
RECOVERING OUR FORGOTTEN PREAMBLE

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INTRODUCTION

This Article argues that the Preamble to the Constitution of the United States of America deserves a primary place in constitutional law, in federal judicial decision-making, and in the nation's civic discourse. The Preamble does more than set forth general, vague aspirations. It epitomizes the particular purposes behind the adoption of the Constitution that were desperately needed to repair and replace the faltering Articles of Confederation. The Preamble's words were specifically and methodically chosen, both in the Preamble itself and often within the body of the Constitution. Based on their prompt affirmative vote, all members of the Constitutional Convention, which drafted the version of the Constitution that was submitted to the thirteen states for ratification, readily embraced the Preamble.¹ Some delegates stated explicitly that it should be used as the key

1. See *infra* text accompanying note 46.

to interpreting the Constitution, its meanings, intentions, purposes, and limitations.² Indeed, it is doubtful that the Constitution would have been ratified without the text of the Preamble prominently standing at the top of the proposed document, and the Preamble occupied a dominant and valuable position at the head of constitutional analysis throughout the nineteenth century.³

In 1905, however, the United States Supreme Court decided the case of *Jacobson v. Massachusetts*.⁴ This case has been rarely discussed at any length and is only cited summarily.⁵ Perhaps somewhat unwittingly, the Court used language that has been understood to relegate the Preamble to a minor, insubstantial role: “Although that 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 conferred on the Government of the United States or on any of its Departments.”⁶ The Court then went on summarily to treat the Preamble as irrelevant to the case.

As will be demonstrated here, the Court’s unnecessarily broad language should be seen as dicta or should otherwise be narrowed or recalibrated. Although in some senses the Preamble may not be a “source of any substantive power” conferred upon the federal government by the people of the United States, this does not mean that the Preamble does not serve any legal functions, as has been consequently generally thought. Instead, the Preamble is a collective source of unifying objectives for the operation of the American democratic republic. It is a formative statement of guiding principles to be used in interpreting the meaning of the words and structures found in the body of the Constitution. It is a body of authorizing statements of purpose that regulate the reasons behind the organic operations of the federal government. And it constitutes a selected list of limits that set boundaries beyond which the federal government is not authorized to go. The 1905 assertion by the Supreme Court and its application in *Jacobson* was based on little, if any, substantive research, briefing, discussion, argument, or consideration. Moreover, this opening point in the *Jacobson* opinion was not material to the holding of the case. Consequently, this dicta should be clarified or otherwise revised.

Jacobson’s dicta has gone down in subsequent judicial history and

2. See, e.g., James Monroe, *Observations on the Federal Government*, in 1 THE WRITINGS OF JAMES MONROE 349, 356 (Stanislaus Murray Hamilton ed., 1898).

3. See *infra* Section I.G.

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

5. See *infra* notes 445–75 and accompanying text (discussing *Jacobson*’s effects).

6. *Jacobson*, 197 U.S. at 22 (emphasis added).

political thought as a controlling dismissal of the idea that the Preamble to the Constitution of the United States has much if any legal power or effect,⁷ and it has most likely contributed to the popular idea that the Preamble has little or no legal value or judicial usefulness. As a result, the Preamble has been largely forgotten, and developments during the intervening century of American constitutional law and politics since *Jacobson* have left constitutional law in the United States in an odd position of unnecessary weakness, lacking purposeful guidance. The Preamble is rarely mentioned in federal court opinions, in constitutional law treatises, or in leading law school constitutional textbooks. Increasingly, the Preamble is taught or memorized less often in primary or secondary school curricula. At a time when constitutional courts could use principled guidance more than ever before in drawing upon the fundamental purposes that give American constitutional jurisprudence its unifying coherence and authority, it is unfortunate that the Preamble's primary written articulation of those leading civic values and defining governmental purposes goes almost entirely unmentioned.

In order to lay a foundation for assessing *Jacobson*'s unsupported claim that the Preamble had "never been regarded as the source of any substantive power" and also to expand *Jacobson*'s glancing reference to Justice Joseph Story's 1833 *Commentary on the Constitution*, Part I of this study begins at the inception of the American Republic and examines the legal and textual history of the Preamble from the founding era of the United States of America until the end of the nineteenth century. This Part develops several lines of inquiry and analysis in order to broaden and strengthen any understanding of the Preamble. This study aims to appeal both to those who favor a more authoritative originalist approach and to those who prefer a more organic living approach. It will be shown that the Preamble was intended to be and functioned as an important statement of specific and exclusive purposes to be undertaken by the federal government.

Questions raised here will include: What problems had arisen under the Articles of Confederation? What words from the Articles of Confederation were retained by the Preamble in addressing those problems? What purposes did the members of the Constitutional Convention see in the Preamble, based on their use of language from preambles in earlier state constitutions and the use of "whereas clauses" or prologues in legal documents under the Common Law in the late-eighteenth century? Other questions explore the importance of the Preamble in the ratification of the Constitution and how the Preamble

7. See *infra* notes 445–75 and accompanying text (discussing *Jacobson*'s effects).

relates to the Ninth and Tenth Amendments, especially the lack of the word “expressly” in the latter.

Using the latest technology and the Corpus Linguistics data base, the contemporaneous late-eighteenth century meanings of main terms in the Preamble will be explored. Part I then goes on to consider how people understood and used the Preamble during the Early American Republic and through the end of the nineteenth century leading up to *Jacobson*. It will be shown that the principles embedded in the Preamble were viewed as articulating the essence of the Constitution and that the Preamble was considered by some to be, in theory, the key of constitutional law. Although debated, the dominant view allowed for the Preamble to be seen as providing implied powers as well as purposeful guidance to all of the operations of the United States.⁸ Questions include: How was the Preamble understood by the Supreme Court in the early nineteenth century? How was the Preamble used in the great 1830 debate over the nature of the Constitution, understood in the 1833 commentary by Harvard professor and Supreme Court Justice Joseph Story, celebrated by John Quincy Adams in the 1837 constitutional jubilee, and crucially invoked by President Abraham Lincoln and others in the mid-nineteenth century? Finally, the development of preambles in state constitutions throughout the nineteenth century shows that the individual state constitutional preambles carefully made use of language from the federal Preamble, affirming the legal import of constitutional preambles generally. All of this sheds light on how the Preamble contributed legally to Constitutional law in many ways.

Part II of this article then offers a detailed examination of the 1905 Supreme Court opinion in *Jacobson v. Massachusetts*. It will be argued, on several grounds, that this case should not be cited for the propositions that the Preamble is not law or that it is not part of the Constitution, as some courts and public discourse have in effect taken that case to mean. Since the holding of this case turned on other factual grounds irrespective of the Preamble, its characterization of the Preamble should be limited or otherwise dismissed as dicta without affecting or overturning the actual holding of that case. Indeed, this general understanding of *Jacobson* should be modified, as it represents an unwarranted departure from eighteenth- and nineteenth-century American jurisprudence of the Preamble, which actually placed meaning in the Preamble.

Part III then surveys how *Jacobson* has been interpreted by federal courts since 1905. At first, *Jacobson*'s marginalizing of the Preamble was

8. See *infra* Section I.H. and accompanying notes.

readily accepted, but in many subsequent cases, *Jacobson* has been ignored.

The relatively few law review articles or essays about the Preamble will be surveyed to show that the Preamble is rightly seen as more than aspirational or wishful (or dangerous) thinking. The Preamble has instead served a number of legal purposes and has helped constitutional law stay responsive to major social changes and legal developments during the years since *Jacobson*. Comparative constitutional law also shows that preambles generally are treated as legally important in the jurisprudence of several countries. International legal experience shows that the terms in preambles are no broader or any less important than other important foundational terms in constitutions.

Part IV draws together several strands running through this article, pondering what constitutional law in the twenty-first century might look like if our overlooked Preamble were to be referenced more often for authoritative guidance. Possible legal functions for the Preamble will be sketched. It can serve well to clarify, interpret, define, limit, oblige, balance, unite, direct, motivate, persuade, guide, and legitimize any action of the federal government, and to provide the foundation for determining the scope of substantive rights established and secured by the Constitution as a whole.

Very different from the perception left by *Jacobson*, this view of the Preamble aligns with James Monroe's 1788 publication calling the Preamble "the Key of the Constitution" and declaring, "[w]henver federal power is exercised, contrary to the spirit breathed by this introduction, it will be unconstitutionally exercised, and ought to be resisted by the people."⁹ Altogether, this Article encourages citizens, lawyers, officials, judges, scholars, diplomats, educators, and politicians throughout America to take the Preamble more seriously than it was taken in the twentieth century under the chilling effects of *Jacobson*. But before the Preamble can be used generally, its legal force and effects need to be recovered, remembered, and reinstated. For reference throughout this article, the words of the full text of the 1787 Preamble, with its **parties**, *verbs*, nouns, and ADJECTIVES, reads as follows:

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**

9. Monroe, *supra* note 2, at 356.

America.

I. THE PREAMBLE: FROM INCEPTION TO *JACOBSON*

Any assessment of *Jacobson*'s dismissive claim that the Preamble has “never been regarded as the source of any substantive power”¹⁰ needs to begin with an extensive examination of the textual and legal history of the Preamble. The fifty-two words of the Preamble formed the single constitutional shot that, in 1787, was heard ‘round the world. It could easily take fifty-two weeks, or maybe years, to unpack everything that the Preamble says, what it stands for, and how it has been used over the intervening years. The following pages strive to show that the Preamble was intended and understood to function—and that it did indeed function for its first century—as an important principled statement of the specific legal purposes to be undertaken by the federal government.

