

The Legal Order and the Common Good: Abortion Rights as Contradiction of Constitutional Purposes

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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.ⁱ

I. INTRODUCTION

With these words, the Preamble of the Constitution of the United States outlines the purposes for which the Constitution—and the Federal union—were created. The goals to which the American people commit and bind themselves in a political union are identified in this pledge. The topic with which this paper is concerned is whether the United States Constitution, especially the Preamble, establishes a framework in which the fundamental laws of the land do not support the prevalent claim for abortion rights. It is my contention that the Constitution and the purposes for which it was framed by the Preamble are intended and designed to promote the common good in which the right to human existence—regardless of the stage of human development—will always trump any claim in support of abortion.ⁱⁱ At the outset, it is necessary for me to reveal my understanding of the role of law in society—and, in particular, Constitutional law. Law is the framework, institutionalized by social and governmental conventions, that provides for an ordered society. Law is the tool we use to govern and protect ourselves and our relations and

relationships with one another.

In order to present and argue this thesis, I first offer a brief explanation of the common good. Next I shall provide a concise analysis of the Preamble to demonstrate how it promotes the common good. Finally, I shall examine two U.S. Supreme Court Decisions, *Jacobson v. Massachusetts*ⁱⁱⁱ [the vaccination case] and *Stenberg v. Carhart*^v [the partial birth abortion case], to illustrate how the goals set out in the Preamble are vital to guide the law of the land in such a way as to promote the common good.

II. THE COMMON GOOD

The concern about the common good as a social, political, and legal issue extends back to ancient times. In classical Greece and Rome, philosophers were concerned about the common good. Among the first to investigate this issue was Aristotle, who noted that “Every state is a community of some kind, and every community is established with a view to some good.”^v In examining the state and political institutions established to govern the community, he suggested that just governments are those “which have a regard for the common interest.”^{vi} In assessing what Aristotle considered to be just, we examine his discourse on ethics, in which he supplied the foundation of a theme that justice is reciprocity and mutuality through relationship.^{vii} In placing the notion of reciprocity into the human community, Aristotle contended that the truest or best form of justice is the reciprocal display of friendship.^{viii} The Roman Marcus Tullius Cicero shared some of Aristotle’s attitudes when he suggested that a commonwealth or social order emerges from the social spirit of people who make the commonwealth their “property,” which is established on the principles of “respect for justice” and “partnership for the common good.”^{ix}

The idea of the common good has a rich tradition within Christian philosophy and social thought. For example, St. Augustine reflected some of the preceding thinking of Aristotle and Cicero when he suggested that the human race is not simply united “in a society by natural likeness” but that it is or should be “bound together by a kind of tie of kinship to form a harmonious

unity, linked together by the ‘bond of peace.’^x During the Middle Ages, Thomas Aquinas concluded that the object of justice is to keep people together in a society in which they share relationships with one another. In his words, “justice is concerned only about our dealings with others.”^{xi} The notion of justice as being the mutuality or reciprocity shared among the members of society was further refined by Aquinas when he argued that “the virtue of a good citizen is general justice, whereby each person is directed to the common good.”^{xii} Furthermore, Aquinas understood the connection between virtue and the common good as directed by justice “so that all acts of virtue can pertain to justice in so far as it directs [each person] to the common good.”^{xiii}

The Twentieth Century Christian philosopher Jacques Maritain brought Aquinas’s understanding of the common good into the contemporary era. He recognized the need to separate the dignity of the individual human being from the dangers of the primacy of the isolated individual and the promotion of the private good. The common good, for Maritain, is “the human common good,” which includes “the service of the human person.”^{xiv} In large part, Maritain was responding to the threats posed to the dignity of the human person by three forms of states that existed during the first half of the twentieth century: (1) the bourgeois liberal state, (2) the communist state, and (3) the totalitarian state. With regard to the first category, in which the American legal culture is situated, Maritain concluded that “bourgeois liberalism with its ambition to ground everything in the unchecked initiative of the individual, conceived as a little God,”^{xv} was a threat to the dignity of the human person and the common good. Maritain stated that the emphasis on individualism at the expense of community results in “the tragic isolation of each one in his or her own selfishness or helplessness.”^{xvi} As will be demonstrated in the discussion of the *Stenberg* case and the individual’s claim to abortion and “reproductive” rights, the emphasis on the isolated, autonomous individual and associated problems survive.

