forced to rule in a way that would violate the book of Rawlsian political ethics that I keep under my pillow and will never disobey." In the end, though, while Roberts's claim is less vague and could lead one to conclude that it is appropriate to outsource to another authority the task of determining what is and is not moral, trying to absolve Breyer and indict Roberts requires showing that there is something deeply wrong with beliefs derived through faith, as compared with beliefs derived merely though introspection. To this end, perhaps what drove much of the anger against Roberts's statement was not as much the fact that Roberts would recuse himself but rather concern about the authority he would rely on to make the decision.

II. Strengthening the Role of Religion in the Public Square: The Communion-Denial Movement

A. Catholic Duties in the Court: *Roe, Dred Scott,* and *Plessy*

> *In September 1960, [when] Sen. John F. Kennedy [spoke about his faith, h]e had one purpose. He needed to convince 300 uneasy Protestant ministers, and the country at large, that a Catholic like himself could serve loyally as our nation's chief executive. . . . [H]is speech left a lasting mark on American politics. It was sincere, compelling, articulate- and wrong. Not wrong about the patriotism of Catholics, but wrong about American history and very wrong about the role of religious faith in our nation's life. And he wasn't merely "wrong." His Houston remarks profoundly undermined the place not just of Catholics, but of all religious believers, in America's public life and political conversation. Today, half a century later, we're paying for the damage.*[55]

When Archbishop Charles Chaput delivered the above excerpted speech to a mostly Protestant congregation in the heart of Bible-Belt Texas, the symbolism of the event would have been lost on very few. Indeed, Chaput spoke almost fifty years to the day after Kennedy had delivered quite a different address to almost exactly the same type of audience. With this new anti-Kennedy approach, Chaput placed the challenge not just before all U.S. Catholics but before all Christians to unite, "in mind and heart and action, as Christ intended" in order to address the ills of this world.[56] Although the list of ills was long, Chaput identified abortion as the "the foundational human rights issue of our lifetime" and compared the passions inspired against the "legal killing of unborn children" with the "*visceral* hatred" the Ancient Romans felt toward the Carthaginians because of the Carthaginians tradition of sacrificing their infants to the pagan God Ba'al.[57] Chaput's language is important not only because of the jarring comparisons he makes between pro-choice advocates and ancients who engaged in human sacrifice but also because he argues that the way to combat this problem is by injecting more religious belief into U.S. politics

[55] Charles Chaput, *Christianity in American Public Life*, Mar. 1, 2010, *available at* http://www.catholicculture.org/culture/library/view.cfm?recnum=9262 (emphasis added).
[56] *Id.*
[57] *Id.*

and undoing the "wrong" hatched by President Kennedy half a century ago. Because Chaput paints the stakes in the debate as so high, it seems unlikely that judges or legislators can stay on the sidelines in a fight against the equivalent of ancient barbarities.

If Chaput has sketched the broad contours of how he envisions the Catholic pro-life cause, conservative Catholic legal commentators have linked the crusade against *Roe* to the ones waged against other unjust Supreme Court rulings, particularly *Dred Scott v. Sanford*[58] and *Plessy v. Ferguson*.[59] Indeed, both cases have a rich yet not widely considered connection to Catholic protests against slavery and segregation. They also provide pro-life activists with useful roadmaps for how to effectuate Chaput's mission in the legal realm.

President George W. Bush and his advisors quickly grasped the importance of such connections and applied them in President Bush's 2004 reelection campaign. One of the most interesting uses of this strategy came in the second presidential debate in President Bush's answer to the question, "[I]f there were a vacancy in the Supreme Court and you had the opportunity to fill that position today, who would you choose and why?"[60] Bush began with the unsurprising answer: "I would pick somebody who would not allow their personal opinion to get in the way of the law. I would pick somebody who would strictly interpret the Constitution of the United States." Then, in giving examples of judges who would not let personal opinion "get in the way of the law," Bush noted:

> Another example would be the *Dred Scott* case, which is where judges, years ago, said that the Constitution allowed slavery because of personal property rights. . . . That's a personal opinion. That's not what the Constitution says. The Constitution of the United States says we're all—you know, it doesn't say that. It doesn't speak to the equality of America.[61]

---

[58] 60 U.S. 393 (1857).
[59] 163 U.S. 537 (1896).
[60] Commission on Presidential Debates, *Debate Transcript*, October 8, 2004, http://www.debates.org/index.php?page=october-8-2004-debate-transcript.
[61] *Id*.

Granted, in his answer, President Bush was not the paragon of articulation we all know him to be. Yet even those attempting to understand the gist of the future president's remarks might have asked themselves why he would take the precious thirty seconds he had to present his position on Supreme Court nominations and spend much of it talking about his commitment *not* to appoint judges in favor of *Dred Scott*'s pro-slavery holding. But many viewers of the debate might not have been aware of the tremendous signaling power derived from a mention of *Dred Scott* to the pro-life community. Indeed, practically every prominent conservative Catholic public-intellectual has made the connection between *Roe v. Wade* and *Dred Scott*.[62] The analogies are too attractive to miss: just as *Dred Scott* denied the humanity of slaves, so too did *Roe* deny the humanity of the unborn; just as *Dred Scott* became a divisive issue that ultimately led the country to armed conflict, so too has *Roe* divided America; and just as *Dred Scott* was overturned, so too is it the great hope of the pro-life community that *Roe* will suffer a similar fate.

The *Dred Scott* allusion also puts greater pressure on Catholics who claim to be "personally opposed" to abortion, yet, as a matter of public policy, do not want to criminalize or restrict access to the procedure. Responding to such a position, Francis Cardinal George, Archbishop of Chicago, has drawn a comparison between such Catholics and Chief Justice

---

[62] *See, e.g.*, Peggy Noonan, *A Tough Roe: Will the Democratic Party be Abortion's Final Victim?*, WALL STREET J., Jan. 20, 2003, *available at* http://www.opinionjournal.com/columnists/pnoonan/?id=110002936 (calling *Roe* "as big a travesty as the Supreme Court decision on *Dred Scott*"); Michael Novak, *Deeply Held Feelings: The Pryor Controversy*, NATIONAL REVIEW ONLINE, Aug. 4, 2003, http://article.nationalreview.com/A/deeply-held-feelings/michael-novak ("[T]he current abortion regime of *Roe* v. *Wade* is as bad as, or even worse than *Dred Scott*, because it reduces the legal status of a whole class of Americans to a level less than human."); Justin Taylor, *An Interview with Robert George*, FIRST THINGS BLOG, (Jan. 22, 2010, 12:00 A.M.), http://firstthings.com/blogs/evangel/2010/01/an-interview-with-robert-p-george-on-roe-v-wade. (noting that George said "[j]ust as *Dred Scott v. Sanford*, the infamous decision protecting slavery, eventually fell, *Roe* will someday fall. It will not fall due to a civil war, as *Dred Scott* did, but rather under the pressure of scientific facts and the conscience of the American people"); George Will, *Roe v. Wade Backfire*, ABC NEWS, Jan. 19, 2006, *available at* http://abcnews.go.com/ThisWeek/story?id=132567&page=1 (calling Roe "the most imprudent act of judicial power since the *Dred Scott* decision"); *see also* Timothy Noah, *Why Bush Opposes Dred Scott*, SLATE, Oct. 11, 2004 (connecting similar arguments made by other commentators between *Roe* and *Dred Scott*).

Roger Taney, the (Catholic) author of the *Dred Scott* decision. As Cardinal George noted, while Justice Taney's act of freeing his own slaves made him "personally opposed" to slavery, the Justice's "support for the right of others to own slaves and to take their slaves into free territory makes us ashamed today. Yet, on the logic of those who today rationalize their support for legal abortion, he was merely 'pro-choice.'"[63] If abortion really is like slavery, then George's analogy has much force: how could you personally choose not to kill your unborn child yet defend your neighbor's choice to do so?

While claims such as Cardinal George's might be applauded by some pro-life activists, because the link to *Dred Scott* may lead others to believe that violence or civil war is needed to overturn *Roe*, many in the pro-life community have instead likened *Roe* to *Plessy v. Ferguson* and the larger struggle of African Americans for equality under the law.[64] A good example of the use of this conceit can be seen in the Manhattan Declaration, a social conservative's religiously inspired manifesto, which invokes the "exemplary and inspiring" words of Martin Luther King's Letter from a Birmingham Jail and the lesson to be learned that "just laws elevate and ennoble human beings because they are rooted in the moral law whose ultimate source is God Himself," while "[u]njust laws degrade human beings."[65] When faced with the prospect of adhering to unjust laws, the signers of the Manhattan Declaration note, "[t]hrough the centuries, Christianity has taught that civil disobedience is not only permitted, but sometimes required."[66] Addressing the age-old Bible passage on "rendering to Caesar," the signers state "[w]e will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to

[63] Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 10 (2003).
[64] For one example of the direct link made between *Plessy* and *Roe*, see Michael Kinsley, *What Abortion Debate? Why There is No Honesty About Roe*, SLATE, Nov. 18, 2005, http://www.slate.com/id/2130607.
[65] *Manhattan Declaration: A Call of Christian Conscience*, MANHATTANDECLARATION.ORG, Nov. 20, 2009, http://manhattandeclaration.org/the-declaration/read.aspx.
[66] *Id*.

Caesar what is God's."[67] The not-too-implicit reference lost on no one is that the unborn and the institution of marriage are two things that are uniquely possessed by God and are impossible to render to the state.

Similar to Cardinal George's analogy to *Dred Scott* and Justice Taney, the reference to Martin Luther King is an apt way to combat abortion fence-walking by Catholics, as it is reminiscent of the equivocations on civil rights issues made by the segregationist element of the Catholic Church. Indeed, much to the consternation of U.S. segregationists, Pope Pius XII, though not reacting directly to *Plessy*, made the Catholic case against the "separate but equal" principle that undergirded the legal opinion and noted in a 1939 encyclical that "[t]hose who enter the Church, whatever be their origin or their speech, must know that they have equal rights as children in the House of the Lord, where the law of Christ and the peace of Christ prevail."[68] Pius XII launched this theological condemnation of separate but equal, using principles of Catholic social teaching and the natural law, fifteen years before the Supreme Court would arrive at essentially the same conclusion in *Brown v. Board of Education*.[69]

Moreover, in seeking to effectuate Church policy on integration, New Orleans's Archbishop Joseph Rummel made national headlines when he announced that promoting segregation was not merely sinful but also merited excommunication.[70] This admonition even extended to those who opposed desegregation of Louisiana's public schools.[71] Rummel finally followed through on his threat on April 16, 1962 and excommunicated three Catholic segregationists who had thwarted implementation of his integrationist plan for Catholic

---

[67] *Id.*
[68] Pius XII, *Summi Pontificatus*, Oct. 20, 1939, *available at* http://www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_20101939_summi-pontificatus_en.html.
[69] 347 U.S. 483 (1954).
[70] For a summary of Rummel's integration efforts in Louisiana, see Diane T. Manning & Perry Rogers, *Desegregation of the New Orleans Parochial Schools*, 71 J. NEGRO EDU. 31 (2002).
[71] *Id*. at 33.

schools.[72] In the end, on September 4, 1962, Rummel, by then ailing and legally blind, witnessed his plan for desegregation come to partial fruition, when almost two hundred African-American school children crossed the picket lines and the raging crowds to attend an integrated parochial school.[73]

Keeping in mind this Catholic participation in the struggle for civil rights, it is easier to understand the campaign of some Catholic pro-life activists. They seek to challenge an institution they consider as odious as segregation or slavery, yet one which they believe they can undermine through continued and vociferous appeals to a higher authority. Such a strategy also stands in sharp contrast to the paradigm on church-state relations popularized by President Kennedy's historic speech on religion. Indeed, just as some have claimed that Kennedy's public wariness to follow Rome as a ploy to appease pro-segregation Protestants wary of papist efforts at integration,[74] so too could a pro-choice Catholic's position on abortion be cast in an equally problematic light.

B. The Problematic Standard of the Communion-denial movement

If abortion is as great an evil as slavery or segregation, when does a failure to act to restrict abortion rights trigger official Church censure? What degree of complicity in abortion is required in order to merit sanction? Should Justice Scalia, who has publicly insinuated that he could uphold abortion laws "in good conscience," be treated the same way as Justice Brennan, who joined the majority in *Roe*? Should the Church have denied Justice Taney communion for

[72] *Id*. at 62.
[73] *Id*. at 39-40; *see also* John W. O'Malley. *Excommunicating Politicians*, AMERICA, Sept. 27, 2004, *available at* http://www.americamagazine.org/content/article.cfm?article_id=3778 (recounting other instances of U.S. public figures risking excommunication).
[74] Some commentators suggest that Kennedy used his Texas speech at least in part to signal to segregationists that he could chart a course on segregation that was independent of the Church's stance on this issue. *See, e.g.*, STEPHEN CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 20 (1998).

his pro-slavery opinion in *Dred Scott*? One of the biggest problems with the communion-denial regime is that there are no clear answers to these types of questions. As will be argued in this Part, non-uniform adherence to the communion-denial regime and the arbitrary standard it invites leaves the system open to abuse.

The main problem with the communion-denial regime stems from a June 2004 directive from the U.S. Conference of Catholic Bishops (USCCB), which attempted to address what standard should be used when denying communion. As the directive suggested:

> The question has been raised as to whether the denial of Holy Communion to some Catholics in political life is necessary because of their public support for abortion on demand. Given the wide range of circumstances involved in arriving at a prudential judgment on a matter of this seriousness, we recognize that such decisions rest with the individual bishop in accord with the established canonical and pastoral principles. Bishops can legitimately make different judgments on the most prudent course of pastoral action. Nevertheless, we all share an unequivocal commitment to protect human life and dignity and to preach the Gospel in difficult times.[75]

Thus, with this order, the USCCB made grave sin in large part a function of geography.[76] Yet Canon Law 915, which, as noted above, is the basis for the communion-denial regime and which countenances communion denial only for those who "obstinately persist in manifest grave sin,"[77] seems a rule that should not be applied in such a non-uniform manner. Indeed, because of this decision—unchanged since adopted in June 2004—Catholics have endured a long litany of events that has politicized the most important and defining sacrament of their faith. A short list of these unfortunates might include: "wafer watch 2004," when the news media followed John

---

[75] U.S. Conference of Catholic Bishops, *Catholics in Political Life*, Catholic News Agency, June 18, 2004, *available at* http://www.catholicnewsagency.com/document.php?n=39 [hereinafter *Catholics in Public Life*].

[76] Notably, this delegation (or decentralization) of power is a well established part of Church history. Indeed, local episcopally mandated rules on fasting, which differed across Italy, inspired Saint Ambrose's now famous advice: "When I go to Rome, I fast on Saturday, but here [in Milan] I do not. Do you also follow the custom of whatever church you attend, if you do not want to give or receive scandal." OXFORD DICTIONARY OF QUOTATIONS 13 (Elizabeth Knowles, ed.). This admonition has of course entered contemporary parlance in the shortened form: "When in Rome, do as the Romans do." *Id*.

[77] *See* CODE OF CANON LAW *supra* note 6.