A. BEGINNINGS OF THE PREAMBLE IN THE ARTICLES OF CONFEDERATION

It is common knowledge that problems quickly arose under the Articles of Confederation during the final stages of the American struggle for independence from Great Britain. It is less known that significant terms of the Preamble were derived from the Articles as the Founders responded to those particular problems.

Prior to the ratification of the Constitution, the colonies were governed by the “Articles of Confederation and Perpetual Union between the States.”¹¹ Created on November 15, 1777 and signed in July of 1778, the Articles of Confederation were officially ratified by the colonies on March 1, 1781.¹² They served as the only governing document of the United States until the era of the Constitution began in 1787.¹³ The Articles were intentionally weak in certain respects, but hoped to bind the colonies in what was termed a “firm league of friendship.”¹⁴

The Articles began nothing like the Preamble. Beginning with an opening salutation that declared that the Delegates had signed the following

10. *Jacobson*, 197 U.S. at 22.

11. ARTICLES OF CONFEDERATION of 1781.

12. See Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 403 (2017) (discussing the process by which the Articles came to be).

13. There is some debate as to exactly when the Articles of Confederation ceased functioning as law. Compare Vasani Kesavan, *When Did the Articles of Confederation Cease to be Law?*, 78 NOTRE DAME L. REV. 35, 44 (2002), with Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 4 (2001).

14. ARTICLES OF CONFEDERATION of 1781, art. III.

agreement, they then simply announced: “Whereas the Delegates of the United States of America in Congress assembled, did . . . agree to certain Articles of Confederation and Perpetual Union between the states of . . .,” and then went on to name—twice—each of the thirteen states. But beyond its unimpressive “whereas” clause, the Articles of Confederation lacked a preamble. And yet, that governing document paved the way for the Preamble to the Constitution in two ways: in some of its wording and in several of its failings.

Article I of the Articles of Confederation gave the central government the name of “The United States of America,” the national title that would be retained in the Preamble to the Constitution.¹⁵

Article III set forth the three specific purposes for the league of confederation in serving its members and their citizens: “for their *common defense*, the *security of their liberties*, and their mutual and *general welfare*”¹⁶ The confederation saw these purposes as setting mutually binding legal obligations (“binding themselves”) to the duty to, “assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.”¹⁷ Several noticeable words in these obligating phrases in Article III were retained in the Preamble to the Constitution of the United States.

While these provisions united the colonial states under a common name, they made it clear that each state retained its own status as a sovereign entity. In doing so, the Articles declared that the states retained each and every power beyond those purposes that were not “expressly delegated to the United States, in Congress assembled,”¹⁸ thus expressly limiting and curtailing the powers and functions of the central regime.

With respect to foreign relations, Article VI allowed the states to make treaties, develop navies, or engage in war, but only with “the consent of the United States, in Congress assembled.”¹⁹ Articles VII and VIII likewise established the expectation that states raise their own armies, while any expenses “incurred *for the common defence or general welfare*, and allowed by the United States, in Congress assembled,” were to be “defrayed out of a common treasury,” but that common pool was to be funded by the states in proportion to the total values of their lands and properties.²⁰ The words

15. *Id.* art. I.

16. *Id.* art. III (emphasis added).

17. *Id.*

18. *Id.* art. II.

19. *Id.* art. VI.

20. *Id.* art. VIII (emphasis added); *see id.* art. VII.

“common defense or general welfare” would be included, as a pair, in Article I, Section 8, Clause 1 of the Constitution, and also would be placed, with slight separation, in the Preamble.

Articles V, VI, VII, and IX established rules by which the central authorities would coordinate affairs between the states, laying out the central governing process, as well as prescribing policies and procedures for conducting foreign affairs and military matters.²¹ Again, limitations and exceptions were stated. For example, Congress was given the power to be “the last resort on appeal” of all disputes between two or more states, so long as an elaborate procedure was followed for empaneling the court for hearing the matter and provided also that “no State shall be deprived of territory for the benefit of the United States.”²² Concerns were ever present to define, protect, and curtail grants of authority given to the central government.

While the Articles of Confederation provided for a loose bond between the states and although it was intended “that the *Union* shall be perpetual,”²³ too many necessary powers and ideals were missing to create a lasting form of government. Only ten years after it was drafted and six years after its 1781 ratification, the Constitutional Convention began with the deliberate purpose of revising and improving the document.²⁴ The need for this revision stemmed primarily from three overarching problems with the document.

First, the central government established by the Articles of Confederation lacked crucial components. For example, the Articles of Confederation did not establish a federal executive branch or a federal judicial branch,²⁵ as many state constitutions had already established state-level executive and judicial branches.²⁶

Second, and relatedly, the central government under the Articles of Confederation was ill designed. The Congress established by the Articles of Confederation was ill equipped. The simple, single chamber Congress, with a one-vote-per-state design, did not account for the population differences amongst the states. Additionally, the super-majority requirement for passing any new legislation was too difficult to achieve and therefore stalled any

21. *Id.* art. V–VII; *id.* art. IX.

22. *Id.* art. IX, §. 2.

23. *Id.* art. XIII (emphasis added).

24. The Constitution’s Preamble itself makes this purpose clear when it states, “in order to form a more perfect union.” U.S. CONST. pmb. *See also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (Max Farrand ed., rev. ed. 1966) (1911).

25. *See generally* ARTICLES OF CONFEDERATION of 1781.

26. *See, e.g.*, N.Y. CONST. of 1777, art. XVII (establishing the executive branch); *id.* art. XXIV–XXXII (establishing rules and guidelines governing the judicial branch).

legislation being considered in Congress. The Articles of Confederation did not give its Congress the ability to tax²⁷ nor the ability to regulate commerce. Therefore, when great debt befell the nation during and following the Revolutionary War, there were no mechanisms for the federal government to receive additional funds to pay down the debt.²⁸

And third, the several states retained too much independence. While a level of federalism exists under the Constitution, the Articles allowed states to pursue independent foreign policies and trade and to establish their own separate monetary systems,²⁹ making it nearly impossible to centrally govern. It soon became clear that that the “firm league of friendship” between the states was insufficient to sustain a growing population and economy.

Although the Articles of Confederation had not distilled and brought together a salient statement of its foundational purposes and binding goals, its terminology included fundamental words such as “united,” “union,” “justice,” “common defense,” “general welfare,” “secure,” and “liberties.” The fact that these words were perpetuated from the body of the Articles of Confederation into the United States Constitution through the Preamble reinforces the view that the Preamble was not only an integral part of the Constitution, but also served valuable substantive legal purposes.

B. THE PREAMBLE AND THE CONSTITUTIONAL CONVENTION

The Constitutional Convention began in May of 1787 with the purpose of revising and amending the Articles of Confederation. The initially stated reason for the Convention was to “correct[] & enlarge[]” the Articles so as “to accomplish the objects proposed by their institution; namely ‘common defense, security of liberty and general welfare.’”³⁰ Ultimately, the Convention did not merely alter and enlarge the Articles of Confederation but produced a significantly new frame and form of government.

While the Articles of Confederation would cease to be the governing document of the United States, several aspects of those Articles, and at times direct terms from that document, were included in the ratified version of the

27. This power was specifically reserved for the states. ARTICLES OF CONFEDERATION of 1781, art. VIII, § 2 (stating that taxes were to be “levied by the authority and direction of the legislatures of the several states”).

28. See KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 51, 175–76 (2001).

29. *Id.* at 80.

30. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 20 (quoting from the document commonly referred to as “The Virginia Plan”).

Constitution. One of the clearest of these borrowings is found in the Preamble. Article III of the Articles of Confederation had stated: “The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare.”³¹ The heart of the Preamble to the Constitution similarly states that the Constitution is established to “provide for the common defense, promote the general welfare,” and “secure the blessings of liberty.”³² While the Constitution laid out many more specifics and created a stronger central government, the core legal goals of the two documents are overlapping.

Very few statements in the records of the Constitutional Convention report on the actual drafting of the Preamble. The only substantive mention of the Preamble in the records of the Convention came in the assignment given to the Committee of Detail regarding their review of draft one. The Committee of Detail was created on July 24, 1787, and was charged “to prepare & report a Constitution conformable” to “the proceedings of the Convention.”³³ From July 26, 1787 to August 6, 1787, the Convention adjourned to provide the Committee of Detail time to draft the initial document.³⁴ The Committee of Detail was a five-member committee led by Chairman John Rutledge (South Carolina), Edmund Randolph (Virginia), Oliver Ellsworth (Connecticut), James Wilson (Pennsylvania), and Nathaniel Gorham (Massachusetts).³⁵ On August 6, after the recess, the Committee of Detail reported their efforts, including a reading of their draft of the Preamble. That initial version of the Preamble proclaimed:

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.³⁶

This version of the preamble was not debated by delegates of the Convention and was unanimously accepted.³⁷

An early Randolph draft reflects his thinking about preambles in

31. ARTICLES OF CONFEDERATION of 1781, art. III.

32. U.S. CONST. pmb1.

33. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (Max Farrand ed., rev. ed. 1966) (1911).