Through his perceptive understanding of the social conditions of the times during which he wrote, Maritain acknowledged that evil

arises when “we give preponderance to the individual aspect of our being.”^{xvii} Maritain recognized individualism as an evil because he understood that the human being, who is an individual, is simultaneously a member of the human community. For Maritain, a constitutive element of being human is the “inner urge to the communications of knowledge and love, which require relationship with other persons.”^{xviii} In plain terms, Maritain advanced the basic position that the human person and the community are not in conflict with one another because their vital interests are complementary rather than contradictory. The words of Maritain are compelling:

There is a correlation between this notion of the person as a social unit and the notion of the common good as the end of the social whole. They imply one another. The common good is common because it is received in persons, each one of whom is a mirror of the whole.... The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of human persons, just as the social body itself is a whole of human persons, this conception also would lead to other errors of a totalitarian type. The common good of the city is neither the mere collection of private goods, nor the proper good of a whole that, like the species with respect to its individuals or the hive with respect to its bees, relates the parts to itself alone and sacrifices them to itself. It is the good human life of the multitude, of a multitude of persons; it is their communion in good living.^{xix}

In these words, Maritain pointed out that the rights of the individual human person and the interests of the community are compatible, harmonious, and inextricably related. The fundamental rights of persons and those of the society in which each person lives share as the principal value “the highest access...of the persons to their life of person and liberty of expansion, as well as to the communications of generosity consequent upon such expansion.”^{xx} For Maritain, the expansion of each person’s rights needs the community. In isolation, each is cut off from the others, and the solitary person is alone and must fend for the self. However, when in community, the individual

person can rely on the generous support of others to be more, not less, of a human being. In the context of the abortion issue to be examined in the discussion of the *Stenberg* case, it would seem that the individuals most concerned (the mother, her child, and future generations of human beings) would be better served if society would do more to help them and their interrelated interests. Programs providing concrete assistance to the mother and the child she bears would constitute attractive alternatives to abortion that are respectful of the interests of both. Similarly, programs that benefit the child encourage its coming into this world with the reasonable expectation of becoming a contributing member of society and its future. Hence, the interests of future generations are taken into account. A brief digression is in order here. Each person who is a member of the present community of human beings can go back in time to recall how he or she, while in the mother's womb, was a member of a future generation. By going back in time to this stage in our own human development, we are powerfully reminded that each of us shared this status as a member of a future generation. We are also reminded of the mutuality and reciprocity that we share with the unborn of all generations.

The protection of the human person and of human dignity at all stages of human life requires insertion and participation in, not insulation and separation from, the community. The community prospers when its members contribute of themselves in making it prosperous; the community withers when its members turn within and tend only to their private cares.^{xxi} The threat to a free world of the good citizen was identified by Benjamin Barber as the world in which people exist for no one else but themselves. As he argued, "there can be no fraternal feeling, no general will, no selfless act, no mutuality, no species identity, no gift relationship, no disinterested obligation, no social empathy, no love or belief or commitment that is not wholly private."^{xxii}

In a legal context, the common good was carefully examined by Heinrich Rommen, a lawyer and legal philosopher who left Nazi Germany for the United States in the late 1930's. In 1945 he

published his comprehensive *The State in Catholic Thought*.^{xxiii} He saw the common good

as the creative principle, the conserving power of the body politic; it is the final cause of the state, its intimate end; it and nothing else gives the political, sovereign power its moral authority and legitimacy. Therefore the common good is the directive rule and the last unappealable norm of the acts of the sovereign power, as the object of this power is nothing but to produce, in collaboration with the citizens, the actual realization of the common good. The common good is the first and the last law.^{xxiv}

The common good, for Rommen, is not simply the sum of the goods for each private individual.^{xxv} It is, in essence, a relational concept in which the good of the one must be understood in the context of the good for all other members of the society.^{xxvi} In several instances, Rommen acknowledged the interrelation of the private or individual and the common good.^{xxvii} He recognized this connection in the concept of the *suum cuique* where everyone receives his due.^{xxviii} To this perspective I would add that what is due one person cannot be determined until that which is due all other individuals concerned with the same issue is taken into account.