Kerry to the communion rail to see if he would be allowed to receive the sacrament in each American city he visited;[78] a bizarre quilt of communion rules in which pro-choice politicians can receive communion in, for example, Delaware, Los Angeles, and New York, but not in most of Colorado or parts of Kansas and Nebraska;[79] and, perhaps most perplexingly, the argument made by Archbishop Donald Wuerl, of Washington, D.C., that even if he believed in the communion-denial regime, he would have no authority to deny Nancy Pelosi communion, in part because such a decision would have to be made by her home pastor in San Francisco.[80] Needless to say, the above list of problems created by the 2004 decision should suggest, at the least, a revisiting of this topic, if only for the sake of creating a uniform standard.

While the non-uniform application of the communion denial standard creates confusion for the Catholic flock and politicizes the Eucharist, the broad discretion accorded communion deniers might raise concerns about the ability of unelected bishops to culturally blackmail elected or democratically appointed public servants. This is the exact type of perception that John F. Kennedy had to fight against fifty years ago, which ultimately formed the backdrop of his famous speech on religion. Consider, as just one concrete example of this problem, the case of Senator Bob Casey, Jr., a self-identified pro-life U.S. Senator, who openly hopes that the Supreme Court will overturn *Roe* so as to allow for the adoption of legislation designed to drastically limit the use of abortion.[81]

---

[78] *See, e.g.*, Ellen Goodman, *Putting Kerry on the 'Wafer Watch'*, BOSTON GLOBE, Apr. 15, 2004, *available at* http://www.boston.com/news/politics/president/articles/2004/04/15/putting_kerry_on_the_wafer_watch/.

[79] *See* Tbls. 1 & 2, *infra*.

[80] Tom McFeely, *Archbishop Wuerl on Pelosi*, NAT'L CATH. REG., May 11, 2009**,** http://www.ncregister.com/blog/archbishop_wuerl_on_pelosi/. Wuerl made this argument in the alternative: he claimed that being a pro-choice politician does not warrant communion denial; but even if it did, he had no say in making this determination because Pelosi was not his parishioner.

[81] *See, e.g.*, Carrie Budoff, *Casey's Clear View on Abortion Could Muddy Campaign Waters*, PHILA. INQUIRER, Dec. 18, 2005, at A1.

Even this decidedly pro-life position was not satisfactory for Scranton Bishop Joseph Martino. In a series of public letters to Casey, Martino took issue with two of Senator Casey's positions: his support for the nomination of Kathleen Sebelius, the pro-choice (and Catholic) former Kansas governor, as Secretary of Health and Human Services, and his failure to support an amendment to continue the so called "Mexico City restriction," which bars U.S. foreign aid for organizations that promote family planning and—in some cases—access to abortion.[82]

Martino's quarrel with Casey on both of these issues is particularly instructive, as Casey took pains to justify that his stance either had nothing to do with his position on abortion or was necessitated because of the greater good that would come from adopting such a position. First, Casey defended his vote for Sebelius both on grounds that he thought she was a good administrator, regardless of her abortion position, and that the country could not delay in filling this cabinet position, given the real threat of an avian flu epidemic in January 2009.[83] Similarly, Casey supported rescinding the Mexico City restriction by arguing that it would lead to a *reduction* of the number of abortions in the third world, through increased access to family planning.[84]

Nevertheless, Martino found these justifications unacceptable. First, Martino rejected—without explanation—Casey's exigent circumstances argument on the Sebelius nomination.[85] He then dismissed Casey's family-planning argument on the Mexico City restriction, reasoning that

---

[82] Letter from Joseph Martino, Bishop of Scranton, to Robert Casey, United States Senator, (Feb. 10, 2009) [hereinafter *Martino Letter*], *available at* http://www.catholic.org/politics/story.php?id=32056; *see also* Borys Krawczeniuk, *Bishop Intensifies Message to Casey*, SCRANTON TIMES-TRIB., Apr. 30, 2009, http://thetimes-tribune.com/news/bishop-intensifies-message-to-casey-1.6085#axzz1EAcMndJV (providing a news account of the controversy).

[83] *See* Krawczeniuk, *supra* note 82.

[84] Casey's spokesman Larry Smar was widely quoted as saying that "[c]urrently, more than half of all unintended pregnancies end in abortion. Very simply, fewer unintended pregnancies means fewer abortions." Fred Lucas, *Pennsylvania Bishop Warns Sen. Casey on His Support for Ending Mexico City Policy*, CATH. NEWS SERV., Mar. 2, 2009, http://cnsnews.com/news/article/pennyslvania-bishop-warns-sen-casey-his-support-ending-mexico-city-policy.

[85] *Id.*

because all use of non-natural contraception is "intrinsically evil," it cannot be a justifiable means of reducing abortions.[86] Martino concluded a second open letter to Casey by mentioning that "future determinations will be made regarding whether Sen[ator] Casey is worthy to receive Holy Communion," and asking Casey "to reflect on his actions and ask himself if he should receive the sacrament."[87]

In the end, Martino's fiery rhetoric on abortion might have cost him his job: in March 2009, Martino retired twelve years before the required age of retirement for bishops, claiming to suffer from insomnia and other mental conditions that precluded his continued work as a Church leader.[88] There are few that would venture to call such a resignation expected or typical; there are plenty who believe that Martino was forced out in part because of his strident stance on pro-choice politicians.[89]

Nevertheless, Martino's position toward Casey serves to highlight several of the problems of having no clearly articulated metric for what constitutes the degree of complicity in abortion sufficient to warrant Church censure. First, without any limiting principle, Martino derived a standard that gave him an effective veto over Senator Casey on any subject Martino could even remotely connect to abortion. If Martino could exert this power to influence a U.S. Senator's vote for Secretary of Health and Human Services, why not for the myriad of other political appointees subject to Senate approval who presumably at one point in their lives had to make a decision on abortion? This awesome power raises serious problems even for officials

---

[86] *Martino Letter*, *supra* note 82.
[87] *Id*.
[88] Laura Legere, *Vatican Accepts Martino's Resignation, Interim Leaders Announced*, SCRANTON TIMES-TRIB., Aug. 31, 2009, *available at* http://thetimes-tribune.com/news/vatican-accepts-martino-s-resignation-interim-leaders-announced-1.218627.
[89] *See* Amy Sullivan, *Was an Anti-Abortion Bishop Too Outspoken?*, TIME, Sept. 2, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1919969,00.html (suggesting that Martino was forced out because of his outspoken views on abortion).

whose public positions are consistently pro-life—be they judges or legislators—if their credentials do not match up with the specific requirements imposed by their bishops.

Second, Martino's position should also raise alarm for Catholics and non-Catholics alike, who do not want their politicians to be seen as being forced to unconditionally acquiesce to the demands of an unelected religious authority. Indeed, Catholics should perhaps be most fearful of this problem, as it is precisely the perception against which President Kennedy had to battle to become President. Third, Martino's focus on just one type of public policy sin begs the question of why the Church should not also start denying communion to other sorts of Catholic public figures who have acted contrary to Church teaching. Arizona's Sherriff Joe Arpaio and Justice Scalia would be just two in the long list of Catholic public figures who might incur communion denial for their public positions on immigrant rights and the death penalty, respectively.[90]

Finally, the communion-denial regime, by forcing Catholics to choose between enacting what they consider good public policy and adhering to episcopal demands, could hinder Catholic participation in the political process. Perhaps the late Avery Cardinal Dulles made this point best when he observed, just before his death, that the problem with communion denial is that "Catholic politicians will have to choose between their faith and their ministry in the public arena. Eventually, Catholics will not choose politics as a career, and we will lose our place at the

[90] *Compare* Cardinal Roger Mahony, *Arizona's Dreadful Anti-Immigrant Law*, CARDINAL ROGER MAHONY BLOGS L.A., (Apr. 18, 2010, 7:40 AM), http://cardinalrogermahonyblogsla.blogspot.com/2010/04/arizonas-new-anti-immigrant-law.html ("I can't imagine Arizonans now reverting to German Nazi and Russian Communist techniques whereby people are required to turn one another in to the authorities on any suspicion of documentation."), *and* The Holy See, *The Catechism of the Catholic Church*, ¶ 2267, *available at* http://www.vatican.va/archive/catechism/ccc_toc.htm. (noting that the acceptable uses of capital punishment are very rare, if practically nonexistent) *with* Press Release, Maricopa County Sherriff's Office, Tent City Celebrated 17th Anniversary (July 20, 2010), *available at* http://www.mcso.org/include/pr_pdf/Tent%20City%2017%20News%20Release.pdf. (quoting Arpaio as enthusiastically asserting that his jail, comprised of non-climate controlled tents in the Arizona desert, will always have "enough room for violators of SB1070"), *and* Scalia, *supra* note 20 (describing the Church position on the death penalty as "wrong"). *But see Archbishop's Address*, *supra* note 5 (noting that other social evils are "important but less foundational social issues" and noting the need to end abortion as taking priority over campaigns on other social causes).

table and our voice in the public arena."[91] Certainly, the purpose of this Part is not to suggest that the Church should have no voice in the public square. Nevertheless, it seems clear from the above that there are definite problems with the current communion-denial regime.

III. The Duties of Judges and Legislators in Their Public Personas

Having considered Senator Casey's problems with the communion-denial movement, the question might arise: why do pro-choice legislators, and not judges, receive the brunt of Church censure on abortion, if their positions are so similar? In response, some commentators have distinguished a Catholic judge upholding an abortion law from a Catholic legislator voting for an abortion law by arguing that the legislator—unlike the judge—has a *choice* in how he or she votes..[92]

This Part critiques such a position in two ways. First, I will suggest how the "choice" distinction leaves unexamined the question of whether judges have a choice in *how* they interpret the Constitution, and if judges do have this choice, whether legislators have a similar constitutionally-based defense to pro-choice votes. Second, I will highlight a number of public Church pronouncements which imply that neither legislators nor judges have such a defense. To the contrary, the Church seems to suggest that there is a constitutional *obligation* to protect life from conception and rejects any method of constitutional interpretation that yields pro-choice

[91] Patrick Verel, *Cardinal Dulles' Legacy Debated at Forum*, FORDHAM UNIVERSITY PRESS OFFICE, http://www.fordham.edu/Campus_Resources/eNewsroom/topstories_2019.asp (last visited Mar. 1, 2011).

[92] I have outlined this position, which is seemingly advocated by Justice Scalia in Part I, *supra*. Many other Catholic legal commentators have cited Justice Scalia's position in arriving at essentially the same conclusion. *See, e.g.*, Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211, 241 (2007) (supporting and citing Scalia's position and justifying a decision of a judge to join or draft a "pro-choice" ruling based on the judge's interpretation of the Constitution); Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L.J. 221, 248-49 (2006); Stephen F. Smith, *Cultural Change and "Catholic Lawyers"*, 1 AVE MARIA L. REV. 31, 36-44 (2003).

outcomes. Thus, it is unsurprising that Church leaders might charge judges and legislators with fulfilling what is a religious and constitutional duty to restrict abortion rights.

A. Constitutional Absolution for a Pro-Choice Vote?

If a judge bears no moral blame for interpreting the Constitution to guarantee a right to abortion, is a legislator similarly absolved if she employs the same reasoning? To examine this issue more concretely, consider the abortion-rights voting record of Representative David Obey of Wisconsin and the grounds upon which he was denied communion by his local bishop. Obey's episcopal problems present a good case study to examine communion denial, not only because of the stance Obey took on abortion, but also because Obey appears to be one of the first politicians targeted by the communion-denial movement[93] and was in fact censured by the bishop, Raymond Burke, largely seen as the intellectual architect of the communion-denial regime.[94]

In November 2003, Burke sent Obey a letter—a seemingly final one in a series—demanding that Obey refrain from receiving communion because of two "pro-choice" positions that Obey had taken in Congress. Specifically, Burke faulted Obey for his failure to prohibit female members of the armed services from receiving abortions on military bases and Obey's vote to support embryonic stem-cell research.[95] In response, Obey wrote what ultimately became

[93] Obey was one of the first Catholics denied communion as part of a concerted nationwide movement targeting a number of pro-choice Catholics, which gained notoriety during (or in reality just before) the 2004 presidential election. *See Politicians Must Balance Faith with Constituent Views*, WISCONSIN STATE JOURNAL (Madison, WI), Dec. 14, 2003, at B1 (suggesting that Burke's moves were part of a larger strategy organized by the Virginia-based American Life League (ALL), which created a list of 400 Catholic lawmakers and politicians across the country, including fourteen politicians from Wisconsin as meriting reprimand for their pro-choice positions on abortion). Nevertheless, by my estimation, the first American politician to ever be denied communion for her stance on abortion was Lucy Killea, a California State Senator, who was first denied the sacrament in 1989. *See, e.g.*, Ari L. Goldman, *Legislator Barred From Communion*, N.Y. TIMES, Nov. 17, 1989, at A1; Rita Gillmon, *Brom Takes Role as Bishop of Diocese*, SAN DIEGO UNION-TRIBUNE, July 11, 1990, at B1. Importantly, Burke's communion-denial movement was national in scope, while Killea seems to have been targeted by one bishop acting on his own accord.

[94] For a full discussion of the movement's history and Burke's rule in its development, see Uelmen, *supra* note 4.

[95] David R. Obey, *My Conscience, My Vote*, AM. MAG., Aug. 16, 2004, *available at* http://www.americamagazine.org/content/article.cfm?article_id=3708.

a controversial[96] reflection in *America Magazine*, a Catholic weekly. In this piece, Obey acknowledged agreeing with "my church that abortion in most cases is wrong" yet also noted that "the Supreme Court has ruled in numerous cases that there are limits to what government can constitutionally do to limit a woman's range of choices in determining whether to have an abortion."[97] In balancing his "respect" for his "religious values" with his "respect for the constitutional processes of this American democracy," Obey came to the following conclusion:

> I do not believe that a woman has an absolute constitutional right to determine whether she might have an abortion at any time during her pregnancy. But neither do I believe it is constitutional—or enforceable—in this society to require a woman to carry a pregnancy to full term if she has been raped or if there is a risk to her life or her health. In such cases, while I would hope a woman makes a choice against abortion, under our Constitution the choice is not mine. It is not any bishop's. It is hers.[98]

Obey's rationale for his votes on abortion legislation suggests that while he sees it as his duty to support laws that he believes are good public policy, he must weigh that support against whether he considers the law in question to be constitutional. For Obey, the Supreme Court is not the only institution that vindicates or protects constitutional rights. He also has a role in this process.

If we accept that legislators such as Obey also occupies this role, then there is less of a difference between the justifications that judges and legislators offer for ex officio positions on abortion. Take, as just one example, how Justice Scalia and Representative Obey would each react to the following hypothetical legislation, which Professor Robert George considered in asking a question at a Republican primary debate earlier this year:

> Many believe that we need a constitutional amendment to overturn *Roe v. Wade*. However, Section Five of the Fourteenth Amendment expressly empowers the Congress, by appropriate legislation, to enforce the guarantees of due process and

[96] Obey's reflection was apparently too provocative a challenge to the Catholic orthodoxy and in part formed the basis of a later order, issued by the Vatican's Congregation for the Doctrine of the Faith, mandating the ouster of the editor of *America Magazine*. *See, e.g.*, Laurie Goodstein, *Vatican Is Said To Force Jesuit Off Magazine*, N.Y. TIMES, May 7, 2005, at A1.
[97] *Id*.
[98] *Id*.