34. William Ewald, *The Committee on Detail*, 28 CONST. COMMENT. 197, 203 (2012). See also *Philadelphia: July 30, 1787*, PA. PACKET AND DAILY ADVERTISER, July 30, 1787, at 3.

35. Ewald, *supra* note 34, at 202.

36. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 177.

37. *Id.* at 193. See also *id.* at 196, 209.

general. He contrasted what he viewed as the purpose of state constitution preambles with the much more limited role that a preamble should play in the federal constitution. Regarding what a preamble should not be:

A preamble seems proper not for the purpose of designating the ends of government and human politics—This [business] i[s] [probably] . . . fitter for the schools, . . . [and] howsoever proper in the first formation of state governments, . . . *is* unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and . . . *interwoven with* what we call . . . the rights of states—Nor yet is it proper for the purpose of mutually pledging the faith of the parties for the observance of the articles—This may be done more solemnly at the close of the draught, as in the confederation. . . .³⁸

“Political theory, in short, was not thought to be a proper concern of a preamble,”³⁹ and neither should be the solemnization of the adoption of duties. What, then, should the federal Constitution’s Preamble contain, according to Randolph? The Preamble to the federal Constitution should, he continued,

briefly . . . declare, that the present federal [sic] government is insufficient to the general happiness, [and] that the conviction of this fact gave birth to this convention; and that the only effectual (means) . . . which they (could) . . . devise for curing this insufficiency, is the establishment of a supreme legislative[,] executive[,] and judiciary.⁴⁰

Except for the reading of the Preamble before the entire Convention, followed by its unanimous vote, Randolph’s suggestions are the only mention in the records of the Constitutional Convention concerning the purposes of preambles in general, let alone of the wording of the Preamble that was finally adopted. Remarkably, it was precisely the four roles of preambles which Randolph thought would be apropos to the new Constitution—namely to recite historical backgrounds, distressing problems, glaring previous inadequacies, and to make bold assertions of certitude about the solutions offered in the newly proposed document—that the Committee of Style, on September 10 or 11, 1787, apparently rejected as they drafted the Preamble.

While the Committee of Detail was responsible for drafting the initial preamble, the Preamble that was actually included with the Constitution during ratification was drafted by the Committee of Style, which was

38. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 137–38.

39. Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127, 132–33 n.16 (1991).

40. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 138.

responsible for revising and finalizing the language of the Constitution.⁴¹ The current Preamble was proposed by the Committee of Style on September 12, 1787.⁴² To the pleasure of Randolph, and no doubt meeting the expectations of most of the delegates, its version did not exude a display of sophisticated theory; it did not attempt the Herculean task of balancing the rights of individuals with the rights of states; nor did it prescribe a formal pledge of faithfulness on behalf of those who would ratify the Constitution. Instead, it offered something different and original but at the same time familiar-sounding and readily embraceable.

The Committee of Style was led by Chairman William Johnson (Connecticut), with Alexander Hamilton (New York), Rufus King (Massachusetts), James Madison (Virginia), and Gouverneur Morris (Pennsylvania).⁴³ While all of these delegates had responsibilities in drafting portions of the Constitution, it is thought that Gouverneur Morris was responsible for drafting the new version of the Preamble.⁴⁴ As reported, it read:

WE the People of the United States, in order to form a more perfect union, to 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.⁴⁵

While this new version of the Preamble was neither objected to nor brought to a specific vote of the delegates,⁴⁶ after it was read, the word “to” was deleted from the clause “to establish justice,” and this version of the Preamble was included in the final document.

In drafting the Preamble, the Committee on Style was clearly influenced by several sources. All of these political, legal, and cultural sources strategically added needed power to the rhetorical voice of the Preamble. The Committee’s draft honored the concerns expressed in Morris’s and Randolph’s resolution, moved on May 30, 1787 that “a Union of the States merely federal []will not accomplish the objects proposed by the [A]rticles

41. *Id.* at 553 (“A Committee was then appointed . . . to revise the stile of and arrange the articles which had been agreed to by the House.”).

42. *See September 12 Draft of the Constitution*, U.S. CONST., https://www.usconstitution.net/draft_sep12.html (last visited Sept. 12, 2018).

43. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 553.

44. Raymond B. Marcin, ‘Posterity’ in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 285 (1993).

45. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 590.

46. *Id.*

of Confederation, namely, common defence, security of liberty, [and] gen[eral] welfare.”⁴⁷

In addition to retaining those three originally charged objectives, the Committee on Style was also influenced by the Declaration of Independence, in one important respect in particular.⁴⁸ Consistent with the root of authority asserted over the king in the Declaration of Independence, the Framers began the Preamble with the phrase “We the People.”⁴⁹ This idea of popular authority, as opposed to the authority of the colonies or their resultant states, was reinforced in the Declaration by the further assertions that governments must “deriv[e] their . . . powers from the consent of the governed,” and that they must secure “certain unalienable Rights . . . among [which] are life, liberty, and the pursuit of happiness.”⁵⁰ It is normally hypothesized that “We the People” was substituted in the final draft of the Preamble to take the place of the names of the thirteen states enumerated in the August 6 draft because it was unknown at that time which nine of the states would come forward first to ratify the document;⁵¹ by saying simply “We the People,” there would be no need to later alter the document to reflect which states comprised the ratifiers. But more than that, to evoke these three powerfully enduring words from the Declaration that had emanated from Philadelphia eleven years earlier was a masterstroke of public relations and political genius.

The records of the Constitutional Convention give little further insight as to why the Preamble was reformulated by the Committee of Style at the very end of the Convention, though that was a natural time for someone to summarize the final work product of the Convention and to draw together the entire contents of the Constitution. The Preamble also satisfied those who wanted to be sure that the federal government would have authorization to achieve its specifically stated purposes, the task that prompted the formation of a Constitutional Convention. The Preamble also assured those who wanted to be certain that the federal government could not drift or wander beyond a limited set of specific duties and responsibilities. The Preamble

47. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 33.

48. “[T]he ‘thin’ Constitution of the United States is anchored in the principles of the Declaration of Independence and the preamble.” Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L. 714, 721 (2010) (citing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181–82, 188–93 (1999)).

49. U.S. CONST. pmbl. In contrast, the Articles of Confederation began, “We, the undersigned Delegates.” ARTICLES OF CONFEDERATION of 1781, pmbl.

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* Himmelfarb, *supra* note 39, at 132 n.13.

51. Mahoney, *Preamble*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1435 (L. Levy et al. eds., 1986).

harmoniously presented the Convention's purposes and brought a unifying closure to its tedious debating and drafting processes.

C. DRAWING STRENGTH FROM PUBLIC VOICES: STATE CONSTITUTIONS
AND CHARTERS

Not pausing long to enjoy a sense of accomplishment, the writers of the Preamble and all of the members of the Convention were already looking ahead, with anxiety, to the next hurdle that the Constitution needed to face: ratification. Here again, frequent stylistic reference to previously used language would help to form, out of the dust of chaos and impending collapse, a more perfect union—a union of all the people, a unity of all their autonomous states, and a united operation of all the branches and departments of the federal government, all checked and balanced. The Preamble built upon the rhetorical voices of several previous foundations. It thereby saved face for those who had supported the Confederation by supportively reviving its three objectives: providing for the common defense; promising the security of liberty; and promoting the general welfare.⁵² Speaking to those who wanted to be sure that the duties of state governments were reinforced, other words in the Preamble resonated consonantly with words in the preambles of state constitutions, striking some of the most highly cherished chords in the American political register. By drawing upon several reservoirs of popular rhetorical expressions, the Preamble rang true in the ears of its listening publics. Its vocabulary and cadence sounded familiar and reassuring.

Research has detected in the records of the Constitutional Convention certain phraseologies used by the delegates that may have spawned the need for the additional and revised Preamble language introduced by the Committee of Style. For example, Himmelfarb points to quotidian language that may have inspired the additions of “establish justice” and “ensure domestic tranquility.”⁵³ Early in the Convention, Roger Sherman, from Connecticut, had posited that the Union had but four objectives: to defend against foreign danger; to defend against internal disputes; to create treaties with foreign nations; and to regulate foreign commerce.⁵⁴ While James Madison had objected that Sherman's list was not comprehensive enough, believing that the Union also had the responsibility to “provid[e] more

52. ARTICLES OF CONFEDERATION of 1781, art. III.

53. Himmelfarb, *supra* note 39, at 134 n.20.

54. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 133 (declaring that the “objects of the Union” were “1. defence agst. foreign danger. 2. agst. internal disputes & a resort to force. 3. Treaties with foreign nations 4. regulating foreign commerce, & drawing revenue from it”).

effectually for the security of private rights, and the steady dispensation of Justice,”⁵⁵ the Preamble eventually would nearly quote these and other commonplace propositions. Himmelfarb proposes that the words “ensure domestic tranquility” could stem from point two on Sherman’s list, “to defend against internal disputes.”⁵⁶ Likewise, delegate Edmund Randolph had expressed a similar sentiment when he pointed out that one of the main failings of the Articles of Confederation was the inability to regulate “quarrels between states.”⁵⁷

But beyond these parallels coming out of the records of the Convention, additional language found in several of the states’ constitutions can also be suggested as having contributed to the wording of the Preamble. Some scholars, studying the language in the preamble that was added by the Committee of Style, have hypothesized that Gouverneur Morris may have been influenced by language from governing documents of his home state of Pennsylvania.⁵⁸ Indeed, the Constitution of Pennsylvania at that time spoke of “posterity” and “blessings of liberty.”⁵⁹

Other state constitutions may have influenced the Preamble’s drafters. For example, the 1780 preamble of the Constitution of Massachusetts—the home state of committee member Rufus King—featured words and phrases such as “to secure,” “safety and tranquility,” “the blessings of life,” “governed by certain laws for the common good,” “provide for,” “for ourselves and posterity,” and “ordain, and establish, the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.”⁶⁰

And the opening section of the freshly redrafted 1786 Vermont Constitution advanced the “indispensable duty to *establish* such original principles of government as will best *promote the general* happiness of the people of this State, and their *posterity*, and *provide for* future improvements,

55. *Id.* at 134.