As this paper suggests, there is a connection between the common good and the purposes of the United States Constitution. While they did not elaborate on the doctrine in great detail, both James Madison and Alexander Hamilton favorably addressed the common good in their advocacy for the adoption of the 1787 Constitution. For example, in addressing the problem of factions, Madison argued that they

divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.^{xxix}

Either Madison or Hamilton submitted later on another important

point in the context of the virtues of a bicameral representative legislature:

Of all the objections which have been framed against the federal Constitution, this [the criticism leveled at the House of Representatives] is perhaps the most extraordinary. Whilst the objection itself is leveled against a pretended oligarchy, the principle of it strikes at the very root of republican government. The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.^{xxx}

Surely, for the principals involved with the drafting of the Constitution and advocating for its adoption, the common good was a vital theme to the establishment, sustenance, and success of the Federal Union. These brief references to the common good, advocates for the adoption of the Constitution provided little in the way of explaining what was meant by the *common good*. That is why it is now essential to examine the language of the Preamble itself for clarification of what is meant by the *common good* in the context of our Federal system of government.

III. AN ANALYSIS OF THE PREAMBLE OF THE CONSTITUTION

As stated at the beginning of this paper, the Preamble of the U.S. Constitution identifies the purposes for which the Federal Government consisting of a Congress, Executive, and Judiciary operating along with the governments of the States was established. While the Preamble does not necessarily serve as a source of power,^{xxxi} it does provide the basic objectives for which the Constitution was drafted and implemented. A parsing of the text within the framework of the common good would help illustrate this point. The text of the Preamble provides as follows:

First of all, it identifies the persons involved with or concerned about the Constitution. It states that “We the People of the United States” are those principally concerned with the Constitution and its implementation. The language suggests individual persons

who are united in a community and uses the first person plural pronoun [We] to do this. Additional definition is given to the nominative plural pronoun by adding the inclusive modifier that states that these individuals are the People of the United States. This language of identification then proceeds to explain that the integrated community as opposed to a collection of isolated, autonomous individuals is a national community bound together for some reason.

The underlying justification emphasizing the communal nature of the Union suggests that the Union exists for a set of reasons. The community, which identifies itself as the People of the United States, was established for a set of purposes that is preceded by the phrase “in Order to...” This language which begins to explain the *raison d'être* of the Union then specifies six categories of activities that are connected with the coordinating conjunction *and*. The significance of this conjunction suggests that the reasons for which the Constitution exists are to achieve all, not just some, of the goals that are listed. It is these goals which identify the purposes for which the community of the People of the United States has come together.

The first goal that the Preamble identifies is to “form a more perfect Union.” Rather than electing to advance the separate interests of autonomous individuals, the initial objective toward which action is to be taken is to develop a union, a community—but not just any union, a more perfect one.^{xxxii}

A second goal follows, and it is geared to the establishment of justice. The justice to be pursued is the justice for the community of the People of the United States who strive to perfect their union.

The third purpose for which the community exists is to “insure domestic tranquillity.” The tranquillity to be pursued is not for the advantage of some. Rather, it is for the benefit of the entire community of individuals who identify themselves as the People of the United States.

The third justification for the union is related to and paves the way for the fourth: those actions pursued to “provide for the

common defence.” In short, the other goals for which the Constitution was established, including domestic tranquillity cannot be protected unless measures are taken to protect the People of the United States. This protection cannot be limited to the benefit of some. Rather, it must be extended for the safeguard of all.

To ensure this, the drafters provided the fifth goal of the Constitution, which is the promotion of the “general Welfare.” The use of the modifier *general* intensifies the significance that the actions taken for the achieving the purposes of the union are for everyone of the People who comprise the United States. This welfare cannot be realized if the beneficiaries do not include all of the individuals who comprise the federation.