> equal protection contained in the Amendment's first section. As someone who believes in the inherent and equal dignity of all members of the human family, including the child in the womb, would you propose to Congress appropriate legislation, pursuant to the Fourteenth Amendment, to protect human life in all stages and conditions?[99]

As was discussed above,[100] Justice Scalia would presumably reject this due-process based argument prohibiting all access to abortion and enjoin the enforcement of such a law, if it were challenged in court.[101] On different grounds, Obey would vote against this same legislation, in order to protect what he believes is a constitutional right to abortion. If Obey were a judge, Scalia would find legal—but not necessarily moral—fault in Obey's position.

Yet in opposing this legislation, both Scalia and Obey would act in accord with the oath they took to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same."[102] Indeed, Justice Brennan forcefully made this same point, when asked at his confirmation hearings how he could

---

[99] Robert George, *Reflections of a Questioner: The Palmetto Freedom Forum Revisted*, PUBLIC DISCOURSE, Oct. 31, 2011, http://www.thepublicdiscourse.com/2011/10/4055. This view of the constitution seems in accord with the view of at least the Archbishop of Chicago, Francis Cardinal George. *See* Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 8 (2003) ("But it seems to me, admittedly a nonlawyer, that the Constitution is *not* silent [on abortion]. The Constitution expressly protects the right of all 'persons' to the equal protection of the laws, including the laws against homicide. If, however, as science discloses, philosophy argues, and faith confirms, unborn human beings *are* "persons," then their rights, too, are protected.") (internal citations omitted).

[100] *See* Part I, *supra*.

[101] Justice Scalia might even decline to reach the merits on the due process question, citing *City of Boerne v. Flores*, 521 U.S. 507 (1997), for the proposition that Congress is sharply limited in its powers under Section 5 of the Fourteenth Amendment to remedy conduct that the Court itself has defined as unconstitutional. *Cf.* Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 165 (1997) (presenting this as one possible reading of *Boerne* and suggesting that the important question for the Court in *this case* seems to have been" not whether Congress was enforcing the intended protections of the Fourteenth Amendment but rather whether it was giving proper respect to the interpretive authority of the Court itself"). On this read of *Boerne*, Justice Scalia might dismiss the case on the grounds that Congress exceeded what the Court had previously recognized as a due process right to life. Nevertheless, it would appear that Professor George, among others, believes that *Boerne* does not foreclose on the Court engaging in a sort of constitutional dialogue with Congress, in which Congress registers its discontent with the Court's interpretation of the Constitution (in this case the *Roe* holding) by passing legislation, which in turn triggers the Court's decision to reconsider its earlier ruling. *Cf. id*. at 172 (presenting this as an alternative reading of Congress's powers that may survive *Boerne*).

[102] UNITED STATES HOUSE OF REPRESENTATIVES, FREQUENTLY ASKED QUESTIONS, *available at* http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Dec. 23, 2011) (providing the text of the oath of office); UNITED STATES SUPREME COURT, TEXT OF THE OATHS OF OFFICE FOR SUPREME COURT JUSTICES, *available at* http://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx (last visited Dec. 23, 2011).

abide by his judicial oath in cases where "matters of faith and morals" got mixed with "matters of law and justice."[103] In response, Justice Brennan said:

> Senator, [I took my] oath just as unreservedly as I know you did . . . . And . . . there isn't any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.[104]

Similar to Justice Brennan, Justice Scalia, as one of the Justices who joined Justice Kennedy's majority opinion in *City of Boerne v. Flores*,[105] recognized that Congress has a legislative duty to vet unconstitutional legislation by voting against it. As the Court reasoned, "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[106] Indeed, on the majority's reasoning in *Boerne*, by voting against laws that he believes will unconstitutionally curtail an abortion right, Obey could vindicate important congressional interests and ensure that the Court continues to "afford Congress the presumption of validity its enactments now enjoy."[107]

In this light, then, Justice Scalia may be closer than he cares to admit to some Catholic lawmakers in his understanding of how a public actor's constitutional duties interact with his or her religious ones. If you accept the premise that any genuine interpretation of the Constitution can absolve the interpreter of moral blame, then it is difficult to see that there are grounds for

---

[103] *Nomination of William Joseph Brennan, Jr.: Hearings Before the S. Comm. on the Judiciary*, 85th Cong., 34 (1957) (statement of Sen. Orrin Hatch).
[104] *Id.* (statement of Brennan, J.).
[105] 521 U.S. 507 (1997). Justice Scalia concurred in the judgment, mainly to critique a position advanced by Justice O'Connor in dissent. 521 U.S. at 537-44 (Scalia, J. concurring).
[106] *Id.* 535. Professor Dawn Johnsen originally made this same connection between abortion rights and *Boerne*. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 DUKE L. REV. 105, 113, n.34 (2004).
[107] 521 U.S. at 535.

condoning one state actor's effort to vindicate a constitutional right through judicial review and indicting another for using her legislative powers to achieve the same end.

Granted, there are instances where a legislator does have a type of discretion not accorded to a judge. A good example of this problem for Obey might be his votes in favor of embryonic stem-cell research, given that there is no plausible "constitutional right" to perform such research.[108] Nevertheless, in those circumstances where Catholic politicians vote to protect an abortion right or are asked about their position on abortion, it might make sense to articulate their position on strictly constitutional grounds. At the least, this seems like a better option than the current justification that pro-choice Catholic politicians offer, which normally involves an inapposite reference to Augustine or Aquinas and provokes the ire of conservative Catholics more than willing to correct the imprecise exegesis.[109] Indeed, beyond highlighting the overlap between the motivations of judges and lawmakers in voting for (or ruling on) specific legislation, this strategy serves as a reminder that the Supreme Court—a majority Catholic institution, with a

[108] Interestingly, the claim that such research always constitutes the destruction of innocent life, while a closed issue to many Catholics, is not so unequivocally accepted by some Catholic ethicists, who note that the process of "twinning," which can occur after an embryo is formed, can affect how the embryo develops and has implications for whether one considers a recently fertilized embryo human. *See, e.g.*, M. Cathleen Kaveny, *Diversity and Deliberation: Bioethics Commissions and Moral Reasoning*, 34 J. REL. ETHICS 312, 332 (2006) (citing Paul Ramsey, *Abortion: A Review Article*, in THREE ON ABORTION 13 (Ramsey, ed. 1978)) (noting that there is "significant perplexity about the status of the early embryo" and citing Ramsey as someone who "grappled" with the fact that "before the window for twinning and recombination closed, the embryo was not sufficiently individuated to count as a human being").

[109] *See, e.g.*, Amy Sullivan, *Does Biden Have a Catholic Problem?*, TIME, Sept. 13, 2008, *available at* http://www.time.com/time/politics/article/0,8599,1840965,00.html (noting the episcopal rebuke that Biden endured after he attempted to justify his pro-choice votes through reference to Aquinas' idea that a fetus does not gain a soul until after the "quickening," an event which occurs forty days after conception); Press Release, Archdiocese of Denver, On the Separation of Sense and State, Aug. 25, 2008, *available at* http://www.archden.org/images/ArchbishopCorner/ByTopic/onseparationofsense%26state_openlettercjc8.25.08.pdf (criticizing Nancy Pelosi for her suggestion that there had been competing perspectives on the abortion question over the course of the Church teaching, including a competing perspective advanced by Augustine). *But see* John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 14 (John T. Noonan, Jr., ed. 1970) (noting numerous Catholic theologians, beyond Augustine and Aquinas, who have posited different positions on when life begins).

majority of members appointed by presidents vowing to appoint Justices willing to overturn *Roe*—has continued to uphold the right to abortion.[110]

B. A Catholic and Pro-Life Interpretation of the Constitution?

While adhering to a constitutionally-based stance in favor of pro-choice legislation might take some pressure off of the pro-choice Catholic legislator, it is less likely to absolve the legislator as it is to invite a new type of censure for a judge. Indeed, there is good reason to believe that the Church itself has rejected any distinction between the duties of judges and legislators. Rather, a sampling of recent ecclesiastical directives on abortion from both Washington and Rome suggests that the Church places equal responsibility on both judges and legislators in limiting access to the procedure. First, consider the view of the heads of the U.S. Conference of Catholic Bishops (USCCB) Pro-Life Committee, who recently asserted:

> [T]he [Supreme] Court's decision in *Roe* denied an entire class of innocent human beings the most fundamental human right, the right to life. In fact, the act of killing these fellow human beings was transformed from a crime into a "right," turning the structure of human rights on its head. *Roe v. Wade* is a clear case of an "intrinsically unjust law" we are morally obliged to oppose. Reversing it is not a mere political tactic, but a moral imperative for Catholics and others who respect human life. [111]

In a similar vein, given that *Roe* is viewed as an "unjust law" that all Catholics seemingly have a moral imperative to overturn, it is not surprising that the USCCB deems a jurist qualified to sit

[110] For the argument of how the current Roberts court has voted to continue to defend abortion rights, see Part V.I., *infra*.

[111] *Joint Statement by Cardinal Justin Rigali, Chairman, Committee on Pro-Life Activities and Bishop William Murphy, Chairman, Committee on Domestic Justice and Human Development*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, (Oct. 21, 2008), *available at* http://www.nccbuscc.org/prolife/Rigali-Murphy-Joint-Statement.pdf [hereinafter *Joint Statement by Rigali and Murphy*].

on the high court as one who "pre-eminently[] support[s] the protection of human life from conception to natural death, especially of those who are unborn . . . ."[112]

The Vatican itself seems to have echoed the position of the USCCB. In a press release issued after Pope Benedict met with House Speaker Nancy Pelosi, the Vatican announced that "all Catholics, and especially legislators, *jurists* and those responsible for the common good of society [are required] to work in cooperation with all men and women of good will in creating a just system of laws capable of protecting human life at all stages of its development.[113] As Professor Douglas Kmiec has noted,[114] there would have been nothing novel about the above recommendations on life issues, but for the addition of the word "jurists" to the normal litany of public figures called on to protect the unborn. This inclusion, which Kmiec insinuated was an error,[115] seems difficult to so easily discount, especially in light of the USCCB's prior statements on the matter.

Finally, these ecclesiastical positions find support in the work of a number of Catholic legal commentators, who have argued that the framers and amenders of the Constitution intended that the document protect rights recognized as fundamental in the natural law, including the right to life from conception.[116] Indeed, if the Constitution is grounded or inextricably linked to the

---

[112] Press Release, U.S. Conference of Catholic Bishops, USCCB Head Writes President Bush on Supreme Court Vacancy (July 6, 2005), http:// www.usccb.org/comm/archives/2005/05-155.shtml; *see also* Kalscheur, *supra* note 92, at 258 (noting this position of the USCCB but discounting it on the grounds that it ignores the fact that the duty to protect human life from conception may not be rooted in the U.S. Constitution and therefore may not be an "appropriate source[] for judicial—in contrast to legislative—decision making").

[113] John-Henry Westen, *Pelosi Spin on Meeting with Pope Dramatically Different From Vatican Statement*, LIFESITENEWS.COM (Feb. 18, 2009), http://www.lifesitenews.com/ldn/2009/feb/09021801.html (emphasis added).

[114] Douglas Kmiec, *Catholic Judges and Abortion: Did the Pope Change the Rules?*, TIME, Feb. 20, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1880977-1,00.html.

[115] *Id*.

[116] Indeed, Clarence Thomas, perhaps best popularized this view of the Constitution, at one point claiming that resort to the natural law was essential to the defense of American liberty. *See* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POLICY 63, 63-64 (1989).("[N]atural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review -- a judiciary active in defending the Constitution, but judicious in its restraint and moderation."). Thomas later retreated from this view

natural law, then the Fourteenth Amendment's guarantee against state-action depriving someone of "life, liberty, or property"[117] can become a means of creating a constitutional mandate to ban all abortion. Professor George, adhering to this view, reached the following conclusion:

> As a matter of indisputable scientific fact, the child in the womb is a living human being. As a matter of moral truth, *deeply embedded in our legal and constitutional traditions*, all human beings are persons. Thus, by the clearest logical implication, the national government is empowered and *obligated* by our Constitution to ensure that unborn human persons are equally protected in their most fundamental right---the right to life.[118]

Although there is disagreement among conservative Catholic legal commentators as to whether the Constitution "obligates" legislators or judges to be the guarantors of rights derived through the natural law,[119] and Professor George himself equivocates on this point,[120] the proposition that the Fourteenth Amendment could (or should) be interpreted to protect life at conception is one that enjoys support among conservative Catholic thinkers and prelates.[121]

These recent Church promulgations, and the legal analysis that supports them, could put Justice Scalia's position at odds with the Church. Not only do leading Catholic thinkers dispute

---

during his Supreme Court confirmation hearings. *See, e.g.*, Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 122 (1995) (narrating Thomas's changing positions on natural law at his confirmation hearings).

[117] U.S. CONST. amend. XIV, § 2.

[118] Robert George, *Governor Perry, the 10th Amendment, and the 14th*, MIRROR OF JUSTICEBLOG (July 30, 2011, 6:45 PM), http://mirrorofjustice.blogs.com/mirrorofjustice/2011/07/governor-perry-the-10th-amendment-and-the-14th.html (emphasis added). Professor George originally made these remarks in a press release issued as a reaction to Republican Presidential candidate Rick Perry's contention that if *Roe v. Wade* were overturned, then determining whether or not to offer legalized abortion would be an issue left up to the states, under the Tenth Amendment. *Id*.

[119] *Compare, e.g.*, Stephen M. Krason, *Constitutional Interpretation, Unenumerated Rights, and the Natural Law*, 1 CATH. SOC. SCI. REV. 20, 25-26 (1996), *available at* http://www.catholicsocialscientists.org/CSSR/Archival/1996/1996_020.pdf (arguing that the founders' intent was to have judges rely on the natural law in their decision making and citing to the Ninth Amendment and a series of English common law cases, of which the framers were aware in 1789, in support of this position), *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 66 (1990) ("I am far from denying that there is a natural law, but I do deny both that we have given judges authority to enforce it and that judges have any greater access to that law than do the rest of us."). Bork was not Catholic when he wrote *The Tempting of America* but has since converted: I will assume he always knew in his heart that he was Catholic.

[120] *See* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001) (suggesting that commentators who reject the idea that judges must use the natural law in deciding cases "are nearer the mark" but declining to articulate his precise position or why, for example, such commentators are not "right on the mark").

[121] *See, e.g.*, George, *supra* note 120; Krason, *supra* note 119; Cardinal George, *supra* note 63.