[Mr. Madison] differed from . . . Mr. Sherman[] in thinking the objects mentioned to be all the principal ones that required a National Govt. Those were certainly important and necessary objects; but he combined with them the necessity, of providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than anything else, produced this convention.

Id.

56. Himmelfarb, *supra* note 39, at 134 n. 20.

57. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 19 (“[Under the Articles of Confederation, the] federal government could not check the quarrels [sic] between states, nor a rebellion in any not having constitutional power Nor means to interpose according to the exigency.”).

58. *See generally* PA. CONST. of 1776.

59. *Id.* pmbl.; *id.* art. I, § 14.

60. MASS. CONST. of 1780 pmbl. (emphasis added).

without partiality,” and in order to accomplish such ends “do . . . ordain, declare *and establish*” that 1786 revision of the Green Mountain State’s Constitution.⁶¹

Other earlier colonial and state constitutions and their declarations of rights reveal yet further possible origins for key provisions of the Preamble. In the central states of Pennsylvania, Virginia, and North Carolina, declarations of rights spoke of preserving the “*blessings of liberty*.”⁶² Pennsylvania’s earlier 1776 constitutional preamble spoke of “promot[ing] the general happiness of the people of this State, *and their posterity*.”⁶³ Several constitutions also spoke of rights designed to provide for the “*common defence*,”⁶⁴ as that word was commonly spelled in those days. The concept of justice and its importance to societal order was expressly repeated in multiple constitutions.⁶⁵

While only the state of Massachusetts had used the word “preamble” at the beginning of its constitution, introductory “whereas” clauses had long been used in the legal drafting of land grants and organizational charters for the colonies.⁶⁶ Indeed, the introductory sections of several of the early state constitutions consisted exclusively of whereas clauses reciting the grievances that had led up to the separation of the colonies from England. These historical recitations often spoke of abuses and deprecations the colonists had suffered, but sometimes they expressed hope for a peaceful reconciliation of the conflict with Great Britain, their parent state.⁶⁷ It is particularly striking, therefore, that the drafters of the Constitution of the United States no longer saw any need to justify in its Preamble the existence of the United States, the peace with England having been agreed upon in the Treaty of Paris in 1781. It was also, of course, an option to begin the Constitution of the United States without a preamble or any other kind of

61. VT. CONST. of 1786 pmb. (emphasis added).

62. N.C. CONST. of 1776; PA. CONST. of 1776; VA. CONST. of 1776.

63. PA. CONST. of 1776 pmb.

64. MASS. CONST. of 1780, art. XVII. Cf. N.C. CONST. of 1776 (discussing defense as something the constitution helps provide for); PA. CONST. of 1776 (same); VA. CONST. of 1776 (same).

65. See generally MASS. CONST. of 1780; MD. CONST. of 1776; PA. CONST. of 1776; VA. CONST. of 1776.

66. For example, in Connecticut, the 1662 grant by King Charles II began with a whereas clause recognizing such things as the good behavior of his loving servants. *Charter of Connecticut*, in FEDERAL AND STATE CONSTITUTIONS 1:529 (Francis Thorpe ed. rev. ed. 1993) (1909). Similarly, in Pennsylvania, the 1696 official declaration entitled “Frame of Government” began with a whereas that some people cannot, for conscience sake, take an oath. *Id.* at 5:3070.

67. Seven of the original state constitutions began in this way, namely Georgia (1777), New York (1777), North Carolina (1776), New Hampshire (1776), New Jersey (1776), Pennsylvania (1776), and South Carolina (1776 and 1778), all presenting lists of all kinds of infractions and grievances.

preview or preface. No preamble or any set of whereas clauses was used in the 1777 Constitution of Delaware or in several bills of rights adopted by some of the states.

But introductory statements traditionally were used to set forth the purposes to be accomplished by public organic documents. Some of the very early colonial charters had mentioned at their outset certain goals to be achieved and duties to be fulfilled by the newly formed local government, articulating among other objectives the government's duty to preserve "liberty," "peace," and "tranquility."⁶⁸ Perpetuating that tradition, many of the constitutions of the newly formed states likewise articulated the objectives and purposes with which their state governments were charged to achieve.⁶⁹ Drawing upon the precedential force and effect of such statements, the Preamble to the Constitution of the United States used language that was fairly similar to, if not the same as, the statements of purpose found in eight state constitutions. As a rule, these statements of purpose were set forth in state constitutions in order to recognize and define the constitutional duties of government.⁷⁰ They spoke inclusively—

68. CHARTER OF DEL. (1701) (to provide "the greatest enjoyment of civil liberties"); FRAME OF GOVERNMENT OF PA. (1682) (stating in its preface that God had chosen man "his Deputy to rule . . . but lust prevailing against duty" it became fitting "to terrify evil doers" and "to cherish those that do well"); THE FUNDAMENTAL AGREEMENTS OF THE FREEHOLDERS, AND INHABITANTS OF THE PROVINCE OF WEST N.J. (1681) ("[F]or the preservation of the peace and tranquility."); THE FUNDAMENTAL ORDERS OF CONN. (1638) ("[T]o maintain and preserve the liberty and purity of the gospel.").

69. Nine states included statements of such purposes and objectives. GA. CONST. of 1777 ("[B]est conduce to the happiness and safety of their constituents in particular and America in general."); MD. CONST. of 1776 ("[F]or the sure foundation and more permanent security thereof . . . [and] founded in compact only, and instituted solely for the good of the whole."); N.J. CONST. of 1776 ("[M]ore effectually to unite the people and enable them to exert their whole force in their own necessary *defence*." (emphasis added)); N.C. CONST. of 1776 (establishing civil and criminal rights "to preserve the *blessings of liberty*" that are "most conducive to their happiness and prosperity") (emphasis added); PA. CONST. of 1776 (asserting "our indispensable duty to *establish* such original principles of government, as will best *promote the general* happiness of the people of this state," "instituted for the *common* benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man . . .") (emphasis added); S.C. CONST. of 1776 ("[F]or the good of the people [who are] the origin and end of all governments, for regulating the internal polity of this colony."); N.Y. CONST. of 1777 ("[T]o *secure* the rights and liberties of the good people of this State, most conducive of the happiness and safety of their constituents in particular, and of America in general.") (emphasis added); MASS. CONST. of 1780 ("[T]o secure the existence of the body-politic, to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and *tranquility*, their natural rights, and the *blessings* of life.") (emphasis added). Of the remaining states, three did not adopt a constitution before 1787.

70. N.C. CONST. of 1776, art. I, § XXXV ("[A] frequent recurrence to fundamental principles is *absolutely necessary*, to preserve the blessings of liberty.") (emphasis added); MASS. CONST. of 1780, pmbl. ("The end of the . . . government, is to secure . . ., to protect . . ., to furnish . . . It is the *duty* of the people, therefore, . . . to provide for an equitable mode of making laws . . . that every man may, at all times, find his security in them.").

individually and collectively—of “the happiness and safety of their constituents in particular and America in general,”⁷¹ as they sought to “secure the existence of the body-politic” as well as “to furnish the individuals who compose it” their “natural rights” and “blessings of life.”⁷²

Also, like the Preamble, state constitutions, at their outset, often mentioned the authority by which the state government was being established. Some constitutions explicitly asserted that “all government of right originates from the people,” using various phrases to invoke the sovereign power of the people,⁷³ which would be the drafting choice preferred by the writers of the Preamble. Alternatively, many state constitutions traced their authority to the representatives duly elected to serve as delegates from the people.⁷⁴ One constitution, that of Massachusetts, went further to acknowledge “with grateful hearts, the goodness of the great Legislator of the universe, . . . imploring His direction,”⁷⁵ following an older form used in formative colonial documents to remember God as an ultimate source of authority.⁷⁶ Five states bolstered their legal position by tracing their legitimacy to the recommendation that had been issued by the Continental Congress.⁷⁷ Nothing in the way of prior historical problems or of remote imprimaturs was implied in the Preamble’s sole authorizing reference to “We the People.”

It was also common for charters, grants, and organic governing documents in the colonial period to speak of their intended open-ended legal duration. Sometimes the wording spoke of rights running to “posterity” in

71. GA. CONST. of 1777. *See also* N.Y. CONST. of 1777.

72. MASS. CONST. of 1780 pmb1.

73. MD. CONST. of 1776. *See also* MASS. CONST. of 1780 (“[I]t is a social compact, by which *the whole people* covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. . . . We, therefore, the people of Massachusetts . . . ordain and establish the following.”); N.C. CONST. of 1776 (“[A]ll political power is vested in and derived from the people only.”); PA. CONST. of 1776 (“[T]he people of this State have the sole, exclusive and inherent right of governing.”).