The sixth and final goal is connected to the previous five with the coordinating conjunction *and*. The purposes for which the union under the Constitution was ordained and established are incomplete or imperfect if the blessings of liberty are not secured. Again, there is little dispute that these blessings are for all, not just some, of the People of the United States. Moreover, this liberty is not just for the people of a particular—the present—generation. It is a goal for all succeeding generations of the American People, and this is made clear by the use of the phrase “our posterity.” It would be sensible to argue within the context of this last of the six interrelated goals that the purposes for which the Constitution was ordained and established were not only for the first generation of Americans who comprised the People of the United States. These aspirations were for the benefit of all succeeding generations who would continue the existence of the People of the United States.

IV. IMPLEMENTATION AND AVOIDANCE OF THE COMMON GOOD IN SUPREME COURT JURISPRUDENCE

Aristotle commented that the state achieves greatness when its leaders promulgate law that promotes or enhances the common good.^{xxxiii} One practical way of implementing this noble goal is for a state to take those steps necessary to protect each of its

members regardless of status, hierarchy, class, or other category of identification.^{xxxiv} A fundamental reason justifying this approach to governance is that as each person is protected, the protection of all will necessarily follow. And when all are protected, each in turn is safeguarded by the State even though some may have to forego the exercise of particular liberties within explicit contexts.

This was illustrated by the Supreme Court's decision in *Jacobson v. Massachusetts*. In this early twentieth-century case, the Commonwealth of Massachusetts had enacted a statute authorizing cities and towns to require mandatory vaccinations free of charge if inoculations were determined necessary to protect public health and safety.^{xxxv} Jacobson refused to comply with the order of his city to subject himself to the required immunization, and he was found guilty of violating the regulation promulgated to enforce the state statute.^{xxxvi} In his defense, Jacobson argued that he was immune from prosecution [and the immunization!] on two Constitutional grounds: (1) under the rights secured to him under the Preamble of the Constitution of the United States,^{xxxvii} and (2) under the rights of liberty, due process, and equal protection guaranteed under the Fourteenth Amendment.^{xxxviii}

In writing for the majority that affirmed the State court conviction,^{xxxix} Justice Harlan quickly passed over Jacobson's first defense that the prosecution violated the Preamble of the Constitution. He noted that the Preamble was not the source of any substantive power; rather it was, as previously argued, the expression of "the general purposes for which the people ordained and established the Constitution."^{xl} The Court focused on Jacobson's second defense that was based on the liberty argument from the Fourteenth Amendment.

At the outset of its examination of the liberty defense, the majority presented Jacobson's argument that his Constitutionally protected liberty was invaded when he was prosecuted for failing to undergo the mandated vaccination. Jacobson claimed that the State authorities trammelled the exercise of his autonomy to protect his own health in the way he determined was best.^{xli} While

the majority acknowledged that there might be some small number of cases where this defense may work,^{xiii} this was generally not the case and particularly not so in Jacobson's circumstances. The majority stated that the rights of liberty enjoyed by each person do not confer an absolute right to be free of all restrictions because "[t]here are manifold restraints to which every person is necessarily subject for the common good."^{xiii} The majority continued by stating that the rights to liberty exercised and enjoyed by each person are subject to

such reasonable conditions...essential to the safety, health, peace, good order, and morals of the community. Even liberty itself...is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others.^{xiv}

In essence, then, the rights properly belonging to the individual must be understood in the context of rights properly belonging to *all* persons. A well-ordered society requires that the civil authorities take account of the welfare of all "and not permit the interests of the many to be subordinated to the wishes or convenience of the few."^{xv} This is precisely what the Preamble of the Constitution establishes as the purposes for which the Constitution of the United States was established.