Scalia's contention that the Constitution is "silent" on abortion,[122] it is also unclear whether the Church would absolve a judge of any moral blame for failing to adhere to an interpretation of the Constitution that restricts access to abortion. Further, on this latter point, because of the loose standard on communion denial examined above,[123] there seems to be nothing to stop a bishop from acting unilaterally to deny communion to a judge for not adhering to a "pro-life" interpretation of the Constitution, as long as the bishop himself adjudged the denial to be "prudent."[124]

C. How Catholic Judges Should Rule on Abortion Rights

If judges' decisions—especially on abortion rights—also carry moral consequences, how should they act when they face the prospect of upholding abortion jurisprudence? On this issue, there are several schools of thought, which can be seen, in part, as a function of the degree and kind of civil disobedience different commentators think necessary to force change on abortion. Although there is no consensus on which path among these should be followed, the following choices seem to be a representative sample of the positions suggested by advocates in the past.[125]

1. Recusal or Resignation

The recusal and resignation positions have already been sketched throughout this Article. The reasoning behind taking such positions is fairly straightforward. As Robert George has noted, "[i]f [a judge] can give judgment according to immoral positive law without rendering

[122] *Cf.* Part I, *supra* (analyzing Scalia's view on this matter in greater detail).
[123] *See* Part II.B, *supra.*
[124] *See Catholics in Public Life*, *supra* note 75. Of course, the real check on bishops taking such action against judges might be that they fear ending up like Bishop Martino: out of a job for striking too strident a tone on abortion. *Cf.* Part II.B, *supra* (detailing Martino's position and the fact that he was forced into early retirement). Indeed, public discomfort with strident views on abortion may play an important part in an individual bishop's decision about whether a decision to deny communion is prudent or not.
[125] Again, note that there is no consensus on whether failing to take one of these positions would trigger automatic communion denial. Nevertheless, no such consensus is needed, as the decision lies with the individual bishop and is merely a matter of what he thinks is "prudent." *Id.*

himself . . . complicit in its immorality, and without giving scandal, then he may licitly do so (though he may also licitly recuse himself). If not, then he must recuse himself."[126] The question of what constitutes complicity sufficient to require recusal is a lively source of debate among Catholic lawyers and judges.[127] Revisiting this debate is outside the purview of this Article, most importantly because the decision of what constitutes complicity, at least under the communion-denial regime, rests solely with the bishop.

Yet recusal seems an all-too-convenient way out of this moral dilemma. Indeed, if you believe that the system over which you adjudicate allows for the killing of the innocent, do you really absolve yourself of all sin by forcing someone else to sign the death warrant? Abortion-rights advocates are also wary of recusal, particularly in judicial bypass cases, as recusal does violence to the efficiency of the judiciary by reducing access to judges willing to recognize a constitutional right.[128]

Given the problems associated with recusal, Justice Scalia's suggestion, that resignation is the better solution, seems immediately more refreshing. Scalia appears to opt for resignation over recusal because he believes that a judge cannot "ignor[e] duly enacted, constitutional laws" as he has "taken an oath to apply the laws and has been given no power to supplant them with

---

[126] Letter from Robert George to Sanford Levinson, cited in Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1076 n.85 (1990).

[127] *See* sources cited *supra* note 10; *see also* Coney & Garvey, *supra* note 9 (applying the same analysis in the context of the death penalty); Noonan, *supra* note 25, at 767 (providing a lengthy discussion of when complicity in the death penalty requires recusal); Pryor, *supra* note 27, at 358-61 (applying a similar analysis primarily in the context of the death penalty and abortion); Eric Parker Babbs, Note, *Pro-Life Judges and Judicial Bypass Cases*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 473, 501 (2008) (discussing when a judge could be sinfully complicit in abortion).

[128] Such has been the situation in many adamantly pro-life areas of the United States, where minors need authorization from a judge to receive an abortion, yet, for religious reasons, no judge is willing to authorize the procedure. *See* Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at A21. In such circumstances, an additional (possibly unconstitutional) burden for access to abortion might be created for the minor. *See* Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions To Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869 (2007) (noting that there is incentive even for conservatives to maintain access to some sort of pro-choice judge, so as not to invite a constitutional challenge to an entire judicial regime that might be seen as creating an undue burden to abortion access).

rules of his own."[129] Presumably, by opting for recusal, by stating "I will not rule on this issue," Scalia believes that a judge has taken a step toward supplanting the system. Granted, Scalia discussed resignation in the context of the death penalty, yet the same principle seems equally applicable to judges and abortion.[130] Resignation could even be seen as the first step in attempting to further true democratic change on an immoral (yet legal) practice. As Scalia has noted, "[if the judge] feels strongly enough, he can go beyond mere resignation and lead a political campaign to abolish the death penalty—and if that fails, lead a revolution. But rewrite the laws he cannot do."[131]

Scalia's stance could also have appeal both to those who highly value strict adherence to the rule of law and to those who value appeals to religious principles. First, in terms of the positive law, this position can be seen as a recognition that the judge will not erode the legitimacy of the judicial process by appealing to principles whose acceptance are not subject to democratic vetting. Moreover, for proponents of increasing a judge's adherence to religious belief, the judge's resignation sends a strong message that the system has broken down so completely that she cannot continue with her job and maintain a clean conscience. As one Catholic scholar noted, in failing to resign in the past, "[t]he silence of the profession has sent a message to generations of the best, most sensitive law students: the highest duty of a judge is to remain a judge and enforce any law that is constitutional."[132] In contrast, in combating this silence with a career-ending—yet soul-saving act—judges could follow in the footsteps of St. Thomas More, perhaps the most famous Catholic judge, who later became the Catholic patron

[129] Liptak, *supra* note 128.
[130] Of course, Scalia does not apply this reasoning to abortion because, as noted in Part IV.A, *supra*, he does not seem to attach moral consequence to his abortion rulings. Moreover, because he believes that the Church is wrong in its arguments on capital punishment, he has not resigned from the bench rather than deciding cases involving the death penalty. Scalia, *supra* note 20.
[131] *Id*.
[132] Bruce Ledewitz, *An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil*, 27 DUQ. L. REV. 1, 2 (1988).

saint of lawyers. As Archbishop Chaput noted, "More stands as a witness against cowardice. When the day came that service to his king clashed with what he held as a Catholic to be sacred, he betrayed neither his king nor his faith. He resigned."[133] Granted, resignation would appear to be an extreme solution, and would leave few Catholic judges on the bench. Nevertheless, if the Church wishes to consider legalized abortion the equivalent of legalized slavery, such a step starts to appear more rational.

2. Undermining *Roe* by Interpretation

While actively removing oneself from the judicial process is one option for Catholic judges, Michael Stokes Paulsen has supported slightly more subversive solutions.[134] For Paulsen, "moral" Catholic judges "[w]here called upon to enforce manifestly unjust law, . . . must refuse to do so, by interpretation where possible, [and] by resignation where necessary."[135] Paulsen's arguments for resignation are not entirely different from the ones suggested above.[136] What distinguishes Paulsen, however, is his advice that "the ethical imperative may demand active judicial subversion—not just refusal to act in complicity with evil when push comes to shove, but some affirmative shoving in the form of active resistance to unjust law."[137]

Importantly, Paulsen's form of resistance marks a drastic point of departure from what Justice Scalia would advocate. While Scalia is willing to pick up a revolutionary's gun to reform the system before he uses his judicial powers in service of the same ends, Paulsen advocates a tactic that would undermine the legitimacy of the system that Scalia would unabashedly protect until the day of his resignation. Taking this step beyond Scalia, in addressing ways to actively

---

[133] CHARLES CHAPUT, RENDER UNTO CAESAR: SERVING THE NATION BY LIVING OUR CATHOLIC BELIEFS IN POLITICAL LIFE 159-60 (2008).
[134] Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's "Justice Accused,"* 7 J. LAW AND RELIGION 33, 37 (1989).
[135] *Id*. at 37 (emphasis added).
[136] *See supra* Part IV.C.1.
[137] Paulsen, *supra* note 134, at 89.

resist pro-choice laws and jurisprudence, Paulsen borrows an idea from Professor Robert Cover, who similarly noted that resignation itself can "appear to be an empty gesture" because "other judges will be found" to enforce the unjust laws.[138] Faced with this prospect, Cover advocated that a judge should engage in "creative judicial obstruction" and "interpret the law to conform to his conscience even if such a course requires the disregard or stretching of authority."[139] Cover initially counseled this type of dissent in cases involving draft-dodgers during the Vietnam War and for judges attempting to undermine antebellum slavery laws.[140] Paulsen applies the same reasoning to abortion. For example, Paulsen counsels that "the judge should indulge every legitimate presumption in favor of the right to life,"[141] and reminds judges that abortion precedent "leaves a lot of leeway for ad hoc 'balancing' of interests in a variety of contexts not literally controlled by the *Roe* holding."[142] Indeed, for Paulsen, *Webster v. Reproductive Health Services*[143] would allow the compelling interest language to become the exception that consumes *Roe*'s pro-choice precedent: "[i]n the world after *Webster*, the presumption in favor of life should go far to provide a constitutional rule of decision that reaches to the very edges of *Roe v. Wade*, irrespective of the fact that the Court technically left *Roe* standing."[144] Thus, the lower-court judge, applying Paulsen's reasoning, should interpret away abortion rights, while the Supreme

[138] Robert Cover, Book Review, 68 COLUM. L. REV. 1003, 1006 (1968) (reviewing RICHARD HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)).
[139] *Id*. at 1007.
[140] *Id*. It should be noted that Cover was quite tolerant of giving deference to religious belief, even bigoted religious belief. *See* Robert M. Cover, *The Supreme Court, 1982 Term--Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (showing Cover's difficulty in taking federal funding from Bob Jones University because of the institution's religiously-inspired, racist policies). Curiously, Paulsen never references this Cover work, despite the support such a position would provide Paulsen.
[141] Paulsen, *supra* note 134, at 74.
[142] *Id*.
[143] 492 U.S. 490 (1989).
[144] Paulsen, *supra* note 134, at 74.

Court Justice should presumably do the same thing by explicitly overruling *Roe*, regardless of how he or she feels about the constitutional status of the right to abortion.[145]

3. Explicit Civil Disobedience

> *Forty years ago in Hitler's Germany it was totally legal to torture, maim, cruelly experiment with and otherwise kill people of Jewish descent. After the war, these same governmental officials were tried and many were executed according to principles of a higher law.*
>
> *To quote from one attorney at the Nuremburg trials: 'A soldier is always faced with the alternative of obeying or disobeying an order. If he knows the order is criminal, it is surely a hollow excuse to say it must be obeyed for the sake of obedience alone.'*
>
> *There is no question in my mind that if I am ordered to initiate procedures to kill innocent life for the expediency of otheres [sic], that that is a 'criminal order' which I cannot obey. For the reasons contained in this opinion, the petition for the abortion is respectfully denied.*[146]

So concluded Judge Randall J. Hekman in an opinion denying a thirteen-year-old a judicial bypass in order to obtain an abortion. Hekman's 1982 decision came just a few years after both *Planned Parenthood of Central Missouri v. Danforth*[147] and *Bellotti v. Baird*,[148] in which the U.S. Supreme Court held that a minor had a right to undergo an abortion against the will of her parents, if she obtained the consent of a judge. Tellingly, Hekman could have undermined the abortion right in this case by, for example, using *Danforth* to conclude that the

---

[145] Notably, a second form of "creative judicial obstructionism" advocated by Paulsen involves a unique reading of the Vesting Clause advocated by Akhil Amar. *See* Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 235-38 (1985). Theoretically, under Paulsen's read of Amar's interpretation of the Vesting Clause, Congress could remove jurisdiction from consideration by the Supreme Court of a subset of cases, including abortion cases, effectively making *Roe* non-binding on the lower courts. *See* Paulsen, *supra* note 134, at 84-85. Finally, Paulsen also advocates explicit civil disobedience of the time discussed in Part III.C.3, *infra*.

[146] Randall J. Hekman, JUSTICE FOR THE UNBORN: WHY WE HAVE 'LEGAL' ABORTION AND HOW WE CAN STOP IT 164-65 (1984) (quoting from In The Matter of Doe, Jane, State of Michigan in the Probate Court for the County of Kent Juvenile Division, No. 28337) (Oct. 25, 1982) (internal citations omitted).

[147] 428 U.S. 52 (1976).

[148] 443 U.S. 622 (1979).

minor was not capable of making a choice in her best interests.[149] Instead, he took a stance against abortion grounded in civil disobedience.

Perhaps most tragically, however, Hekman's zeal in raising moral objections to abortion may have blinded him from seeing the disturbing alternative ways to explain the young woman's pregnancy. Indeed, despite knowing that "[m]ost girls do not voluntarily report incest" and that "such families often hide [this] 'secret,'"[150] Hekman dismisses the testimony of the young woman's mother, who said that "it's possible the father is a cousin of Jane."[151] Indeed, although there was a very real possibility that the young woman did not divulge the identity of her child's father because she was stuck in an involuntary and incestuous sexual relationship with him, Hekman inveighed against her for being "immature," "slightly subaverage in intelligence," and only desirous "to get this 'thing' out of her as soon as possible so she can go back to whatever she wants to do."[152] There are few judges—in fact, I have found no other—who have taken a similar position on abortion. Nevertheless, Hekman offers the last and the most extreme position a Catholic judge could take when faced with the prospect of recognizing an abortion right.

IV. Judge Not Lest Ye Be Judged?

A. Denying Communion to Chief Justice Roberts and Justices Kennedy and Alito

[149] *Cf*. Paulsen, *supra* note 134, at 36 (advocating that a judge overrule by "interpretation" in such a situation).
[150] HEKMAN, *supra* note 146, at 58.
[151] *Id*. at 153.
[152] *Id*. at 154, 161. Unfortunately, when pro-life advocates use Hekman as an example of how a judge should rule on abortion, they fail to mention the circumstances and age of the young woman involved in his decision and the judge's vituperative and paternalistic tone. Even pro-choice academics who have criticized Hekman's position seem unaware of the language that he employed in his opinion, as the main scholars who have written about Hekman cite either Paulsen's aforementioned article or news reports related to his decision, rather than the book Hekman subsequently published on the matter. *See, e.g.*, Paulsen, *supra* note 134, at 81 (noting that Hekman's course of action is "exactly what is called for," yet never mentioning Hekman's tone, despite citing Hekman's book); Babbs, *supra* note 134, at 502 (noting Hekman's actions, but only citing him through Paulsen); *see also* Pamela Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 554 (1999) (criticizing Hekman's stance, yet only citing Hekman through Paulsen and a *New York Times* editorial).

While it is clear that Catholic judges can act in myriad ways to challenge the current *Roe* jurisprudence, it is also apparent that few have taken such a stance. Surprisingly, the most well-known Catholic judges in the country—those on the Supreme Court—have largely escaped scrutiny for these possible sins of omission. Yet there is a plausible argument to be made for denying communion to at least three of the conservative Catholic members of the Supreme Court. Let us take each of them in turn.

First, consider Justice Kennedy. In 1996, *New Yorker* writer Jeffrey Rosen was able to sit in on a class that Justice Kennedy had been teaching in Salzburg, Austria. While there, Rosen asked the students to recount an earlier conversation Justice Kennedy had with them on his abortion jurisprudence. In response, the students told Rosen the following:

> If a member of his family ever became pregnant, Justice Kennedy said, he would do his best to persuade her to keep the child. He would offer to adopt the baby, even to rear it himself, rather than sanction what he fervently believed was the taking of innocent life. At this point, students recall, Justice Kennedy's eyes filled with tears and his voice broke. But when it came time to decide the abortion case, Kennedy said, he could not impose his personal views on the nation.[153]

This moment of great candor offers insight into what seems to undergird Justice Kennedy's abortion jurisprudence. Kennedy might cloak his support for abortion rights in constitutional privacy protections and the framework he advocated in *Planned Parenthood v. Casey*, but the above anecdote suggests that the argument might be solely instrumental: he seems ultimately motivated by what, for him, is a belief that he cannot impose his Catholic beliefs upon others. Indeed, in contrast to Obey who claims that "while I would hope a woman makes a choice

[153] Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82. Interestingly, Rosen insinuates in the same article that the views of Justice Kennedy's wife have great bearing on the Justice's jurisprudence. Although this version of events was later disputed by Justice Kennedy, as Rosen recounts, Justice Kennedy's close friend Gordon Schaber, a former dean of McGeorge School of Law, asserted that he was "having dinner with the Kennedys shortly after the Justice joined the Court. The conversation turned to whether or not *Roe v. Wade* should be overruled, and Mrs. Kennedy, according to Schaber, said to her husband, 'Don't you dare!'" *Id*. at 84.

against abortion, under our Constitution the choice is not mine,"[154] Kennedy's justification for his pro-choice jurisprudence—at least as recounted by his students—is one in which the Constitution is not mentioned. Thus, even without considering Kennedy's ruling in *Planned Parenthood v. Casey*,[155] his belief, as expressed to the students, would appear to open him to indictment from any bishop willing to deny communion to a pro-choice legislator.