74. DEL. CONST. of 1776 (“representatives being chosen by the Freemen”); GA. CONST. of 1777 (“representative of the people, from whom all power originates, and for whose benefit all government is intended”); N.H. CONST. of 1776 (“members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony”); N.J. CONST. of 1776 (“[W]e, the representatives of the colony of New Jersey, having been elected by all the counties.”).

75. Mass. CONST. of 1776.

76. CONST. FOR THE COUNCIL AND ASSEMBLY IN VA. (1621) (invoking “divine assistance”); FUNDAMENTAL ORDERS OF CONN. (1639) (invoking the “name of God”).

77. N.H. CONST. of 1776 (“[A] recommendation to that purpose having been transmitted to us from the said [Continental] Congress.”); N.J. CONST. of 1776 (“[A]s the honorable the continental Congress, the supreme Council of the American colonies, has advised . . .”); S.C. CONST. of 1778 (being “dissolved by the declaration of the honorable the Continental Congress”).

general,⁷⁸ but more often, this legal language was patterned after the common law wording of a fee simple absolute property right being alienable to heirs, assignees, and successors forever, inasmuch as the charters usually dealt with land grants.⁷⁹ But the state constitutions of Pennsylvania and Virginia set a new pattern in bestowing not just property but constitutional rights and privileges upon “the people . . . and their posterity,”⁸⁰ explicitly affirming “which *rights* do pertain to them and their posterity.”⁸¹ The Preamble would prefer the phrase “the blessings of liberty for ourselves and our posterity,” over other formulations, including a simple reference to futurity, as the Constitution of Georgia had done.⁸²

Following long-standing drafting conventions, a variety of consensual or enactment clauses are found in about half of the state constitutions, which use words such as “do will,” “agree,” “ordain,” “declare,” “appoint,” “establish,” or “determine.”⁸³ Using even sparser, yet highly effectual wording, the Preamble simply set forth its creative purpose, namely to “*form* a more perfect union,” and to that end did “ordain and establish” the Constitution.

The fact that the Preamble generated rhetorical power and legitimizing strength through all of these legal associations with wordings and functions of organic colonial charters and state constitutions proves that more was being intentionally signaled and signified by the Preamble than an empty formality or mere procedural protocol.

D. EVOKING AUTHORITY FROM KING JAMES VOCABULARY

It is also noteworthy that several of the words in the Preamble are congruent with biblical phraseology, for the King James language was a significant part of common American language of that day. Whether consciously or subconsciously, biblical elements added yet another voice of

78. FUNDAMENTAL ORDERS OF CONN. (1639) (“for posterity”); THE FUNDAMENTAL AGREEMENTS OF THE FREEHOLDERS, AND INHABITANTS OF THE PROVINCE OF WEST N.J. (1681) (“for the good and welfare of our posterity to come . . . to us and our posterity”).

79. CONN. CHARTER of 1662 (“perpetual Succession . . . for us, our heirs and successors”); THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA (1669) (“ourselves, our heirs and successors, in the most binding ways that can be devised”); CHARTER OF DEL. (1701) (“heirs and assigns forever”).

80. PA. CONST. of 1776.

81. VA. CONST. of 1776 (emphasis added).

82. GA. CONST. of 1777 (noting rights to be protected by the “future government of this State”).

83. CONN. CHARTER of 1662 (“we will and ordain . . . do declare and appoint”); N.C. CONST. of 1776 (“do declare . . . shall be established”); PA. CONST. of 1776 (“do . . . ordain, declare, and establish”); GA. CONST. of 1777 (“ordain and declare”); N.Y. CONST. of 1777 (“this convention . . . doth ordain, determine, and declare”); MASS. CONST. of 1780 (“We, therefore, the people of Massachusetts . . . do agree upon, ordain, and establish the following.”).

recognized authority and enduring reassurance to the overall brilliance of the Preamble. Without any doubt, religion and the Bible were strong factors that justified and emboldened the American colonists and revolutionaries.⁸⁴

Numerous verbatim texts and express legal provisions in the Bible, especially in the authorized King James English, had found their ways into colonial statutes. Beginning with the adoption of the first Capital Laws in the Massachusetts Bay Colony in 1641, such borrowings or adaptations persisted in the enactment of various colonial laws in the 1800s.⁸⁵ The Continental Congress was so deeply concerned with the morale and spiritual condition of its troops that, in 1777 and 1780, it supported the printing and importing of Bibles in order to provide them to civil and military officers, since it was trusted that “an unfailing antidote to immorality was Bible reading;” and in 1787, Congress asserted in the Northwest Ordinance that religion “was one of the principal elements ‘necessary to good government and the happiness of mankind.’”⁸⁶ Christian religious literature and values provided much of the ordinary pallet of colors from which the Preamble was painted.

Popular religion and political government occupied their separate spaces, but they often worked pragmatically together. Even Thomas Jefferson’s heavily weighted 1802 Danbury Letter likely did not see the wall of separation between church and state as a wall devoid of any interconnecting windows or doors. Jefferson’s draft of this letter to the Danbury Baptist Association in Connecticut originally read “a wall of *eternal* separation between church and state,” before Jefferson crossed out the word “eternal.”⁸⁷ As Alexis de Tocqueville perceptively observed in 1835:

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. . . . [T]hey hold

84. JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 55–57, 121–30 (1998); Patrick M. O’Neil, *Bible in American Law*, in RELIGION AND AMERICAN LAW 30, 30 (Paul Finkelman ed., 2000).

85. John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV., 611, 620–29 (2002). On the influence of biblical law on American law, see John W. Welch, *Bible in American Law*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 125, 125–31 (2006); Edward McGlynn Gaffney, Jr., *The Interaction of Biblical Religion and American Constitutional Law*, in THE BIBLE IN AMERICAN LAW, POLITICS, AND POLITICAL RHETORIC 89 (James Turner Johnson ed., 1985).

86. JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 101, 103 (2008).

87. HUTSON, RELIGION AND THE FOUNDING, *supra* note 84, at 85 (document illustration and caption).

[religion] to be indispensable to the maintenance of republican institutions.⁸⁸

Among the Founders who esteemed the Bible highly were John Adams, who said of the Bible: “It is the most Republican Book in the World;” and Benjamin Rush, who asserted: “All systems of religion, morals, and government not founded upon it must perish.”⁸⁹ Benjamin Franklin recommended, and Thomas Jefferson undertook, their own revisions of the Bible to bolster its contemporary comprehension and public esteem.⁹⁰ In one of his landmark studies of society and rhetoric in the early American republic, Harry Stout astutely concluded that while

the classical and Puritan rhetorical worlds had much in common, . . . [i]n the early years of the republic, these differences were largely inferential and philosophical—more matters of emphasis and priority than mutually exclusive categories. . . . The clergy oriented their speech and commentary around the vernacular Bible—read and internalized by most New England inhabitants for one and a half centuries. For most of the framers, the Bible stood to the side of political oratory as a more or less licit guest that could be brought in to legitimate truths that enlightened reason made clear. . . . The Bible supplied . . . metaphors and analogies, both religious and political.⁹¹

Understanding these cultural backgrounds sheds light on the meaning and power of the words and purposes set forth in the Preamble—the bold opening of the Constitution. While in some cases, wordings are no more than merely suggestive, the following examples show that being mindful of the force of the King James language behind several words in the Preamble brings to light an important dimension of rhetoric and meaning to this text that was intended, and needed, to be influential. From these words, the Preamble drew and evoked subtle signifiers of authority.

Consider the verb “to form,” in the directive “in order to form a more perfect union.” It is a strong, active term, grammatically in the infinitive mood, conveying connotations of shaping or creating something new, purposeful, and enduring. In the King James Version of Genesis, the word “form” stands prominently in the creation account: “the earth was without form . . .; God formed man . . .; God formed every”⁹² Echoes of this

88. THE TOCQUEVILLE READER: A LIFE IN LETTERS AND POLITICS 63 (2002).

89. JAMES H. HUTSON, THE FOUNDERS ON RELIGION: A BOOK OF QUOTATIONS 23, 26 (2005).

90. *Id.* at 32–33, 36–37.

91. Harry S. Stout, *Rhetoric and Reality in the Early Republic*, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE PRESENT 65, 69 (2007).

92. *Genesis* 1:2; *id.* 2:7, 19. All biblical references are to the King James Bible, the version used almost universally in the late eighteenth century.

creational term resonate, as a bookend, at the conclusion of the Torah in Deuteronomy: “that God formed;”⁹³ and also in Isaiah, the leading book among the Hebrew prophets: “thou art my servant, I have formed thee, . . . I formed the light and created, . . . formed the earth, . . . formed me from the womb.”⁹⁴ In the Noah Webster’s 1828 *American Dictionary of the English Language*, the first of fourteen meanings for the verb “to form” is a “To make or cause to exist. And the Lord God *formed* man of the dust of the ground. Gen. ii.”⁹⁵ In addition, the English translation of the Hebrew Bible speaks 121 times of Jehovah acting to “establish” his people: it was the “Lord that formed it to establish it.”⁹⁶ Again, the first of eight meanings given by Webster was “to set and fix firmly or unalterably; to settle permanently,” citing Genesis 17.⁹⁷ These well-known usages confer exalted authority upon “We, the People,” who now undertake to “form” and “establish” this new order of governance.