Although the rationale of the Court in *Jacobson* remains intact, the protection it provides to promote and enhance the common good was put aside in a much more recent decision. In *Stenberg v. Carhart* [the "partial birth abortion" case], a majority of the Supreme Court sacrificed the common good for the interests of the autonomous individual. The majority opinion concluded that the state legislation banning a particular method of abortion [Dilation and Extraction—known as the D&X method] was unconstitutional on several grounds.^{xvi} At the outset of the majority opinion, Justice Breyer acknowledged "the controversial nature of the problem" and the "virtually irreconcilable points of view" presented in the case.^{xvii} Nonetheless, the majority based its decision on the "Constitution's guarantees of fundamental

individual liberty” that protect “the woman’s right to choose” as founded in previous decisions of the Court.^{xlviii}

The individual liberty identified by the *Stenberg* majority was allowed to trump the common good. In this regard, the majority decision is at odds with the fundamental purposes of the Constitution identified in the Preamble and the identification of the relationship between individual liberty and the common good as explained in the earlier *Jacobson* decision.

At issue in *Stenberg* was the legality of the statute enacted by the State of Nebraska to outlaw the D&X method of abortion—a method that Justice Breyer stated “may seem clinically cold or callous to some, perhaps horrifying to others.”^{xlix} Of course, *this could be said about virtually every other method used to terminate a pregnancy*. In spite of the reaction that one may have to the descriptions of the procedures, Justice Breyer’s opinion noted on several occasions that it [and a similar method, Dilation and Evacuation, or D&E] was performed “on a living fetus”^l or “of a still living fetus.”^{li} Regardless of the method used to perform the abortion, the majority recognized that the target of the procedure is “a still living fetus”^{lii}—a status every person has enjoyed in the chain of human development. The efforts pursued by the State to regulate the D&X method, in the opinion of the majority, were unconstitutional for two independent reasons. First, they failed to provide for an exception “for the preservation of the...health of the mother”^{liii} and, second, they imposed an “undue burden” on the mother’s liberty to choose other types of abortion not specifically regulated by this statute.^{liv}

In a brief concurring opinion joined by Justice Ginsburg, Justice Stevens attempted to reinforce the majority’s opinion by arguing that the State irrationally attempted to regulate only one of “two equally gruesome procedures.”^{lv} Nevertheless, the outcome the outcome of this case, for Justices Stevens and Ginsburg, was mandated by *Roe v. Wade* because

...the word “liberty” in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision—makes it

impossible...to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.^{lvi}

Thus, the liberty of a woman to choose an abortion, regardless of its gruesomeness and regardless of the immediate and eventual consequences for her child, was of paramount interest to the majority. Indeed, liberty is an important matter for purposes of the Constitution as was acknowledged earlier. However, what the majority failed to grasp is that the liberty they protected was the liberty of the “one” [or perhaps other “ones”] who may wish to exercise her liberty to “kill” a “still living fetus.” What the majority did not acknowledge and, arguably could not, was that the purpose of Constitutional protection of liberty is not just for some but for the benefit of all—to “ourselves and our Posterity.”^{lvii}

In short, the majority in *Stenberg* was consumed by the same kind of individual liberty as was Mr. Jacobson. But this is not the sort of liberty that the Preamble addresses. Justice Scalia in his dissenting opinion noted the relevance of the Preamble—and possibly the common good—to this case. After observing that the majority decision authorizing the D&X “method of killing a human child” gave “live-birth abortion free rein,”^{lviii} Justice Scalia argued that

The notion that the Constitution of the United States, designed among other things, “to establish Justice, insure domestic Tranquility, ...and secure the Blessings of Liberty to ourselves and our Posterity,” prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.^{lix}

In addition to Justice Scalia, the Chief Justice, Justice Thomas, and Justice Kennedy dissented. While Justices Scalia and Thomas and the Chief Justice had previously opposed the position that “the right to abortion” is Constitutionally protected, Justice Kennedy had not.^{lx} However, in *Stenberg* his dissent was conspicuous and detailed in its opposition to the D&X method of

abortion. While this paper is not the forum to examine all of the details of Justice Kennedy's dissenting opinion [many of which note that abortion, regardless of the method used, entails the killing of a living human being], a major component needs to be identified in the context of my argument. And that element is this: the Preamble of the Constitution establishes the purposes for which the rest of the text and the laws made under it were promulgated—to promote the common good.