While the case for communion denial for Justice Kennedy is more straightforward, if one disputes the claim that judges are absolved of moral blame for their interpretations of the Constitution, there is also a basis for denying communion to Justice Alito and Chief Justice Roberts because of the ruling they joined in *Gonzales v. Carhart.*[156] Most pro-life advocates praise the *Carhart* decision, as it upheld the Partial Birth Abortion Ban, despite arguments that the bill could create a dangerous and unconstitutional obstacle to abortion access. Yet there is little discussion about the fact that only two of the five Justices in the *Carhart* majority joined the concurrence announced by Justices Scalia and Thomas, in which these Justices declared: "I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pennsylvania. v. Casey*. I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution."[157] In contrast to Justices Scalia and Thomas, the three other Justices in the majority—Kennedy, Roberts, and Alito—all used the *Casey* framework, supplemented by other abortion decisions, to arrive at the same conclusion, yet with wildly different consequences for abortion rights in the United States.[158]

---

[154] Obey, *supra* note 96.
[155] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 844 (1992).
[156] 550 U.S. 124 (2007).
[157] *Id.* at 168-69 (2007) (Scalia and Thomas, JJ. concurring) (citations omitted).
[158] 550 U.S. at 132-68.

Although it is more difficult to argue that charting this course was an explicit acceptance of *Roe*,[159] it is startling that few commentators have seen the decision for what it also represents: another denial of the thirty-year dream of the pro-life movement. What were the results of not making the Thomas concurrence the holding? As noted in the *Carhart* opinion itself, 1.3 million abortions are performed each year in the United States.[160] No doubt at least some of these could have been averted by overturning *Roe*. In fact, one might consider that the decision of these three Catholic justices *not* to reverse *Roe* constituted the single greatest blow that could have been dealt to the American unborn in the twenty-first century. At the least, the position adopted by these three Catholic Justices seems to disregard the "moral imperative for Catholics and others who respect human life" to overturn what the Church has equated with an "unjust law."[161]

Now, in the face of possible communion denial for this opinion, Roberts and Alito might try an exigent circumstances argument by suggesting, for example, that to keep Justice Kennedy from defecting to the *Carhart* dissenters who would have found the abortion law unconstitutional, they had to write the narrower holding. Unfortunately, the most artful argument from the most gifted advocate on these or other grounds is given no required deference by the Church. As long as the bishop thinks it prudent, he can impose the communion-denial sanction.[162] Thus, at the least, if Martino were still bishop of Scranton, there would be ample reason for these Justices to avoid his diocese.

---

[159] Tellingly, the opinion seems to have been written in such a way as to avoid this type of explicit endorsement: rather than setting out the clear abortion precedent with language such as "In *Roe* we held," the majority uses phrases such as "[w]e *assume* the following principles for the purposes of this opinion." 550 U.S. at 146 (emphasis added).

[160] *Id*. at 134.

[161] *Joint Statement by Rigali and Murphy*, *supra* note 111. Indeed, Scalia and Thomas's opinion might not even go far enough, as they fail to recognize a constitutional duty to restrict abortion proffered by some Catholic legal commentators. *See*, *e.g.*, note 119.

[162] *See Catholics in Public Life*, *supra* note 75

B. Justices Saved: Receiving Communion in Washington, D.C.

In the end, though, even if you accept the argument that these three Justices should be denied communion for their pro-choice jurisprudence, they could present themselves for the sacrament in Washington, D.C. This fact must still infuriate pro-life activist Randal Terry, who registered his disdain for Washington Archbishop Donald Wuerl's "collegial treachery," in failing to deny communion to then-House Speaker Nancy Pelosi or any other pro-choice Catholic politician who attended mass in Washington D.C.[163] Indeed, in an opinion piece written for the *Washington Times*, Terry asked that the Vatican "intervene" in the "scandal" created by Wuerl and suggested that if Wuerl failed to follow a Vatican directive to deny communion to Pelosi that "he be relocated—perhaps to Idaho or Montana—and replaced by a bishop with true Apostolic valor. We need a man who will uphold the teachings of the church in the place where America's laws are made."[164]

Terry probably took this awkward position because he wanted to diminish Wuerl's influence (at the expense of many a Catholic Montanan, apparently). If this was Terry's goal, however, my analysis of the prevalence of the communion-denial movement in America's largest fifty dioceses should concern him.[165] Indeed, communion deniers run only ten of these dioceses, while a full thirty-one are governed by bishops who have declined to deny communion (the remaining nine bishops have taken no position on the matter). If one accounts for the

---

[163] Randall Terry, *Why Can Speaker Pelosi Receive Communion?*, WASH. TIMES, Apr. 7, 2010, *available at* http://www.washingtontimes.com/news/2010/apr/07/why-can-speaker-pelosi-receive-communion/.

[164] *Id*.

[165] I have limited my analysis to the largest fifty dioceses mainly because I presumed that I could determine a majority of bishops' positions from this grouping through internet searches. *See* Tbl 1, *infra*. Nevertheless, I was still not able to identify a number of these bishops' positions on communion denial, as they are not required to do so and might have good reason to avoid this battle in the culture wars. *Id*. Finally, it should be noted that the American Life League (ALL) established an online database to monitor bishops' position on communion denial. *See* THE AMERICAN LIFE LEAGUE'S CANON 915 PROJECT, http://www.canon915.org/ (last visited Dec. 26, 2011). I have not relied on this authority, however, because it lists a number of prelates as having an unknown position on communion denial, when in fact they have quite explicitly declined to enforce the practice. Thus, while the database was helpful in informing subsequent searches, I did not rely on the ALL's findings unless I could independently verify the finding.

difference in size of these dioceses, the numbers are even worse for Terry: only seventeen percent of Catholics in these fifty dioceses are under the direction of communion deniers, while sixty-nine percent of Catholics in these dioceses practice their faith under the direction of prelates who do not deny communion (the remaining fourteen percent reside in dioceses where the bishop has taken no discernible position on the matter). Outside of the fifty largest dioceses, I have identified a total of nineteen non-retired bishops who deny communion: they govern about thirteen percent of all American Catholics.[166]

Beyond the statistics, the general trend that seems to emerge from this data is that the larger the diocese, the less likely that it will be run by a communion denier. In Los Angeles, Chicago, New York, and Boston, the four biggest archdioceses, prelates have decided not to deny communion to pro-choice politicians,[167] while bishops from more sparsely populated (and more conservative) parts of the country—like Fargo, North Dakota, and Lincoln, Nebraska—do state that they will explicitly enforce this regime.[168]

There are important exceptions to the city-rural diocese divide. Communion deniers currently run the Archdioceses of Miami, Newark, Philadelphia, and San Diego. Indeed, Archbishop Chaput, formerly Archbishop of Denver and a stalwart communion denier, just

[166] *See* Table 2, *infra*. In reality, there are very few bishops who would enforce Cardinal Burke's version of communion denial, which puts the onus on the Eucharistic minister or local priest to deny communion. *See* Raymond Burke, *The Discipline Regarding the Denial of Holy Communion to Those Obstinately Preservering in Manifest Grave Sin*, 96 PERIODICA 3 (2007), *available at* http://www.catholicculture.org/culture/library/view.cfm?id=7796&CFID=36435744&CFTOKEN=19109044. If the Eucharistic minister refuses to deny communion in this instance, then Burke would counsel that the minister herself might be denied communion. *Id*. To avoid this direct confrontation at mass, communion-denying bishops ask a politician to voluntarily abstain from receiving communion. *See*, *e.g.*, Sullivan, *supra* note 89 (noting that Archbishop Chaput, then Archbishop of Denver, asked then-Senator Joseph Biden to refrain from receiving communion during the Democratic National convention in Denver). It appears that thus far no politician has disregarded such a request.
[167] *See* Table 1, *infra*.
[168] *Id.*

advanced in the episcopal ranks and was named Archbishop of Philadelphia, a move to a very prominent archdiocese that puts Chaput in line to become a cardinal.[169]

Nevertheless, communion-denying bishops have also seen their influence diminish in certain important locales. For example, Bishop Martino of Scranton was forced into early retirement in part for his strident rhetoric on abortion[170] and Archbishop John Donoghue of Atlanta saw himself replaced by an archbishop who does not deny communion.[171] Thus, even if there is an argument to be made for denying communion to Justices Alito and Kennedy and Chief Justice Roberts, these judges can circumvent any problems by avoiding (or tip-toeing through) places like Phoenix and Colorado Springs, and staying in the larger dioceses that do not deny communion to pro-choice public officials.

Conclusion

In the end, then, the communion-denial movement has seen some gains and setbacks over the last few years. Yet this insurgent movement—now only six years old—could easily gain ground through important help from Rome, where communion-denying prelates hold considerable sway on the committee that appoints future bishops. Indeed, Raymond Burke, a newly-ordained cardinal, is now one of the four Americans—all noted conservatives—on the commission that appoints new U.S. bishops.[172] Burke is perhaps the greatest hope for the future

[169] *See, e.g.*, Eric Gorski, *Denver Archbishop Expected To Be Named to Philadelphia Diocese*, DENVER POST, July 19, 2011, *available at* http://www.denverpost.com/frontpage/ci_18503970.
[170] *See* Sullivan, *supra* note 89.
[171] *See* John Blake, *Donoghue Era Comes to an End; Archbishop Bids Atlanta Farewell*, ATLANTA JOURNAL CONSTITUTION, Jan. 11, 2005, at 1B.
[172] *See Burke Named to Congregation for Bishops*, AM. MAG., http://www.americamagazine.org/content/signs.cfm?signID=247 (last visited Feb. 11, 2011). Cardinal Stafford and Cardinal Rigali, two of the other Americans are also decidedly adamant that the Church play a prominent role in shaping U.S. politics. *Id*. The fourth American on the committee is Cardinal Bernard Law, who brought financial ruin and great scandal upon the Archdiocese of Boston for his failed handling of the priest sexual abuse scandal, recently retired. See, e.g., Mark Arsenault, *Cardinal Bernard Law Retired from Post in Rome*, BOSTON GLOBE, Nov. 22, 2011, *available at* http://www.bostonglobe.com/metro/2011/11/22/cardinal-bernard-law-retires-from-post-

of the communion-denial movement: he is the most zealous advocate of communion denial, the movement's intellectual architect and first enforcer, the current chief judge on the highest Vatican court, and the prelate who has enjoyed a rapid ascent through the Church hierarchy, ever since he was a bishop in La Crosse, Wisconsin, and decided to deny communion to Representative Obey.[173] Interestingly, though, the only other American elevated to the position of cardinal on the same day as Burke was Donald Wuerl, the decided moderate from Washington, D.C.[174] Considering the divergent positions of these two men—one lionized and one despised by pro-life advocates like Randal Terry—serves as a fitting analogy for the unknown future course that the U.S. Church will chart on abortion.

These two camps, with dueling views of the role of the Church in abortion politics, will no doubt both seek to influence New York Archbishop Timothy Dolan, the new president of the USCCB, who will shape Church policy on a variety of issues over the next ten years. A branded conservative and unabashed signer to the Manhattan Declaration, Dolan has raised fears that he is a militant culture warrior in the mold of Burke.[175] Yet Dolan also has tendencies closer to Wuerl. Dolan has stated that he would deny communion on occasions "few and far between," because he sees the practice as "counter-productive" and one which will "come[] back to hurt the Church."[176] When pressed to give an example of when he would deny communion, Dolan suggested that he would do so only for someone as contumacious as a member of the Ku Klux Klan who had just marched in a rally in Dolan's diocese and presented himself at communion to

---

rome/8HR98xONgzeY1ixm2ridpL/story.html; *see also* THOMAS J. REESE, S.J., ARCHBISHOP: INSIDE THE POWER STRUCTURE OF THE AMERICAN CATHOLIC CHURCH 35-48 (1989) (explaining the process of selecting bishops in greater detail and noting that members on this bishop appointment committee who come from the same country as the candidate wield greater influence over whether the candidate receives a new appointment).

[173] *See Burke Named to Congregation for Bishops*, supra note 172.

[174] Rachel Donadio, *Two Americans Among New Cardinals*, N.Y. TIMES, Oct. 20, 2010, at A9.

[175] *See* Laurie Goodstein, *Dolan Chosen as President of U.S. Bishops' Group*, N.Y. TIMES, Nov. 16, 2010, at A1 (noting the concerns raised by Dolan's conservatism).

[176] *Up Close with Diana Williams* (ABC News Broadcast Feb. 27, 2010), *available at* http://whispersintheloggia.blogspot.com/2010/02/dolan-on-everything-part-deux.html.

"stick it in the eye" of the Church.[177] Dolan has thus far avoided the worst of the abortion culture wars by publicly espousing adherence to Church doctrine yet quietly declining to endorse the communion-denial regime.

Nevertheless, it is quite likely that the day will soon arrive when Dolan is forced to show leadership in the face of a claim of authority by a communion-denying bishop, who could just as easily deny communion to a Catholic judge. At such a moment, Dolan will have a choice to make. On the one hand, Dolan could applaud the move made by the communion denier or reference the 2004 directive on communion denial and claim that his hands are tied. A communion denying bishop would then have a clear path, on grounds sketched in this Article, to deny a judge communion for the pro-choice ruling. Indeed, as Part II made clear, most judges view their rulings on abortion in a way similar to how John Kerry views his votes on pro-choice legislation: detached of moral consequence because the decisions are arrived at as part of one's professional duties. Yet as Part III confirmed, the Church seemingly does not credit this separation of professional from private duties, especially on the issue of abortion. Finally, Part IV provided a concrete way that the movement could call for communion denial for jurists, even conservatives like Chief Justice Roberts and Justices Alito and Kennedy.

On the other hand, Dolan could opt to put an end to the process of communion denial. Dolan could invoke the words of a contemporary Catholic theologian by acknowledging that "[r]espect for a healthy secularity—including the pluralism of political opinions—is essential in the authentic Christian tradition."[178] He could conclude, citing the same theologian, that if the Church identified "with a single political path and with debatable partisan positions" she could "do less, not more, for the poor and for justice, because she would lose her independence and her

[177] *Id.*

[178] Pope Benedict XVI, Opening Address for the Aparecida Conference (May 13, 2007), *available at* http://www.zenit.org/article-19610?l=english.

moral authority."[179] Using these words would serve Dolan well, as they of course come from Pope Benedict XVI, who has yet to deny communion to any Catholic politician, and succeeded another pope, John Paul II, who administered this sacrament seemingly without regard to a politician's stance on abortion.[180] In adopting this position, Dolan would lend legitimacy to the advice President Kennedy gave fifty years ago—and the advice Justice Scalia seems to offer to us today—that for the sake of both church and state there are many reasons for maintaining some separation between the two, especially on how Catholics can best promote a true "culture of life."