Also mentioned in formative biblical texts, but not as prominently, are other words. The word “justice” occurs thirty-eight times as an ideal of judgment, goodness, and happiness.⁹⁸ For example, it was known that Abraham would command his children and that they will “do justice and judgment,” and Deuteronomy admonished, “[t]hat which is altogether just thou shalt follow.”⁹⁹

With the word “perfect,” Bible-literate early Americans would think readily of the New Testament’s invitation, “be ye therefore perfect,” even if in weakness,¹⁰⁰ and also of Paul’s directive that the purpose of ecclesiastical leaders was to serve their people to help them grow “unto the perfect

93. *Deuteronomy* 32:18.

94. *Isaiah* 44:21; *id.* 45:7, 18; *id.* 49:5.

95. *Form v.t.*, NOAH WEBSTER, 1 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 86 (1828) (emphasis in original). By 1828, additional meanings of the verb “form” included other associated preamble words, such as “to unite individual into a collective body,” “to establish,” “to enact,” “to ordain; as, to *form* a law or an edict.” *Id.*

96. *E.g.*, *Jeremiah* 33:2. *See also* JAMES STRONG, THE EXHAUSTIVE CONCORDANCE OF THE BIBLE 311 (1890).

97. *Establish, v.t.*, WEBSTER, *supra* note 97. The biblical instance cited is “I will *establish* my covenant with him for an everlasting covenant.” *Genesis* 17 (emphasis in original).

98. STRONG, *supra* note 96, at 558; WEBSTER, *supra* note 95 (using no biblical examples in defining “justice,” but rather remaining strictly legal, defining it along Classical lines as either *distributive* or *commutative*).

99. *Genesis* 18:19 (*ṣedekah* and *mishpat*); *Deuteronomy* 16:20 (*sedekah sedekah*—“justice, justice” in the Hebrew— and *dikaiōs to dikaion diōxēi*—“pursue justice justly” in the LXX Greek).

100. *Matthew* 5:48. Two of the four definitions given by Webster for “perfect” as an adjective come from the Bible, in *Matthew* 5:48, and 2 *Corinthians* 12:9, “made perfect in weakness.” As a verb, the first meaning for Webster came from 2 *Chronicles* 8:16, “[s]o the house of the Lord was perfected,” speaking of the central public institution in ancient Israel.

man.”¹⁰¹

Beyond that, the Preamble’s phrase “*more perfect*” might seem like an oxymoron: how can there be degrees of perfection? The biblical idiom, however, allows the use of the comparative, in the sense of being closer to being more finished, or more worthy, as in “having *more perfect* knowledge,”¹⁰² or “by a greater and *more perfect* tabernacle.”¹⁰³

Union, or unity, was also a salient biblical ideal, in passages ranging from the Psalms, to the New Testament epistles, to the last words of Jesus: that the people might “dwell together in unity;”¹⁰⁴ “endeavouring to keep the unity . . . [t]ill we all come in the unity of the faith;”¹⁰⁵ “that they be made perfect in one.”¹⁰⁶ The word “union” had several connotations in American English, both political and ecclesiastical.¹⁰⁷

Holding and using collected resources in “common” for the community was a virtuous ideal of the new followers of Jesus in the book of Acts.¹⁰⁸ The word was widely used in early American law and society, including common law, courts of common pleas, common recovery, and common appendant, as well as common prayer.

The desire to obtain and insure “blessings” notably evoked the language of Genesis, Leviticus, and Deuteronomy, in which numerous references can be found to the stipulation that the blessings of peace and prosperity will follow orderliness, while catastrophes follow lawlessness.¹⁰⁹ Religious uses of the words “bless” and “blessing” are copious and predominant.¹¹⁰

The word “ordain,” to any eighteenth-century ear, might have reminded people of an obscure statement in Shakespeare’s *Cymbeline*: “Mulmutius[,] [the legendary first English king,] . . . *ordained* our laws. Mulmutius made our laws.”¹¹¹ But this word might have most readily called to mind the more

101. *Ephesians* 4:13.

102. *Acts* 24:22.

103. *Hebrews* 9:11.

104. *Psalms* 133:1.

105. *Ephesians* 4:13.

106. *John* 17:23.

107. *Union*, NOAH WEBSTER, 2 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) gives eight meanings, one going back to the Union of Scotland and England in 1707 and another detailing the three ways in which two or more churches could be combined or consolidated into one.

108. *See Acts* 2:44; *id.* 4:32.

109. *See, e.g., Genesis* 49:25–26; *Leviticus* 26; *Deuteronomy* 28:2; *Joshua* 8:34; *Proverbs* 10:6, 28:20.

110. For dozens of examples from biblical passages, see, for example, *Bless, v.t.*, WEBSTER, *supra* note 95 and *Blessing, n.*, WEBSTER, *supra* note 95.

111. WILLIAM SHAKESPEARE, *CYMBELINE* act 3, sc. 1. “You must know, till the injurious Romans

familiar meanings of ordaining of ministers with sacerdotal power by those in authority,¹¹² or certain biblical passages affirming that a law could be ordained by God legitimately through Joseph in Egypt,¹¹³ and that God will “ordain peace for us.”¹¹⁴

With the word “posterity” appearing nine times in all three biblical groupings of texts—the law, the prophets, and the writings¹¹⁵—initial hearers of the solemn language of the Preamble might well have thought of the blessings promised to Abraham of “seed” (posterity) as numerous as the sands of the sea.¹¹⁶

Regarding the blessings of “liberty,” the top line of the inscription on the Liberty Bell, which hung in and rang out from Independence Hall, the building in which the Constitutional Convention was held, reads, “Proclaim Liberty throughout the Land unto All the Inhabitants thereof. Lev. XXV X.”¹¹⁷ This banner originates from the introduction of the jubilee law found in Leviticus 25:10. That compelling biblical ideal of beginning anew every fifty years held out promises to the poor of debt forgiveness, release from slavery and servitude, rights of redemption of family lands that had been sold under duress, relief for the oppressed, and, in short, care for the general welfare.¹¹⁸

These words used in the Preamble were obviously not found exclusively in the Bible, but some of these wordings were more distinctively biblical than others. And in addition, even the more generic words augmented the general biblicisms standing behind the Preamble. This is not to suggest that the Founders were making intentional allusions to specific passages of the Bible, but rather were writing in a particular dialect or style, with formalistic cadences and structure that conveyed moral and sacred implications,¹¹⁹ which reinforced political applications. Working together, whether consciously or subliminally, they evoked traditional or even divine

did extort this tribute from us, we were free. We do say to Caesar, our ancestor was that Mulmutius which ordained our laws,” the first King of Britain. *Id.*

112. *Ordain, v.t.*, WEBSTER, *supra* note 95 (citing biblical passages in *Mark* 3 and *Isaiah* 30, among others).

113. *See Psalms* 81:5.

114. *Isaiah* 26:12.

115. *E.g.*, *Genesis* 45:7; *Amos* 4:2; *Psalms* 49:13.

116. *Genesis* 22:17, 32:12. The human race was regularly referred to as “the posterity of Adam.”

117. *The Liberty Bell*, NAT’L PARK SERV., <https://www.nps.gov/inde/learn/historyculture/stories-libertybell.htm> (last visited Sept. 12, 2018) (quoting *Leviticus* 25:10).

118. *See id.* 25:14, 25:27–28, 25:35, 25:39–42.

119. The six central lines in the Preamble can be seen as a list of extended parallel alternates, and the overall framework hints at being faintly chiasmic: (a) United States, (b) establish, (c) insure, (d) provide // (d) promote, (c) secure, (b) establish, (a) United States. These stylistic flavors facilitate memorization.

sources of approval for the adoption of the new Constitution as a whole. They imbued it with an aura of solemnity.

The need for such overarching authority was critical for multiple reasons. This authoritative register stood in place of the unifying authority previously provided by the existence of the monarchy, and it reassured the colonists, calming the anguish of treason and of post-war traumatic stresses. The new Constitution was not to be seen as a revision of the old Articles of Confederation. As George Washington said in his call for the Constitutional Convention, “all attempts to alter or amend” would not solve the problems, “like the propping of a house which is ready to fall.”¹²⁰ Concisely stated, “[w]hat was needed was replacement,”¹²¹ and in an atmosphere when the very legality of such an effort was in question, what that replacement crucially needed was the rhetorical reinforcement and ethical footing that the Preamble alone provided.

How each of the words and phrases in the Preamble were fully understood in the United States at this time remains a question for much more research. A “corpus linguistics” analysis of the usages of each of the Preamble’s words—biblical or ordinary, before and after 1787—has already begun, pointing to the several rhetorical modes and contexts in which these words most commonly appeared, and is discussed below.¹²² That information, together with further examination, provides further understanding of the general meanings and specific usages of these words in common public discourse in the early American Republic. But for present purposes, the Preamble’s biblical voice adds strength and context to the choir of legal purposes that the Preamble and the Constitution were intended to serve.

E. THE PREAMBLE AND ITS EIGHTEENTH-CENTURY UNDERSTANDING OF RIGHTS

While it exceeds the scope of this Article to retrace the origins of “rights” in Roman and western thought, a brief summary of the intellectual history of rights shows how they were conceived in 1787 (and as recently as shortly before the mid-twentieth century) not as privileges but as “moral powers.”¹²³ As is skillfully documented by James Hutson, Director of the

120. *Letter from George Washington to John Jay (Mar. 10, 1787)*, in CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 131 n. 34 (2008).

