In the 1997 U.S. Supreme Court case Washington v. Glucksberg, the justices ruled unanimously (9-0) that the state of Washington’s ban on physician assisted suicide did not violate the Fourteenth Amendment’s Due Process Clause by denying competent terminally ill adults the liberty to choose death over life. The decision states that such protection applies only to those rights “deeply rooted in this Nation’s history and tradition.” (my emphasis added) More importantly, the case highlighted a key concept in constitutional law, namely that the government has a duty to seek “ordered liberty.” Legal scholars trace the genesis of “ordered liberty” even farther back to Palko v. Connecticut (1937), the Supreme Court case concerning the so-called “double jeopardy” of criminal defendants.

The 8-1 Palko decision allowed the state of Connecticut to retry a man who had been charged with first-degree murder. Due to a judge’s refusal to allow a confession into evidence, the defendant was convicted instead of second-degree murder. The state appealed and won a new trial; this time the court found Palko guilty of first-degree murder. It is a “wonky” decision that evaluates the competing protections afforded by the fifth and fourteenth amendments as it relates to states. The key innovation is the court’s discussion of “ordered liberty,” the clarification that some rights are more fundamental than others, rights that are “of the very essence of a scheme of ordered liberty ... that neither liberty nor justice would exist if they were sacrificed.” Incidentally, Minnesota’s own Justice Pierce Butler cast the lone dissenting vote.

This refers to the often-delicate balancing act between societal welfare and individual rights. In short, some rights are not of the very essence of a scheme of “ordered liberty.” Regarding the “right” of a patient to choose death, the Glucksberg decision stated: “to abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Last month’s Dobbs v. Jackson decision that effectively overturned Roe v. Wade employs this terminology: “Ordered liberty sets limits and defines the boundary between competing interests.” When it comes to contentious issues of morality and individual rights, things get dicey—and quickly! While acknowledging the contentious nature of the abortion debate, Dobbs held that abortion ought not to be enumerated as a fundamental right.

It may help to visualize three concentric circles. (See sidebar, p.5) For this image, I am indebted to a Law Review article (here) by Matthew Grothouse. The outside circle reflects the general but enumerated powers of the federal government: e.g., maintaining and securing our national border. The second circle represents the power of an individual state, wide-ranging as it is, but still limited. An example is Minnesota’s law stating that “aquatic plants growing in public waters are the property of the state,” protecting us from invasive species. Finally, the innermost circle represents “we the People,” and how we exercise and derive our human rights. (cf. U.S. Constitution, Article X) When government limits personal freedom, it is done with appropriate reserve, balancing rights and responsibilities.

One needn’t pass the bar exam to see how the “ordered liberty” principle plays out in daily life. I’d argue that parents exercise “ordered liberty” every single time that they hand the car keys to their high school junior on a Friday night! Parents are equally called to protect their children from harm and to prepare them for life. Sufficient mutual trust allows teenagers to exercise a degree of autonomy, even if some risk is involved. Otherwise, they will never develop any sense of personal responsibility. If the role of the federal government is to protect us from all harm, then
pray tell, the speed limit on the interstate should be 10 mph! I guarantee there would be fewer highway deaths! But at what cost? It is within the purview of the federal government to promote the general welfare of its citizenry. Our National Park System is a treasure! See the Ken Burns documentary entitled “The National Parks: America’s Best Idea.” Besides the U. S. Constitution and Major League Baseball, I’m inclined to agree with him!

There are parallels to this concept in the life of the Church. For example, Minnesota statute 517.08 offers a discount to engaged couples who have completed 12 hours of pre-marriage counseling, whether secular or religious. A statement presented that is “signed, dated, and notarized or marked with a church seal” automatically qualifies for a reduced fee of $40. In Ramsey County, that’s a $75.00 discount. Why? Heretofore, such counseling has been seen to contribute to societal stability. Stable marriages benefit society, and one could infer that pre-marital counseling would contribute to that stability by encouraging discussion of key aspects of marriage. Government has a right—even a duty- to promote societal welfare, while also protecting religious liberty. Yes, it’s contentious and messy— but absolutely essential for a well-functioning society.

- Whither patriotism? Who’s running Orlando’s social media? The city’s announcement of its July 4 fireworks began: “A lot of people probably don’t want to celebrate our nation right now, and we can’t blame them.” It ended, “Yes, America is in strife right now, but you know what...we already bought the fireworks.” Well, at least Orlando had fireworks. Neither Minneapolis nor St. Paul held fireworks within its city limits.

- The St. Paul Center for Biblical Theology (Steubenville, OH) is sponsoring an online event: “Male and Female He Created Them.” Six experts in the fields of philosophy, obstetrics and gynecology, endocrinology, psychology, plastic surgery, and theology will discuss the important topic of gender ideology. The webinar is being held this coming Tuesday, July 12. Register under the events section online here or visit www.stpaulcenter.com.

- In the 2021-22 Supreme Court term, 29% of cases were decided unanimously. Unanimous decisions typically outnumber any other single vote; this year they were edged out by 6-3 decisions. In our politically charged climate, this may seem counterintuitive, but most cases go unnoticed in the news.

- If you have ten minutes, check out (here) the interview of Kristan Hawkins, president of Students for Life in America, referenced in my homily last Sunday. She represents the very best of pro-life advocates— informed, calm, compassionate, patient, yet confident! She hit it out of the park!

- From sea to shiny silver dollar? The Big Ten is expanding again, this time to the west coast, spanning from sea to shining sea. Make no mistake— this is about one thing, the almighty shiny silver dollar! It is about media markets and revenue. In theory, UCLA or USC could host Maryland. Flight time from Baltimore to LAX is over 5 hours. At least it provides student athletes plenty of study time during travel! Crazy.

Sincerely in Christ,
Fr. John L. Ubel,
Rector