[179] *Id*.

[180] *See, e.g.*, *The Body Politic and the Body of Christ: Candidates, Communion, and the Catholic Church*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, June 23, 2004, *available at* http://pewforum.org/Politics-and-Elections/The-Body-Politic-and-the-Body-of-Christ-Candidates-Communion-and-the-Catholic-Church.aspx (quoting Fr. Thomas Reese, S.J., who noted that Pope John Paul II gave communion to Tony Blair and Francesco Rutelli, pro-choice politicians from the United Kingdom and Italy, respectively).

Table 1: The Position on Communion Denial of the Prelates in the Largest Fifty U.S. (Arch)Dioceses[1]

Rank by Size	(Arch)Diocese	Catholic Population	(Arch)Bishop	Position on Communion Denial[2]
1.	Los Angeles	4,180,859	José Horacio Gomez	Does Not Deny[3]
2.	New York	2,608,299	Timothy Dolan	Does Not Deny[4]
3.	Chicago	2,338,000	Francis Cardinal George	Does Not Deny[5]
4.	Boston	1,681,533	Seán Patrick Cardinal O'Malley	Does Not Deny[6]
5.	Rockville Centre	1,521,842	William Murphy	Does Not Deny[7]
6.	Philadelphia	1,464,938	Charles Chaput	Will Deny[8]
7.	Brooklyn	1,440,000	Nicholas DiMarzio	Does Not Deny[9]
8.	Detroit	1,434,622	Allen Vigneron	Unknown[10]
9.	Newark	1,318,557	John Myers	Will Deny[11]
10.	Orange	1,280,159	Tod Brown	Does Not Deny[12]
11.	Dallas	1,181,980	Kevin Farrell	Does Not Deny[13]
12.	San Bernadino	1,167,208	Gerald Barnes	Does Not Deny[14]
13.	Galveston-Houston	1,146,908	Daniel Cardinal Dinardo	Does Not Deny[15]
14.	Fresno	1,074,941	Armando X. Ochoa	Does Not Deny[16]
15.	Brownsville	1,021,861	Daniel Flores	Does Not Deny[17]
16.	San Diego	981,211	Robert Brom	Will Deny[18]
17.	Sacramento	980,650	Jaime Soto	Unknown[19]
18.	Atlanta	850,000	Wilton Gregory	Does Not Deny[20]
19.	Trenton	831,707	David O'Connell	Unknown[21]
20.	Phoenix	764,140	Thomas Olmsted	Will Deny[22]
21.	Cleveland	744,000	Richard Lennon	Does Not Deny[23]
22.	Las Vegas	716,000	Joseph Pepe	Does Not Deny[24]
23.	Miami	703,950	Thomas Wenski	Will Deny[25]
24.	San Antonio	702,547	Gustavo García-Siller	Does Not Deny[26]
25.	Pittsburgh	673,801	David Zubik	Does Not Deny[27]
26.	Milwaukee	657,519	Jerome Listecki	Does Not Deny[28]
27.	Buffalo	656,760	Edward Kmiec	Does Not Deny[29]
28.	Joliet	655,415	Daniel Conlon	Unknown[30]
29.	Saint Paul and Minneapolis	650,000	John Nienstedt	Unknown[31]
30.	El Paso	649,648	Vacant	Does Not Deny[32]
31.	Hartford	624,230	Henry Mansell	Does Not Deny[33]
32.	Providence	619,964	Thomas Tobin	Will Deny[34]
33.	Washington DC	592,769	Donald Cardinal Wuerl	Does Not Deny[35]
34.	Seattle	579,500	James Peter Sartain	Does Not Deny[36]
35.	San Jose	575,000	Patrick McGrath	Does Not Deny[37]

36.	Fort Worth	573,529	Kevin Vann	Does Not Deny[38]
37.	Metuchen	566,087	Paul Bootkoski	Unknown[39]
38.	Denver	533,809	James Conley	Will Deny[40]
39.	St. Louis	531,770	Robert Carlson	Will Deny[41]
40.	Camden	500,326	Joseph Galante	Will Deny[42]
41.	Baltimore	499,529	Edwin O'Brien	Does Not Deny[43]
42.	New Orleans	471,783	Gregory Aymond	Does Not Deny[44]
43.	Cincinnati	468,204	Dennis Schnurr	Unknown[45]
44.	Rockford	451,509	Thomas Doran	Unknown[46]
45.	San Francisco	444,008	George Niederauer	Does Not Deny[47]
46.	Arlington	431,386	Paul Loverde	Does Not Deny[48]
47.	Oakland	431,212	Salvatore Cordileone	Does Not Deny[49]
48.	Paterson	424,722	Arthur Serratelli	Does Not Deny[50]
49.	Orlando	413,643	John Noonan	Unknown[51]
50.	Portland (Oregon)	409,864	John Vlazny	Will Deny[52]
	Total Population for Fifty Largest Dioceses	**46,221,899 (67% of all U.S. Catholics)**		

Aggregates for the Fifty Largest Catholic Dioceses

Position on Communion Denial	Number of Bishops	Total Population In These Dioceses	As a Percentage of the Population of the Largest 50 Dioceses
Does Not Deny	31	30,196,042	69%
Will Deny	10	7,897,391	17%
Unknown	9	8,128,466	14%

Table 2: Full List of Communion-Denying Bishops

(Arch)Diocese	Catholic Population	(Arch)Bishop[53]
Philadelphia	1,464,938	Charles Chaput[54]
Newark	1,318,557	John Myers[55]
San Diego	981,211	Robert Brom[56]
Trenton	831,707	John Smith[57]
Phoenix	764,140	Thomas Olmsted[58]
Miami	703,950	Thomas Wenski[59]
Providence	619,964	Thomas Tobin[60]
Denver	533,809	James Conley[61]
Camden	500,326	Joseph Galante[62]
Portland	409,864	John Vlazny[63]
Kansas City	202,006	Joseph Naumann[64]
Charlotte	171,909	Peter Jugis[65]
Oklahoma City	108,171	Paul Coakley[66]
Lincoln	95,445	Fabian Bruskewitz[67]
Evansville	85,079	Charles Thompson[68]
Fargo	85,229	Samuel Aquila[69]
Birmingham	89,489	Robert Baker[70]
Colorado Springs	82,540	Michael Sheridan[71]
Lexington	46,798	Ronald Gainer[72]
Total Catholic Population in Communion-Denying Dioceses	9,095,132(19 dioceses)	
Total U.S. Catholic Population	68,503,456	
Total Percentage of U.S. Catholics Residing in Dioceses Run by Communion Deniers	13%	

[1] All Statistics for the Catholic population of a diocese, the name of diocese and the governing prelate were taken from THE OFFICIAL CATHOLIC DIRECTORY: ANNO DOMINI 2010 (2010). Certain archbishops or bishops have changed since the publication of this directory. Thus, where necessary, I used news reports to supplement the *Official Catholic Directory* in determining the prelate leading the diocese.

[2] Determining how to classify these fifty bishops necessarily involves a degree of subjectivity. Thus, in conducting this analysis, I adhered to the following conventions. First, the default position for each (arch)bishop is "unknown." However, if a bishop with an unknown position enters a diocese that was previously in the "will deny" category, that bishop must take affirmative steps to continue with the policy of his predecessor; otherwise, the diocese reverts to the "unknown" category. At the same time, if a bishop who denied communion in a prior diocese switches dioceses, I have presumed that he will continue to deny communion unless he has claimed otherwise. Finally, if a bishop has made inconsistent statements on communion denial, I have placed him in the "unknown" category. A bishop moves to the "does not deny" category if he (1) publicly states that he will not deny communion; (2) has a previously unknown position and does not take active steps to change the policy of a predecessor in the diocese who has adhered to a "does not deny" regime; or (3) does not take steps to deny communion to a pro-choice politician in his diocese, despite the entreaties of pro-life activists. A bishop moves to the "will deny" category if he (1) publicly states that he will deny communion or enforce Canon Law 915, or (2) asks a politician to voluntarily refrain from communion. To support my analysis, I considered the following authorities: (1) any national or local newspaper; (2) any report from a pro-life organization, such as Operation Rescue or LifeSiteNews.Com; (3) any press release or other material posted on any Church-affiliated website. All searches were conducted using Lexis-Nexis and Google. All errors in this analysis are my own.

[3] On February 27, 2011, Archbishop Gomez was installed as Los Angeles' new Archbishop, replacing Cardinal Roger Mahony, who reached the age of 75, the mandatory retirement age for bishops. *See About the Archbishop*, ARCHDIOCESE OF LOS ANGELES, http://www.la-archdiocese.org/archbishop/Pages/default.aspx (last visited Mar. 6, 2011). Gomez has yet to take a position contrary to that of Cardinal Mahony, who was adamant in not denying communion to pro-choice politicians. *See, e.g.*, Cardinal Roger Mahony, *Catholic Politicians and Holy Communion*, 34 ORIGINS 110 (2004) ("The archdiocese will continue to follow church teaching, which places the duty of each Catholic to examine their consciences as to their worthiness to receive holy communion. That is not the role of the person distributing the body and blood of Christ."); *see also* Raymond Burke, *The Discipline Regarding the Denial of Holy Communion to Those Obstinately Persevering in Manifest Grave Sin*, PERIODICA DE RE CANONICA 96 (2007),

available at http://www.therealpresence.org/eucharst/holycom/denial.htm (criticizing Mahony's decision not to deny communion to pro-choice politicians).

[4] *See Interview with Archbishop Dolan*, (New York 1 Television Broadcast, Feb. 25, 2010), *available at* http://www.ny1.com/content/news_beats/politics/114315/-i-ny1-online---i--full-interview-with-archbishop-timothy-dolan/ (noting that he would not deny communion to pro-choice politicians).

[5] Francis Cardinal George, *Catholic Participation in Political Life, Revisited*, CATHOLIC NEW WORLD (Chicago), Oct. 10, 2004, http://www.catholicnewworld.com/cnw/issue/2004 /cardinal_101004.html ("If I haven't [denied communion] in this Archdiocese, it's primarily because I believe it would turn the reception of Holy Communion into a circus here. Who should be excluded? Is a special list to be published or will the Communion minister make the determination, supposing that a particular politician is even recognized by the minister. Will the media be invited in to watch a confused or disobedient minister give the Eucharist to a politician making a point? What happens next?"). While he has not denied communion to pro-choice politicians, Cardinal George set off a fire-storm by denying communion to gay-rights protestors who attempted to receive the sacrament while wearing rainbow sashes. He claimed, though, that had the protestors not been wearing the sashes and turning the Eucharist into a "political statement," he would not have denied the protestors communion. *See* Michelle Martin, *Cardinal George Denies Communion to Rainbow Sash Gay Activists*, CATH. NEWS SERV., Jun 2, 2004, http://www.catholicnews.com/cnw/issues/2004/cardinal_101004.html.

[6]*See, e.g.*, John-Henry Westen, *Kerry, Dodd Receive Communion at Papal Mass, Kennedy Also Receives*, LIFESITENEWS.COM, Apr. 17, 2008, http://www.lifesitenews.com/ldn/2008/apr/ 08040408.html (showing photos of the two pro-life senators from O'Malley's Archdiocese receiving communion at an event in Boston where O'Malley was also present); Deal W. Hudson, *Closing Ranks on Canon 915*, INSIDECATHOLIC.COM, Mar. 30, 2009, http://insidecatholic.com/ Joomla/index.php?option=com_content&task=view&id=5705&Itemid=48 (lamenting that Cardinal O'Malley did not direct Kerry to refrain from receiving communion, as it would have prevented him from receiving the sacrament at a mass celebrated by the Pope).

[7] *See* John Rather, *Bishops Won't Deny Rites to Politicians*, N.Y. TIMES, July 11, 2004, at p. 2 [Long Island Weekly Desk] (citing a conversation that Murphy had with a priest in which he said he would not deny a pro-choice politician the sacrament).

[8] Philadelphia's new archbishop, Charles Chaput, regularly denied communion to Catholic politicians when he was Archbishop of Denver. *See, e.g., Archbishop Scolds Pro-Choice Biden*, WASH. TIMES, Aug. 26, 2008, http://www.washingtontimes.com/news/2008/aug/26/archbishop-condemns-bidens-pro-choice-stance/ (noting that Biden should refrain from receiving

communion at the Democratic National Convention). He has not changed his views since arriving to Philadelphia.

[9] DiMarzio is a moderate on the abortion issue, and actively prevented the adoption of a more harsh policy from being placed in the 2008 voter's guide published by the U.S. Conference of Catholic Bishops. *See* Cathy Lynn Grossman, *Bishops: Faith Should Shape How People Vote in '08*, USA TODAY, Nov. 15, 2007, at 8D. He has never denied communion to Joseph Crowley, a pro-choice member of the U.S. House of Representatives who resides in DiMarzio's diocese. The severest action against Crowley came after Crowley joined 55 other Catholic Democrats in attempting to justify their mixed position on abortion. *See* Cardinal William Keeler, Cardinal Theodore McCarrick, & Bishop Nicholas DiMarzio, *Statement on Responsibilities of Catholics in Public Life*, U.S. CONFERENCE OF CATHOLIC BISHOPS, http://www.usccb.org/catholicspubliclife.shtml (acknowledging the need for dialogue and implicitly declining to sanction the Catholic politicians who wrote the letter that justified their pro-choice stance). Finally, much to the chagrin of many conservative Catholics, DiMarzio did not deny communion to Andrew Cuomo, despite the New York Governor's support of gay marriage. *See, e.g.*, Christien Dhanagom, *New York Bishop's Office: No Plans To Deny Gov. Cuomo Communion at This Point*, LIFESITE.NET, Jul. 5, 2011, http://www.lifesite.net/news/new-york-bishops-office-no-plans-to-deny-gov-cuomo-communion-at-this-point

[10] Vigneron has not taken a public position on communion denial in Detroit. Moreover, as Coadjutor Bishop of Oakland, he declined to comment when asked whether he would apply the sanction to Catholic politicians such as Mayor Gavin Newsom, who disagreed with church teachings on homosexuality and abortion and who continued to receive communion. *See* Don Lattin, *Bay Area Bishops Decline Comment; Questions on Sex Issues, Politicians and Sacraments*, S.F. CHRONICLE, May 31, 2004, at B1.

[11] Myers asked then-Governor Jim McGreevey to refrain from receiving communion because of his pro-choice views. *See, e.g.*, David Kocieniewski, *Archbishop Denies Scolding McGreevey*, N.Y. TIMES, May 22, 2004, http://www.nytimes.com/2004/05/22/nyregion/archbishop-denies-scolding-mcgreevey.html?reTf=john_joseph_myers. Calling himself a "moderate" on the issue, Myers has emphasized that he asks these politicians to voluntarily refrain from receiving communion but will not deny them they sacrament if they try to receive it. *See Jeff Diamant, Archbishop Defends Communion Stance*, THE STAR-LEDGER (Newark, New Jersey), May 22, 2004, at 11. Nevertheless, when pressed on the issue, Myers admitted that if McGreevey presented himself for communion, he would give him a blessing instead of the sacrament. David O'Reilly, *Bishop Would Deny Rite to N.J. Governor: New Camden Bishop Would Deny Communion to McGreevey*, PHIL. INQUIRER, Apr. 30, 2004.