121. *Id.* at 131.

122. See discussion *infra* Section I.I; *infra* notes 203–68 and accompanying text.

123. For a persuasive historical analysis of “rights as moral powers” in connection with political

Manuscript Division of the Library of Congress, “the current presumption that the idea of a right was an unchanging feature of American society ‘from the beginning’ conflicts with evidence that, at the dawn of American history, a ‘modern’ understanding of rights was absent or, at best, inchoate.”¹²⁴

Rights, as understood in Roman law, entitled people to their “just share” of society’s “benefits and burdens,” and rights (*jura*) conferred benefits but at the same time burdens and obligations to create “a just and harmonious order.”¹²⁵ Understood this way, rights were “objective” and naturally imposed duties, both to be proactive and preventative. Rights thus came to be seen as powers, most famously in Ockham’s persuasive arguments on behalf of the Franciscans that the Pope’s plan for them to have rights over property, which they did not want, stood just as contrary to the Franciscan the vow of poverty as did possessing the property itself. But with this development, rights shifted from being “objective” to being “subjective”; that is, not referring to some “share of an external object,” but as a “power inherent in an individual.”¹²⁶ And, being “conferred upon man” by his Creator, subjective rights carried with them not only the old notions of burdens and duties but also were “grounded in religion” in general and “on Christian morality” in specific.¹²⁷

In the ensuing centuries, philosophical and legal developments elaborated the contours of subjective rights, until in eighteenth-century America, John Locke, following Grotius, derived all “rights from duties.”¹²⁸ John Dunn “stressed that Locke’s concept of rights must be understood in the context of his religious belief,” and asserted “all the rights humans have . . . derive from, depend upon and are rigidly constrained by a framework of objective duty, [which constitutes] God’s requirement for human agents.”¹²⁹ So understood, subjective rights were necessary to perform the duties that God, nature, or society had imposed upon them. “A right, therefore, in the new United States meant, in its fullest sense, power inherent in and owned by an individual to act in a way consistent with

thought at the time of the drafting of the Constitution, see JAMES H. HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 73–110 (2003), which is summarized, paraphrased, and quoted in the following paragraphs.

124. *Id.* at 76.

125. *Id.* at 76–77.

126. *Id.* at 78.

127. *Id.* at 79.

128. *Id.* at 95.

129. *Id.* (citing James Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 16 (1987)).

Christian morality.”¹³⁰ In the words of Vattel, a right was “nothing more than the power of doing what is morally possible.”¹³¹ It was in this sense that rights were axiomatic for the founding generation of the Constitution.

Responding to Rousseau’s claim that Americans had invented the science of rights, John Adams argued they had simply “found it in their religion.”¹³² Whether this clever statement of Adams represents a majority or minority view among the Founders or not, it is clear that the popular view of the science of subjective rights as based on duties—the view which prevailed in Adams’ day—has been largely forgotten since the middle of the twentieth century.

By losing that bearing, American jurisprudence has also lost touch with the eighteenth-century communitarian foundations and civic functions of the Preamble, for it is in the Preamble that particular duties of the people, which are delegated to their representative governments, are to be found. Those duties are the purposes obligingly undertaken by all, “We the People,” in recognition of the powers given to each to do what is possible to form a more perfectly united nation, to establish social justice, to ensure collective tranquility, to provide cooperatively for the common defense, to promote and facilitate the well-being of the nation, and to permanently secure and maintain the blessings of liberty for themselves and also for generations to come.

These duties, which would have been seen as necessarily latent in the language of the Preamble, are detected especially through the lens of its biblical and moral terminology. In the eighteenth-century view, the Preamble—a bill of duties—is, of logical necessity, the origin of the subjective rights bestowed upon each subject. Concurrently, constitutionally granted powers—that is, rights, privileges, and protections—also reciprocally include the enumeration of conditions and abilities needed to accomplish the attendant moral obligations.

F. THE LEGAL IMPORT OF STATUTORY PREAMBLES IN THE COMMON LAW

Recognizing the cognate texts in the history of deliberations over the Constitution, in the preambles of state constitutions, and in the solemn language of faithful commitment that prevailed in the shared rhetoric of the early American Republic is just the beginning in the quest to unpack,

130. *Id.* at 100.

131. *Id.* (citing EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATIONS*, at x (1811)).

132. *Id.*

deconstruct, or reconstruct, for legal purposes, the meanings of the words and phrases in the Preamble. To gain yet another sense of the Preamble's possible intended legal effects, the following section adds one more consideration, namely, how statutory preambles were legally understood in eighteenth century English law.

The Constitution is not the only legal document to begin with a purpose statement. Many statutes have preambles that establish the goals and purposes of the legislation. These preambles have long been given authoritative weight in construing statutes and, more particularly, when resolving statutory ambiguities. Specifically, around the time of the Ratification, courts regularly turned to statutory preambles to better understand and effectuate the legislature's intent. Thus, ignoring the Constitution's Preamble would be a significant departure from the original methods of interpreting public law as would have been understood by the Framers and the delegates in the state ratification conventions.

Much of our understanding of the interpretive enterprise is derived from English law traditions. Leading up to the American Revolution, colonial law was largely a product of English law principles.¹³³ One such principle was that statutory preambles ought to be given at least some weight when making sense of laws. For pre-colonial English courts, preambles provided a window to the legislature's intent, in turn allowing courts to interpret the law in a manner that addressed the evils the law sought to remedy.¹³⁴ Leading legal commentators of the seventeenth and eighteenth centuries captured this principle of interpretation in their writings. Thomas Hobbes advised lawmakers to concisely state "why the Law was made," for "the Perspicuity, consisteth not so much in the words of the Law it selfe, as in a Declaration of the Causes, and Motives, for which it was made. That is it, that shewes us the meaning of the Legislator."¹³⁵ Edward Coke likewise stated that preambles are a "good mean to find out the meaning of the statute" and "key" to having an open understanding of the law.¹³⁶ Likewise, William Blackstone wrote that, "the proem, or preamble, is often called in to help the construction of an act of parliament."¹³⁷

133. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 4–5 (3d ed. 2005).

134. *See, e.g.*, *Stowel v. Lord Zouch* (1569), 75 Eng. Rep. 536, 560 (C.B.) ("And for the better apprehension of the purview, the preamble of the Act is to be considered . . . a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.")

135. THOMAS HOBBS, *LEVIATHAN* 242–57 (1651).

136. EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 79 (1628).

137. WILLIAM BLACKSTONE, *1 COMMENTARIES ON THE LAWS OF ENGLAND* 59–60 (Univ. of Chi. Press 1979) (1765).

This interpretive rule generally persisted throughout the eighteenth century¹³⁸ and found its way into American courts.¹³⁹ However, at the time when the Constitution was being ratified, the general rule was tempered. One of the parties in *Paca's Lessee v. Forwood* articulated this principle in 1787 in terms of the then well-established rule of statutory interpretation:

Though it is true, as a general rule, that the preamble of a statute is the key to open the minds of the makers as to the mischiefs which are intended to be remedied by the statute, yet this rule must not be carried so far as to restrain the general words of the enacting clause by the particular words of the preamble.¹⁴⁰

In 1790, in *Hubley's Lessee v. White*, the Supreme Court of Pennsylvania stated that although a statutory preamble should be given “considerable weight in discovering [the statute’s] meaning,” the preamble cannot “control the clear and positive words of the enacting part.”¹⁴¹ “[I]t may [only] explain them if ambiguous.”¹⁴²

Thus, preambles in the eighteenth century played a valuable role in statutory interpretation. To ignore the preamble to any legal document of that day, let alone any state or national constitution, is to turn one’s back on an original method of interpreting legal texts. To trace next how the Constitution’s Preamble was actually understood and received by its first essential audience—the delegates at the state ratifying conventions—it is helpful to review the ratification debates amongst the states and consider what role or roles they envisioned the Preamble playing.

G. THE PREAMBLE IN THE STATE RATIFICATION PROCESS

The public ratification process began in earnest when the Constitution was first presented to the American people in the Philadelphia newspaper, *Pennsylvania Packet, and Daily Advertiser*, on September 19, 1787.¹⁴³ It was

138. See, e.g., *Brett v. Brett* (1716), 162 Eng. Rep. 456, 458–59 (“[I]t is the Preamble more especially that we look for the reason or spirt, of every statute; rehearsing, . . . as it ordinarily does, . . . in the best and most satisfactory manner, the object or intention of the legislature.”); *Copeman v. Gallant* (1716), 24 Eng. Rep. 404, 404–07.

139. See, e.g., *Cox v. Edwards*, 14 Mass. 491, 493 (1782) (“But it is said we are to consider the preamble, which is a key to the sense and meaning of the legislature.”); *Lynch’s Ex’rs v. Horry*, 1 S.C.L. 229, 230 (1792); *Turner v. Turner’s Ex’x*, 8 Va. 234, 235–36 (1792).

140. *Paca’s Lessee v. Forwood*, 2 H. & McH. 175, 191 (Md. 1787).

141. *Hubley’s Lessee v. White*, 2 Yeates 133, 146–47 (Pa. 1796).