Justice Kennedy noted that much of the discussion of abortion procedures uses “clinically neutral terms” such as “reduction procedure.”^{lxix} But, such neutral, perhaps sanitized language is akin to another neutral term—“the final solution”—a term that led to the destruction of millions of human beings and posed a most definite threat to the common good. If “the final solution” were a form of genocide [a topic that will be addressed in a moment], the D&X procedure is, as Justice Kennedy stated, a type of “infanticide”—and the statute involved here was a lawful barrier to “one of the most serious crimes against human life.”^{lxxii}

In line with this concern, Justice Kennedy recalled that the three-Justice plurality of *Casey* had acknowledged that the State has interests—preservation of the common good—for continuing pregnancy and caring for the mother and child before and after birth.^{lxxiii} He then noted that the State also has an interest to ensure that the medical profession and society do not become insensitive to the taking of human life including that of the fetus.^{lxxiv} His concerns go beyond one person or a few—they affect the entire community and future communities of human beings. As Justice Kennedy said, States can take those steps needed to ensure that the medical profession focuses on the need to preserve rather than take life and to take those compassionate and ethical steps to make society's members “cognizant of the dignity and value of human life.”^{lxxv}

It is important to take account of Justice Kennedy's use of the phrase “one of the most serious crimes against human life.” The phrase “crimes against human life” is not too removed from the concept of “crimes against humanity” as understood in public

international law, which is the law of the land. As the Supreme Court of the United States has stated, “International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”^{lxvi} Under Article 7(1)(b) of the Statute of the International Criminal Court, which codifies some of the public international law developed at the Nuremberg trials, extermination is such a crime and is defined in subsection (2)(b) of the same article as “the intentional infliction of conditions of life...calculated to bring about the destruction of part of the population.” Surely any method of abortion including the partial-birth method is calculated to bring about the destruction of a component of the human population.

But Justice Kennedy’s reference to a concept of international law—the law of the land—raises another crime recognized by the *jus gentium*,^{lxvii} i.e., genocide. Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the International Criminal Court Statute also address this crime. Genocide is defined as those acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group...” The acts listed under this article include “(a) killing members of the group” and “(d) imposing measures intended to prevent births within the group.” Arguably, abortion—regardless of the method—could be used for such purposes and fall within the two categories of acts listed in the Statute. Moreover, genocide and crimes against humanity clearly constitute threats to the common good of humanity when some individual or group decides to employ abortion as the means to exterminate, kill members of a group, or impose measures intended to prevent births. And if such actions under these circumstances constitute crimes under international law, should they not constitute wrongs against the common good of humanity regardless of the reasons that justify their use? Justice Kennedy seems to imply an answer in the affirmative.

A final observation about Justice Kennedy’s dissent is in order. He relied on the *Jacobson v. Massachusetts* case

discussed earlier. In relying on *Jacobson*, Justice Kennedy made the point that it was the province of the legislature, not a doctor deciding on an individual case, to determine what was to be public policy for society and the protection of “public health and safety.”^{lxviii} He further argued that “this...is the vice of a health exception resting in the physician’s discretion.”^{lxix} This discretion places in the hands of the few a momentous decision that affects, sometimes quite adversely, the many—and perhaps even all.

The liberty argument advanced by the majority in *Stenberg* intensifies this problematic result. Although the interests of individuals must be considered in a serious and respectful manner, they are not the only interests that are at stake where the matter of abortion is at issue and that demand the attention of and protection from society. In particular, the interest of an autonomous individual cannot trump those of the rest of society. Should this happen, the existence of the future communities would be threatened because their prospective members would face extinction. Through the exercise of unrestricted autonomy, individual persons or their physicians would decide who gets to participate in the liberty that the Constitution declares is for all of us and our Posterity.