[12] *See No Help from the Left Coast*, CALIFORNIA CATHOLIC DAILY, Nov. 12, 2007, *available at* http://calcatholic.com/news/newsArticle.aspx?id=261461ab-e39b-4323-9a21-6c4b6e93306a. ("Bishop Tod Brown of the Diocese of Orange has made no public statements about the issue, but has given Holy Communion to pro-abortion Congresswoman Loretta Sanchez and remains on very friendly terms with her. It is not likely that he would embrace a program of denying Communion to pro-abortion politicians.").

[13] Farrell is bound by the rule of the Texas Conference of Bishops, announced by Archbishop DiNardo, that no member of the conference would deny communion to a pro-choice politician. *See* Tara Dooley, *Cardinal Watch: DiNardo Weighing How To Use Platform; But First He'll Get Red Biretta from Pope on Saturday*, HOUSTON CHRONICLE, Nov. 18, 2007, at A1 [hereinafter *Dinardo Cardinal Watch*]. At the same time, he has issued particularly incendiary materials on how it is "morally impermissible" to vote for a pro-choice candidate, when a pro-life candidate is also running. Bishop Kevin Farrell & Bishop Kevin Vann, *Joint Statement to the Faithful of the Dioceses of Dallas and Fort Worth*, TEACHINGS OF THE CATHOLIC CHURCH ON ABORTION, (Priests for Life, Staten Island, N.Y.), Oct. 8, 2008, *available at* http://www.priestsforlife.org/magisterium/bishops/farrell-vann.htm.

[14] *See No Help from Left Coast*, *supra* note 12 (". . . Bishop Gerald Barnes of San Bernardino [has not] made any public statements about the issue, but a June 2004 chart on Catholicvote.net indicates that Bishop Barnes would not withhold communion.").

[15] DiNardo, along with the rest of the Texas Catholic Conference, which includes all of bishops and archbishops from Texas, has declined to deny the sacraments to pro-choice politicians. *See Dinardo Cardinal Watch*, *supra* note 13. Dinardo has explicitly said that he would not enforce Canon Law 915. *Id*.

[16] Bishop Ochoa has not taken a public position on communion denial as the new bishop of Fresno, though in his previous job as bishop of El Paso, he was part of a conference that did not deny communion. *See Dinardo Cardinal Watch*, *supra* note 13. Further, he has not publicly distanced himself from that of his predecessor, the late Bishop John Steinbock, who did not deny communion to pro-choice politicians. *See No Help from the Left Coast*, *supra* note 12. (quoting Steinbock as saying, in a July 2004 memo, "I pointed out to the priests and deacons that this document did not say, as was falsely reported by the secular media, that Catholic politicians who vote for abortion may not receive Communion. It did not refer to Catholic politicians at all. . . . Let us not politicize the Eucharist. We all struggle, whether we are public figures or not, to be faithful to the Lord Jesus, and must constantly examine our own consciences. Let us not judge the consciences of others and be so presumptuous as to say who is and who is not worthy to receive Communion" . . . .).

[17] Flores was just recently installed as Archbishop of Brownsville. Nevertheless, as a member of the Texas Catholic Conference, which has as a conference declined to deny communion in the past, Flores would presumably adhere to this position. *See Dinardo Cardinal Watch*, *supra* note 13. At the least, he has not publicly deviated from it.

[18] Brom began his time in San Diego in 1989 with a communion-denial controversy left by Bishop Leo T. Maher, who made national headlines by being the first prelate to deny communion to state Senator Lucy Killea. *See* Rita Gillmon, *Brom Takes Role as Bishop of Diocese*, SAN DIEGO UNION-TRIBUNE, July 11, 1990, at B1; Armando Acuna, *Preservation of Life Emphasized by New Bishop*, L.A. TIMES, Dec. 1, 1989, at B1. Brom immediately took a less confrontational approach than his predecessor saying that he refused to be "baited" into making controversial pronouncements on issues such as abortion. Tom Gorman, *San Diego Bishop Shows New Style of Church Leadership*, L.A. TIMES, Aug. 31, 1991, at F18. Killea adhered to the ban and did not receive communion in Sacramento until after she left the State Senate. *See* Sandi Dolbee, *Catholic Political Dilemma is Back*, SAN DIEGO UNION TRIBUNE, May 6, 2004, at E1. Brom stated that the ban only applied to Killea while she was in office, leaving open the question of whether she had to repent for her votes after leaving office. Apparently, Brom did not ask for any form of repentance, calling into question the basis for the ban in the first place. Brom initially equivocated on the communion denial ban for Catholic politicians such as John Kerry. *See* Bill Ainsworth, *Catholics Giving Governor a Pass on Abortion? Pro-Rights Democrats Attacked for Same View*, SAN DIEGO UNION-TRIBUNE, June 9, 2004, at A1. In the end, though, Brom adopted a middle path, asserting that he would not deny communion to pro-choice politicians but that they should instead refrain from receiving the sacrament. *See SD Abortion*, SD ABORTION CITY NEWS SERVICE, June 23, 2004. Finally, Brom invoked Canon Law 1184 in denying Catholic funeral rites to an owner of a night club that catered to a predominantly gay clientele. *See* Alex Roth, *Bishop Won't Allow Funeral for Club Owner*, SAN DIEGO UNION TRIBUNE, Mar. 18, 2005, at A1.

[19] Jaime Soto has been noticeably silent on whether he would deny communion to pro-choice candidates. This is in marked contrast to his predecessor, William K. Weigand, who denied communion to then-governor Gray Davis for his pro-choice views. *See California Catholic Bishop Says Pro-Abortion Politicians Should Not Receive Communion*, NATIONAL RIGHT TO LIFE NEWS, Feb. 1, 2003, at 21. Soto may be less likely to invite controversy on the abortion issue because he is attempting to convince more lapsed Catholics to return to the Church. *See* Duke Helfand, *The Region; Enticing Former Members To Attend Mass Again; Many Roman Catholic Dioceses Are Preparing a Campaign To Get Lapsed Followers To Return to Church*, L.A. TIMES, Sept. 6, 2009, at A37.

[20] Gregory, the first African-American head of the U.S. Conference of Catholic Bishops, took over control of the Archdiocese of Atlanta from a firebrand former prelate, John Donoghue, who

issued edicts denying communion to pro-choice politicians and demanding that women refrain from the traditional foot-washing ceremonies that occur on Holy Thursday. *See* John Blake, *Donoghue Era Comes to an End; Archbishop Bids Atlanta Farewell*, ATLANTA JOURNAL-CONSTITUTION, Jan. 11, 2005, at 1B. Gregory adopted a decidedly less provocative approach to these sensitive issues and declined to deny communion to pro-choice politicians. *Clerics Reluctant To Deny Politicians Communion*, THE TIMES UNION (Albany, NY), May 1, 2004, at B8.

[21] Bishop O'Connell, who succeeded former Trenton Bishop John Smith on December 1, 2010, has not yet been forced to take a position on communion denial and did not seem to express a public view in his last job, as president of the Catholic University of America. *See, e.g.*, *Bishop David M. O'Connell: Full Biography*, *The Catholic Diocese of Trenton*, (last visited Dec. 26, 2011), *available at* http://www.dioceseoftrenton.org/document.doc?id=76. Notably, Bishop Smith did deny communion to pro-choice politicians. *See* Barbara Kralis, *Will Denver Catholic Archbishop Finally Enforce Canon 915*?, RENEWAMERICA.COM, Aug. 18, 2008, http://www.renewamerica.com/columns/kralis/080818#fn6 (identifying Smith as one of the fifteen U.S. prelates who have "publicly stated that they would deny Holy Communion" to pro-choice politicians); Randal Terry, *Sanguis Innocen, Sanguis Sanctus*, at 18-19, Feb. 22, 2010, http://www.ahumbleplea.com/Docs/Innocent_Blood.pdf. (identifying Smith as someone disposed to denying communion and citing other literature produced by Terry to support this proposition).

[22] Olmsted is better known for excommunicating a nun who authorized an abortion for a woman with severe pulmonary hypertension. *See, e.g.*, News Release, The Roman Catholic Diocese of Phoenix, Statement of the Diocese of Phoenix, Re: Situation at St. Joseph's Hospital, (May 14, 2010), *available at* http://www.catholicsun.org/2010/may/15/DIOCESE-STATEMENT-051410.pdf. The nun has since been declared "no longer excommunicated." Kevin Clarke, *McBride Un-Excommunicated*, AMERICA BLOG IN ALL THINGS (Dec 14, 2011, 1:57PM), http://www.americamagazine.org/blog/entry.cfm?entry_id=4809. Nevertheless, Olmsted was previously on record as not seeking to deny communion to pro-choice politicians and has not done so yet. *See Two Bishops Won't Punish Pro-Choice Politicians*, CAPITAL TIMES (Madison, Wisconsin), May 22, 2004, at 8A ("Bishop Thomas Olmsted of Phoenix said that instead of refusing to offer Communion, he will attempt to use persuasion to educate politicians about church teachings."). He has similarly been attacked by pro-life activists like Randall Terry for taking such a stand. *See* Randall Terry, *Oves Sin Pastore: A Plea to Vatican Leaders To Restore Faithful Catholic Leadership in America*, March 2009, *available at* http://www.ahumbleplea.com/Docs/Oves_Sine_Pastore.pdf. At the same time, he published a more recent booklet on the matter in which, as reported by pro-life activists, he seems to have recanted this earlier view. *Phoenix Bishop Tells Pro-Abortion Politicians They May Not Receive*

Holy Communion, LIFESITENEWS.COM,http://www.tldm.org/News9/OlmstedReceptionOfCommunion.htm. He has also been more recently praised by Randal Terry for adhering to the communion denial position. *See* Terry, *supra* note 21, at 20. Although it is a close call given the inconsistencies, it seems that Olmsted has been consistent enough in his position to put him in the "will deny" category.

[23] Lennon's immediate predecessor, Anthony Pilla, expressly rejected banning pro-choice politicians from receiving communion. *See, e.g.*, David Briggs, *Pilla Lets Politicians Decide on Eucharist; Won't Ban Backers of Abortion Rights from Communion*, PLAIN DEALER (Cleveland, Ohio), July 2, 2004, at A1 (quoting Pilla as saying, "[t]he battles for human life and dignity and for the weak and vulnerable should be fought not at the Communion rail, but in the public square, in hearts and minds, in our pulpits and public advocacy, in our consciences and communities"). Lennon has never publicly deviated from this policy, has never taken any public steps to deny communion to pro-choice Catholic Dennis Kucinich, and has given several prior statements that would appear to indicate he is against the practice of communion denial. *See, e.g.*, David Briggs, *Pope Laments 'Shame' of Abuse Scandal*, PLAIN DEALER (Cleveland, OH), Apr. 17, 2008 (quoting Lennon as saying that in speaking out on abortion, the Pope was not encouraging the church to be involved in politics; rather the Pope "was asking us to be good citizens, and bring to the table what we have to offer").

[24] Pepe most recently irked pro-life activists by heartily embracing Governor Sandoval just after a mass commemorating the governor's inauguration, despite the governor's pro-choice stance. *See* David McGrath Schwartz, *Sandoval Begins Inauguration Day at Mass*, LAS VEGAS SUN, Jan. 3, 2011, *available at* http://www.lasvegassun.com/blogs/nevada-territory/2011/jan/03/sandoval-begins-inauguration-day-mass/; Steven Ertelt, *Pro-Abortion New York and Nevada Governors Get Catholic Mass*, LIFENEWS.COM, Jan 4, 211, http://www.lifenews.com/2011/01/04/pro-abortion-new-york-and-nevada-governors-get-catholic-mass/ (lamenting Pepe's decision to embrace Sandoval).

[25] Wenski, recently installed as Archbishop of Miami, after running the Diocese of Orlando, is on record as asking pro-choice politicians to refrain from receiving communion. *See, e.g.*, Thomas Wenski, *No 'Wafer' If You 'Waffle'*, ORLANDO SENTINEL, May 11, 2004, at A15. ("Those pro-abortion politicians who insist on calling themselves Catholics without seeing the contradiction between what they say they believe and their anti-life stance have to do a lot more 'practicing.' They need to get it right before they approach the Eucharistic table.").

[26] Gustavo García-Siller, recently appointed as Archbishop, has yet to deny communion to any pro-choice politician. A step toward communion denial would represent a departure from the 2004 directive agreed upon by the conference, which sought specifically not to deny communion to politicians based on their public support for pro-choice policies. *See Dinardo Cardinal Watch*, *supra* note 13.

[27] Zubik did not deny pro-choice Catholics communion when he was Bishop of Green Bay, Wisconsin. *See* Jean Peerenboom, *Zubik Cool on Denying Politicians Eucharist*, GREEN BAY PRESS-GAZETTE (Green Bay, Wisconsin), June 12, 2004, at 1B. Zubik has maintained this stance in his new job in Pittsburgh. *See* James O'Toole, *No Communion for Wayward Lawmakers, Activist Urges*, PITTSBURGH POST-GAZETTE (Pennsylvania), Dec. 5, 2009, at A-9 (citing a statement released by Zubik that read, "The Church has traditionally taught that every Catholic has the serious moral responsibility to examine his or her conscience before receiving Communion or not. At the same time, the Church also has the responsibility to protect the sacredness of the Eucharist from any abuse, inclusive of politicizing Communion."); Salena Zito, *Zubik Urges Catholics To Defend Right-To-Life Stance*, PITTSBURGH TRIBUNE, Nov. 14, 2008, (noting that Zubik will not punish advocacy of pro-choice candidates but that he respects other bishops' decision to take this stand).

[28] *See, e.g.*, *Archbishops Dolan, Listecki Reluctant To Deny Communion to Pro-Abortion Politicians*, CATHOLIC WORLD NEWS, Mar. 10, 2010, available at http://www.catholicculture.org/news/headlines/index.cfm?storyid=5681.

[29] *See, e.g.*, Jay Tokasz & Tom Precious, *Communion Issue Is Raised About Cuomo*, BUFFALONEWS.COM, http://www.buffalonews.com/city/politics/article349436.ece?articleId=349436&pubDate=2011-02-23&order=T&page=6 (noting that Kmiec has "taken a conciliatory approach to distribution of the Eucharist for elected officials whose politics differ from church teaching" and that when a handful of U.S. bishops in 2004 said they would withhold Communion, "Kmiec sided with the vast majority of bishops who said they preferred a different tack").

[30] *See, e.g.*, Manya A. Brachear, *Joliet Diocese Gets New Leader*, CHICAGO TRIB. May 17, 2011, *available at* http://articles.chicagotribune.com/2011-05-17/news/ct-met-new-joliet-bishop-20110517_1_joliet-diocese-joliet-bishop-joseph-imesch-sexual-abuse (noting that recently appointed bishop Daniel Conlon has not decided what position he will take on communion denial).

[31] Nienstedt has not articulated a position on whether or not to deny communion to pro-choice politicians, primarily because he has been immersed in a controversy surrounding communion denial to gay-rights advocates. Believing that homosexuality is a result of "childhood trauma," Nienstedt has been forced to confront what had been a rather pro-gay Catholic community that had developed in Minneapolis prior to his appointment to the city. *See* Nick Coleman, *Future Archbishop's Compassion Stops Short When It Comes to Gays*, STAR TRIBUNE (Minneapolis, MN), Nov. 28, 2007, at 1B; *see also* Paul Walsh & Maria Elena Baca, *Gay Activists Denied Communion*, STAR TRIBUNE (Minneapolis, MN), Oct. 8, 2010, *available at* http://www.catholiccitizens.org/platform/platformview.asp?c=52230 (noting that Nienstedt

denied communion to gay-rights activists who were wearing rainbow sashes while presenting themselves for communion). Given all the controversy surrounding Nienstedt's position on gay rights, it is not surprising that he has yet to address the question of denying communion to pro-choice politicians.

[32] Although the seat is currently vacant, there has been no effort to deny communion in any diocese that is part of the Texas Catholic Conference, which includes San Antonio. A step toward communion denial would represent a departure from the 2004 directive agreed upon by the conference which sought specifically not to deny communion to politicians based on their public support for pro-choice policies. *See Dinardo Cardinal Watch*, *supra* note 13.

[33] John Larson and Rosa DeLauro, both pro-choice Catholic legislators, have never been denied communion by Mansell, despite calls to do so by pro-life activists like Randall Terry. *See, e.g.*, Peter Urban, *U.S. Lawmakers Defend Pro-Choice Views*, CONNECTICUT POST ONLINE, May 27, 2007, *available at* http://banderasnews.com/0705/nw-prochoiceviews.htm.

[34] Ray Henry, *RI Bishop Asked Kennedy in 2007 to Avoid Communion*, ASSOCIATED PRESS, Nov. 22, 2009, http://abcnews.go.com/US/wireStory?id=9147572 (noting that Bishop Tobin asked Representative Patrick Kennedy to refrain from receiving communion).

[35] Wuerl's attempted middle ground confounds and infuriates all on this issue. He will not personally deny communion to those of the Washington Archdiocese. He will, however, accede to the request for communion denial of other bishops, which have some pro-choice politicians visiting Washington as permanent parishioners of another diocese. Thus, at present, Archbishop Nieubaur of San Francisco will not deny communion to Nancy Pelosi. This policy has brought the Archbishop under intense attack, most notably by the pro-life group Operation Rescue, which seeks Archbishop's ouster, preferably (and inexplicably) to a far off state like "Montana or Idaho." Randall Terry, *Why Can Speaker Pelosi Receive Communion?*, WASH. TIMES, Apr. 7, 2010, *available at* http://www.washingtontimes.com/news/2010/apr/07/why-can-speaker-pelosi-receive-communion/ (asking for Wuerl's banishment to another part of the U.S. and expressing serious regret that "[i]f bishops will not withhold Communion over child killing, for what crime would they withhold it?," and identifying the pro-life Catholic movement's "unhappy task. . . to lift up our voices until truth prevails, innocent children are protected from murder and Holy Communion is protected from sacrilege"). I have found no example of Wuerl publicly denying communion to a politician whose local bishop has requested that this sanction be imposed. Of course, if Wuerl does not wish to participate in the communion-denial regime under any circumstances, he has great interest of keeping this information from the press.

[36] Sartain would not have denied communion to pro-choice politicians when he was Bishop of Little Rock, Arkansas. *See, e.g.*, Van Jensen, *The Politics of Catholic Communion Views Differ on Denying Rite to Candidates*, ARKANSAS DEMOCRAT-GAZETTE (Little Rock, AK), June 1,

2004. ("If John Kerry had requested Holy Communion during his campaign stop in Arkansas, he would have received it."). He is now joining a diocese where the outgoing Archbishop, Alexander Brunett, refused to deny communion to pro-choice politicians, much to the chagrin of pro-life activists. *See, e.g.*, Chris McGann & Claudia Rowe, *Archbishop Warns Catholic Politicians on Abortion*, SEATTLE POST-INTELLIGENCER, July 20, 2004, *available at* http://www.seattlepi.com/local/182820_bishop20.html.

[37] *See No Help From Left Coast*, *supra* note 12 (citing a previous June 2004 survey that noted that McGrath would "[follows] the policy of San Francisco" and similarly not deny communion to pro-choice politicians).

[38] Vann is bound by the rule of the Texas Conference of Bishops, announced by Archbishop DiNardo, that no member of the conference would deny communion to a pro-choice politician. See *Dinardo Cardinal Watch*, *supra* note 13. Moreover, while he has frowned upon giving communion to pro-choice politicians, he has not specifically denied the sacrament, despite having the opportunity to do so, most notably with pro-choice Catholic senator Richard Durbin. Rocco Palmo, *The Bishop-Elect: A Primer*, WHISPERS IN THE LOGGIA (Dec. 15, 2005 1:25 AM), http://whispersintheloggia.blogspot.com/search?q=The+Bishop-Elect%3A+A+Primer (noting that Vann remained "reticent" about Durbin receiving communion when Vann was still a priest in Durbin's Illinois diocese).

[39] Bootkoski has avoided taking a public stance on the communion denial question perhaps because he has been dealing with a clerical sex-abuse scandal and investigation. *See, e.g.*, Mark Spivey, *North Plainfield Priest Removed from Parish Amid Sexual-Misconduct Allegations*, HOME NEWS TRIBUNE (East Brunswick, New Jersey) Oct. 11, 2010, [page number omitted].

[40] Former Denver Archbishop Chaput, who adhered to the communion-denial regime, was recently appointed Archbishop of Philadelphia. His interim replacement in Denver, Bishop James Conley, seems closely aligned with Chaput on this matter. *See, e.g.*, Charles Chaput & James Conley, *Public Servants and Moral Reasoning: A Notice to the Catholic Community in Northern Colorado*, Sept. 8, 2008, *available at* http://www.archden.org/repository//Documents/ArchbishopChaputCorner/Addresses/PublicServants%26MoralReasoning9.8.08.pdf (critiquing pro-choice Catholic politicians).

[41] *See, e.g.*, Rocco Palmo, *Comings and . . . Comings*, WHISPERS IN THE LOGIA (June 7, 2009, 10:30 AM), *available at* http://whispersintheloggia.blogspot.com/2009/06/comings-and-comings.html (quoting an interview between Carlson and the Saint Louis Post-Dispatch—no longer available online—in which Carlson said that if he spoke to a pro-choice politician about his pro-choice votes and if that person persisted, he would deny the person communion). Notably, when he was a bishop in South Dakota, Carlson did allegedly ask that then-Senate Minority Leader Tom Daschle remove all references to his Catholicism from his campaign

website, because of Daschle's pro-choice votes. *See* Charlotte Allen, *For Catholic Politicians, A Hard Line*, WASH. POST. Apr. 11, 2004, at B01.

[42] *See* Terry, *supra* note 21, at 19 (identifying Galante as one who would deny communion and collecting authorities to support this proposition); Kralis, *supra* note 21 (same).

[43] O'Brien has insinuated that he would deny communion to pro-choice candidates in his archdiocese. *See* Liz F. Kay, *New Home for a New Archbishop; After a Worldwide Parish, O'Brien to Live at Cathedral*, BALTIMORE SUN, July 14, 2007, at 1A (quoting O'Brien as saying, "If it got to a point where a serious scandal was being created, maybe it would be a point to go further and to deny [communion] . . ."). Nevertheless, pro-choice U.S. (Catholic) Senator Barbara Mikulski continues to receive communion in Baltimore, much to the chagrin of pro-life activists. *Tour Asks Bishops To Deny Communion*, (Defend Life, Baltimore, Md.) Jan.-Feb. 2010, Vol. 21 No. 1 at 1, *available at* http://www.defendlife.org/Jan2010Newsletter.pdf (calling on O'Brien to publicly deny Mikulski communion). Further, O'Brien has yet to deny communion to pro-choice Catholic governor Martin O'Malley, despite publicly clashing with him over the issue in the past. *See* Gerard O'Connell, *Pope Appoints O'Brien as Pro-Grand Master of the Equestrian Order of the Holy Sepulchre of Jerusalem*, LASTAMPA VATICAN INSIDER, Aug. 27, 2011, *available at* http://vaticaninsider.lastampa.it/en/homepage/the-vatican/detail/articolo/baltimore-us-jerusalem-7593/.

[44] Aymond has not expressed a wish to deny communion in the past, particularly during his time as Bishop of Austin, Texas. *See* Eileen E. Flynn, *Bishop Speaks for Tenets Amid Cultural Changes*, AUSTIN AMERICAN-STATESMAN (Texas), Mar. 10, 2008 at A01 (noting that Aymond "tries to avoid the tactics" of communion-denying bishops because while "they're standing boldly for the teachings of the church," they are taking such a stance "with judgmentalism, a heavy hand. [These bishops are] not inviting people to know Jesus and the truth; it comes across as trying to manipulate people").

[45] Schnurr has not had to publicly take a position on communion denial, perhaps because he does not seem to have any high-profile pro-choice Catholics living in his diocese and because the diocese itself has been more concerned with a developing priest sex-abuse scandal and with financial solvency issues. *See* Amber Ellis & Dan Horn, *Catholics Welcome Shepherd*, THE CINCINNATI ENQUIRER, Dec. 8, 2008, at 1A (focusing on these issues in appraising Schnurr's future responsibilities in his new job in Cincinnati).

[46] Doran is not publicly on record as denying any pro-choice politician communion. Nevertheless, it seems probable, given his past rhetoric on the matter that if he were accorded the opportunity to deny communion to a pro-choice Catholic, he would do so. *See, e.g.*, Joe Feuerherd, Op-Ed, *Voting Democratic, Without Fear of Damnation, the Bishops Err in Making One Issue the Test for U.S.*, THE STAR-LEDGER (Newark, New Jersey), Mar. 3, 2008, at 15

(quoting Doran as saying, "[n]o doubt, we shall soon outstrip the Nazis in doing human beings to death [with abortion]. . . We know . . . that adherents of one political party would place us squarely on the road to suicide as a people.").

[47] Niederauer has considered denying Speaker Pelosi communion but has yet to do so; he has drawn the ire of many pro-life activists for this apparent failing. *See, e.g.*, Archbishop George Hugh Niederauer, *Archbishop Addresses Recent Comments Made by House Speaker Pelosi*, ARCHDIOCESE OF SAN FRANCISCO, Sept. 5, 2008, http://www.sfarchdiocese.org/about-us/news/?search=pelosi&C=65&I=1308.

[48] Paul Loverde, like Donald Wuerl in Washington, D.C., has been similarly criticized by Randal Terry for failing to deny communion to pro-choice politicians. Because Loverde has taken such a position, Terry has tried to have Loverde removed from office with the aid of Cardinal Raymond Burke. *See, e.g.*, *Randall Terry's Interview with Archbishop Burke*, AMERICA MAGAZINE IN ALL THINGS BLOG (Mar. 25, 2009, 2:08 PM), http://www.americamagazine.org/blog/entry.cfm?blog_id=2&id=10124323-3048-741E-9778043649175856.

[49] Salvatore J. Cordileone has not publicly denied communion to Ellen Taucher or George Miller, two pro-choice Catholics in his district. If he were to deny communion to pro-choice politicians, he would be one of the only California prelates to take such a step. *See No Help from the Left Coast*, *supra* note 12.

[50] Serratelli has not denied communion in the past and has expressed wariness about denying communion to Catholic politicians, as the practice "make[s] the altar a place of confrontation." Robert Hanley, *Deputy in Newark Named Bishop of Paterson*, N.Y. TIMES June 2, 2004, at B5. Certain pro-life media outlets have suggested that Serratelli has changed his position. *See, e.g.*, Peter J. Smith, *American Bishop: Pro-Choice Equals No Communion for Catholics*, LIFESITENEWS.COM, http://www.lifesitenews.com/news/archive/ldn/2007/jun/07061904. Yet in his public statements, Serratelli has only spoken about how a pro-choice view would put a politician "out of communion" with the Church. He has not taken the specific stance of denying communion to a pro-choice politician. *Id.*

[51] John Noonan was recently installed as Bishop of Orlando and has not taken a public stand on communion denial. *See* Jeff Junerth, *John Noonan Installed As Bishop of Orlando Diocese*, ORLANDO SENTINEL, Dec. 16, 2010, *available at* http://articles.orlandosentinel.com/2010-12-16/news/os-bishop-john-noonan-installation-20101216_1_john-noonan-fifth-bishop-orlando-diocese.

[52] Vlazny is on record as seeking to deny communion to any politician—or any Catholic voter—who supports a pro-choice platform. *See* Jeff Wright, *Archbishop: Kerry, Others Shouldn't*

Receive Communion; Religion; He Says Any Catholic Whose Beliefs Defy Church Teachings Should Avoid the Sacrament, THE REGISTER-GUARD (Eugene, OR), May 14, 2004, at a1.

[53] For this chart, I applied the same rules as above in determining who would be classified as a communion denier. I did not consider retired prelates who are no longer the chief administrators of their dioceses. Thus, I have not included the following communion deniers in my list: Andrew Gettelfinger of Evansville, Indiana; Elden Curtiss of Omaha, Nebraska; René Gracida of Corpus Christi, Texas; John Yanta of Amarillo, Texas; Joseph Martino of Scranton, Pennsylvania; Robert Baker of Charleston, South Carolina; and John Donoghue of Atlanta, Georgia.

[54] *See supra* note 8.

[55] *See supra* note 11.

[56] *See supra* note 18.

[57] *See supra* note 21.

[58] *See supra* note 22.

[59] *See supra* note 25.

[60] *See supra* note 34.

[61] *See supra* note 40.

[62] *See* Kralis, *supra* note 21.

[63] *See supra* note 52.

[64] *See, e.g.*, Finn Bullers, *Archbishop to Gov. Sebelius: Stop Taking Communion, Publicly Apologize*, KANSAS CITY STAR PRIMEBUZZ, May 10, 2008, *available at* http://primebuzz.kcstar.com/?q=node/11658 (noting that Naumann asked that then-Governor Sebelius to voluntarily refrain from receiving communion).

[65] *See* Bishop Baker and Bishop Jugis, *Worthy To Receive the Lamb: Catholics in Political Life and the Reception of Holy Communion*, Aug. 4, 2004, http://www.ewtn.com/library/bishops/recvlamb.htm (explaining why Jugis will deny communion to pro-choice politicians) [hereinafter *Worthy To Receive the Lamb*].

[66] Coakley stated that he would deny communion to pro-choice politicians when he was bishop of Salina, Kansas. *See* Terry, *supra* note 21, at 20. He has not publicly changed his position since moving to Oklahoma City.

[67] *Id*. at 19 (identifying Bruskewitz as one who would deny communion and collecting authorities to support this proposition).

[68] *Id.* (identifying Gettelfinger as a bishop who would deny communion and collecting authorities to support this proposition).

[69] *Id*. (identifying Aquila as a bishop who would deny communion and collecting authorities to support this proposition).

[70] *See Worthy To Receive the Lamb*, *supra* note 65.

[71] Terry, *supra* note 21, at 20.

[72] *See* John-Henry Westen, *Kentucky Bishop on Denying Pelosi Communion: 'We've Been Patient Enough'*, LIFESITENEWS.COM, Jan 26, 2010, http://www.lifesitenews.com/news/archive/ldn/2010/jan/10012609 (explaining how Westen would deny communion to Representative Pelosi).