V. CONCLUSION

The subject of liberty is of central concern to the American political tradition, the institutions of the American people, and the laws of this country as protected and guided by the principles established by the U.S. Constitution. But, as the Preamble of the Constitution states, the liberties and freedoms protected by the Constitution are not just for some, they are guaranteed for all. The language of the Preamble unambiguously sustains this conclusion. The Preamble frames the rights and duties of American citizens so that the present and future generations may experience the opportunities for human flourishing as protected by the purposes for which the Constitution was drafted and implemented. This is what the common good is all about—the ability of the one to enjoy the liberties protected by our foundation legal text can only be

understood in the context of all others participating in the same protections. As Pastor Martin Neimoller suggested about a half century ago, an attack on one is ultimately an attack on all. As he is believed to have said

In Germany, they first came for the Communists and I didn't speak up because I was not a Communist. Then they came for the Jews, and I didn't speak up because I was not a Jew. Then they came for the trade unionists, and I didn't speak up because I was not a trade unionist. Then they came for the Catholics, and I did not speak up because I was a Protestant. Then they came for me—and by that time no one was left to speak up.^{lxx}

No person can enjoy the liberty claimed unless every other person may enjoy the same. That is the essence, the nature of the American Federal Republic that is guaranteed by the Preamble of its Constitution. If we cannot be spared at this time all methods of abortion that take innocent human life, might we at least be saved from the evil of this insidious means that presents a most serious threat to the common good and *all* the individual goods that it protects.

NOTES

i. Preamble, Constitution of the United States.

ii. A paper related to this one entitled “The Constitution and the Common Good: A Perspective on the Catholic Contribution” was delivered at the Self-Evident Truths: Catholic Perspectives on American Law Symposium held at The Catholic University of America on March 3 and 4, 2001. In the present paper, I develop a new line of investigation, i.e., the status of public international law and how it might apply to the domestic law of the United States on the question of abortion and the subject of the common good.

iii. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

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- iv. *Stenberg v. Carhart*, 120 S.Ct. 2597 (2000).
- v. Aristotle, *Politics*, in *Introduction to Aristotle* (Modern Library College Editions), at 553.
- vi. *Id.* at 629-30.
- vii. *Id.* at 433-34.
- viii. *Id.* at 502-03.
- ix. Cicero, *De Re Publica, De Legibus* 65 (New York: Putnam, 1966).
- x. St. Augustine, *The City of God*, 14.1, at 547 (Henry Bettenson, trans., New York: Penguin Books Edition, 1986).
- xi. *Summa theologiae*, q. 58, a. 2.
- xii. *Id.* a. 6.
- xiii. *Id.* a. 5.
- xiv. Jacques Maritain, *The Person and the Common Good* (New York: C. Scribner's Sons, 1966), p.29.
- xv. *Id.* at 91-92.
- xvi. *Id.* at 92-93.
- xvii. *Id.* at 43.
- xviii. *Id.* at 47.
- xix. *Id.* at 49-50. (Footnote omitted)
- xx. *Id.* at 51. While writing from the perspective of the eve of World War II, Maritain suggested that “[i]t is up to the supreme effort of human freedom, in the mortal struggle in which it is today engaged, to see to it that the age which we are entering is not the age of the masses, and of the shapeless multitudes nourished and brought into subjection and led to the slaughter by infamous demigods, but rather the age of the people and the man of common humanity-citizen and co-inheritor of the civilized community—cognizant of the dignity of the human person in himself, builder of a more human world directed toward an historic ideal of human brotherhood.” Jacques Maritain, *Christianity*

and *Democracy* (1944), pp. 97-98.

xxi. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: Univ. of California Press, 1984), p. 4. Barber continues by arguing that “From this precarious foundation [of individualism and privacy], no firm theory of citizenship, participation, public goods, or civic virtue can be expected to arise.” *Id.* at 4.

xxii. *Id.* at 71-72.

xxiii. H. A. Rommen, *The State in Catholic Thought: A Treatise in Political Philosophy* (St. Louis: B. Herder, 1945).

xxiv. *Id.* at 310-11.

xxv. *Id.* at 314, 316.

xxvi. See Robert John Araujo, S.J., “Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action,” 27 *Pepperdine Law Review* 377, 448-450 and 474-476 (2000).

xxvii. Rommen, *supra* note 23, at 332.

xxviii. *Id.* at 334.

xxix. Federalist No. 10.

xxx. Federalist No. 57.

xxxi. See, *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905), where the Court stated that the Preamble “indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power...”

xxxii. Prof. Mary Ann Glendon has made an important observation of this phenomenon. As she stated, “Our overblown rights rhetoric and our vision of the rights-bearer as an autonomous individual channel our thoughts away from what we have in common and focus them on what separates us. They draw us away from participation in public life and point us toward the maximization of private satisfactions.” See, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Cambridge: Harvard Univ. Press, 1991), p. 143.

xxxiii. See Aristotle, *Politics*, I, 1252a.

xxxiv. See H. Rommen, *supra* note 23, at 349.

xxxv. *Jacobson v. Massachusetts*, 197 U.S. at 12.

xxxvi. *Id.* at 13-14.

xxxvii. *Id.* at 13-14.

xxxviii. *Id.* at 14.

xxxix. *Id.* at 39.

xl. *Id.* at 22.

xli. *Id.* at 26.

xlii. *Id.* at 38-39.

xliii. *Id.* at 26.

xliv. *Id.* at 26-27.

xlv. *Id.* at 29.

xlvi. 120 S.Ct. 2604-2605.

xlvii. *Id.* at 2604.

xlviii. *Id.* The previous decisions were identified as *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

xlix. 120 S.Ct. at 2605.

l. *Id.* at 2608.

li. *Id.* at 2613.

lii. *Id.* Justice Kennedy commented in his dissenting opinion that the D & X method differs from the D & E method in part only because of the measurement of a few inches: in the former method, the child is killed outside the womb where the fetus has more autonomy; in the latter method, the same fetus is killed inside the womb and suffers the indignity of dismemberment and being bled to

death. *Id.* at 2626. (Kennedy, J., dissenting). See also *Id.* at 2638 and 2649. (Thomas, J., dissenting).

liii. *Id.* at 2609.

liv. *Id.*

lv. *Id.* at 2617.

lvi. *Id.* Justice Ginsburg later stated in her own concurring opinion joined by Justice Stevens that, “Chief Judge Posner [in *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (1999), dissenting opinion by Posner, C.J.] correspondingly observed...that the law prohibits the D & X procedure ‘not because the procedure kills the fetus, not because it risks worse complications for the woman..., not because it is a crueler or more painful or more disgusting method of terminating a pregnancy....’ Rather, Chief Judge Posner commented, the law prohibits the procedure because the State legislators seek to chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Casey*.” *Id.* at 2620.

lvii. Again, Prof. Glendon’s work is most informative on this point. As she has insightfully argued, “The strident rights rhetoric that currently dominates American political discourse poorly serves the strong tradition of protection for individual freedom for which the United States is justly renowned. Our stark, simple rights dialect puts a damper on the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends. It contributes to the erosion of the habits, practices, and attitudes of respect for others that are the ultimate and surest guarantees of human rights... Rights talk in its current form has been the thin end of a wedge that is turning American political discourse into a parody of itself and challenging the very notion that politics can be conducted through reasoned discussion and compromise. For the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires. Its legitimation of individual and group egoism is in flat opposition to the great purposes set forth in the Preamble to the Constitution: ‘to form a more perfect Union, establish Justice, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’” Glendon, *supra* note , at 171-72.

lviii. 120 S.Ct. at 2621. (Scalia, J., dissenting).

lix. *Id.* (Scalia, J., dissenting).

lx. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

lxi. 120 S.Ct. at 2624. (Kennedy, J., dissenting).

lxii. 120 S.Ct. at 2635. (Kennedy, J., dissenting).

lxiii. *Id.* at 2625. (Kennedy, J., dissenting).

lxiv. *Id.*

lxv. *Id.*

lxvi. See, *The Paquet Habana*, 175 U.S. 677, 700 (1900).

lxvii. “The law of nations. That law which natural reason has established among all men is equally observed among all nations, and is called the ‘law of nations,’ as being the law which all nations use.” *Black’s Law Dictionary*, Revised Fourth Edition.

lxviii. 120 S.Ct. at 2630-2631, quoting from *Jacobson v. Massachusetts*.

lxix. *Id.* at 2631.

lxx. See www.bit.umkc.edu/vu/course/cs451/bits.html.