142. *Id.* For an exposition of similar current uses of preambles or other prefatory materials in legal texts, see ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 35, 218–20 (2012) (with thanks to Jarred Shobe and with anticipation of his forthcoming article on the legal force of statutory prologues).

143. *Constitution of the United States Printed in the Pennsylvania Packet and Daily Advertiser*,

front-page news. The Preamble was set conspicuously in very large font, while the rest of the Constitution was the fine print.¹⁴⁴ Within weeks, the Constitution was printed as a sixteen-page pamphlet, again with the Preamble prominently typeset as the title page, followed by the text of the Constitution's body set in smaller, regular type.¹⁴⁵ Thus, from the beginning, the public perception of the Constitution was captured by the Preamble; it boldly epitomized what the Constitution promised to deliver. Accordingly, one might well wonder: was it the Preamble, more than anything else, that finally tipped the voters' scales and secured the successful adoption of the Constitution?

Recognizing that the Preamble might bear great sway, some opponents attacked it. Wisely, most proponents simply let the Preamble speak for itself, and thus little was said about the Preamble in the ratification process in the various states. Nevertheless, through those occasional debates, one can learn more about how the Founders—both Federalists and Anti-Federalists—viewed the Preamble. The arguments in favor of or against the Preamble in the state ratification conventions were consistently based on the same concerns. The broad, sweeping language of the Preamble was a cause for concern with many Anti-Federalists. Worried that the expansive language gave virtually unchecked and unlimited power to the federal government, some Anti-Federalists feared the central government would absorb the states.

Brutus, the pen name for a well-known Anti-Federalist, wrote: “This constitution gives sufficient colour for adopting a[] [broad] construction, if we consider the great end and design it professedly has in view—these appear [in] its preamble The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the accomplishment of the end.”¹⁴⁶ He later repeated his fear of the over-breadth of the Preamble: “If the end of the government is to be learned from [the Preamble's] words, which are clearly designed to declare it, it is

September 19, 1787, Identifier: 2812, HIST. SOC'Y OF PA., <https://digitallibrary.hsp.org/index.php/Gallery/72#> (last visited Sept. 12, 2018) (image 6/10).

144. This followed but accentuated the printing format of the printed draft of the Constitution. See *Jacob Broom Draft of the United States Constitution, 1787*, Identifier: 2765, HIST. SOC'Y OF PA., <https://digitallibrary.hsp.org/index.php/Gallery/72#> (last visited Sept. 12, 2018) (image 7/10).

145. Typeset and printed by Nathaniel Patten as “WE THE PEOPLE, of the United STATES, In order to form a more perfect union” *Copy of the U.S. Constitution Printed and Sold by Nathaniel Patten*, Identifier: 6151, HIST. SOC'Y OF PA., <https://digitallibrary.hsp.org/index.php/Gallery/72#> (last visited Sept. 12, 2018) (image 2/10). Another printing that year was prepared for use of the State of Pennsylvania in General Assembly, comparing the proposed constitution with the present Articles of Confederation, along with copious state-by-state notes of proposed revisions.

146. *Essays of Brutus No. XI: 31 January 1788*, in 1 THE COMPLETE ANTI-FEDERALIST 417, 420–21 (Herbert J. Storing ed., 1981).

obvious it has in view every object which is embraced by any government”¹⁴⁷

Another opponent of Ratification, Maryland delegate Luther Martin, argued a year after the Constitution was signed that the Preamble sought to obliterate state governments:

As altered, every appearance of the *existing* governments, under their respective Constitutions, is relinquished, the very names struck out, general purposes and powers given extending to every purpose of the social compact, and then *this Constitution* including all these purposes, is made the Constitution of the United States, without any reserve of the several States or their Constitutions then existing; and then this Constitution enacted for these unlimited purposes, we afterwards find is expressly declared paramount to *all Constitutions*, and laws existing in the States.¹⁴⁸

Proponents of the Preamble often allowed the document to speak for itself, but at times pointed out the clear role the Constitution outlines for States. Specifically, they argued that the Preamble actually serves as a restraint, limiting the exercise of the Constitution’s enumerated powers and thus preserving state powers and individual rights. James Madison, a strong Federalist and often considered the “Father of the Constitution,” authored a direct response to these Anti-Federalist arguments in Federalist No. 41.

It has been urged and echoed that the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction. . . . Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no

147. *Essays of Brutus XII: 7 February 1788*, in 1 THE COMPLETE ANTI-FEDERALIST 422, 424 (Herbert J. Storing ed., 1981).

148. SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 291–92 (James H. Hutson, ed., 1987) (emphasis in original). Professor Raymond Muscin said the following regarding Luther’s criticism:

It seems probable that Luther Martin regarded all the clauses of the present Preamble as amounting together to something like a national bill of rights preempting of all the states’ declarations and bills of rights, when he wrote of the Preamble’s “general purposes and powers . . . extending to every purpose of the social compact,” i.e., every reason why people form governments, and tied that reference in with a latent reference to the Supremacy Clause.

Raymond B. Marcin, ‘Posterity’ in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS 273, 286 (1993).

other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.¹⁴⁹

Madison argued that the broad language of the Preamble (along with other broad language in the Constitution) is not as sweeping as Anti-Federalists contended it was; the Preamble's language is narrowed (but not necessarily eliminated) by the specific enumerations of powers and the more specific uses of Preamble language later in the Constitution. He had previously made a similar argument in a letter written to Robert S. Garnett:

The general terms or phrases used in the introductory propositions, and now a source of so much constructive ingenuity, were never meant to be inserted in their loose form in the text of the Constitution. Like resolutions preliminary to legal enactments it was understood by all, that they were to be reduced, by proper limitations and specifications¹⁵⁰

Supporting and adding to Madison's writings, Alexander Hamilton stressed that the Preamble does not abrogate the people's retention of their individual rights.

[T]he people surrender nothing, and as they retain every thing, they have no need of particular reservations. "[W]e the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.¹⁵¹

Considering isolated discussions surrounding the Preamble that occurred during the Ratification process provides some sense of how various Founders interpreted its language. But this information does not provide any concrete answers to the legal weight carried by the Preamble. While Anti-Federalist's clearly were concerned that the Preamble had great legal weight sufficient to expand the federal government's size, the Federalists seemed to view the Preamble as a purpose statement, limited by the enumerated powers within the Articles of the Constitution, without legal force on its own—except, as one might additionally argue, to restrict the areas of power granted by the Constitution so as to include only the particular objectives and duties

149. THE FEDERALIST NO. 41, at 262–63 (James Madison) (Jacob E. Cooke ed., 1961).

150. Letter from James Madison to Robert S. Garnett (Feb. 11, 1824), in 9 THE WRITINGS OF JAMES MADISON 176, 176–77 (G. Hunt ed., 1910).

151. THE FEDERALIST NO. 84, at 578–79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

undertaken in the Preamble and no more.

In addition to the foregoing statements from national figureheads, the records of seven of the state ratifying conventions provide insights into how people at the time envisioned the Preamble being used.¹⁵² Based on our review of the state constitutional ratification conventions, it does not appear that the Preamble was necessarily the center of debate. Its “We the people” opening aside, the details of the Preamble’s language were not contested. Rather, the Preamble was a source of various arguments with regards to (1) principles of federalism and (2) questions as to whether a bill of rights was a necessary appendage to the Constitution.

Pennsylvania. On Wednesday, November 28, 1787, the Pennsylvania Convention took up the lively topic of the Preamble.¹⁵³ James Wilson opened the debate by stressing the Preamble’s empowerment of the people. It is “the People,” that “ordain and establish” the Constitution. Because the Constitution derives its power from the people, the people explicitly have the power to amend and implicitly have the right to repeal and annul.¹⁵⁴ Mr. Wilson hoped that this implied power would “give ease to the minds of some, who ha[d] heard much concerning the necessity of a bill of rights.”¹⁵⁵

In response to Mr. Wilson’s comments, John Smilie addressed the convention and declared the Preamble to be an inadequate substitute for an express bill of rights. Mr. Smilie contrasted the simple language of the Preamble with the grand declarations of equality and liberty permeating the Magna Charta and the Declaration of Independence.¹⁵⁶ To secure the people’s rights, Mr. Smilie believed a bill of rights was necessary.¹⁵⁷

Robert Whitehill joined Mr. Smilie in his criticism of the Preamble, but expanded the critique and raised concerns about creating a strong, centralized government. ““We the people of the United States’ is a sentence that evidently shows the old foundation of the Union is destroyed, the principle of confederation excluded, and a new unwieldy system of consolidated empire is set up upon the ruins of the present compact between the states.”¹⁵⁸ Mr. Whitehill was seriously concerned that the Preamble

152. In the other six state conventions, the Preamble seems to have been taken as given.

153. *The Pennsylvania Convention Wednesday 28 November 1787*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 382, 382 (Merrill Jensen et al. eds., 1976).

154. *Id.* at 383.

155. *Id.*

156. *Id.* at 384–86.

157. *See id.* at 386.

158. *Id.* at 393. *See also id.* at 408; *The Pennsylvania Convention Saturday 1 December 1787*, in 2

abolished the independence and sovereignty of the states. And if the states were going to surrender such power, a bill of rights was necessary.¹⁵⁹

Connecticut. The Preamble was rarely mentioned during Connecticut's ratification debates. One of the lone, significant mentions of the Preamble came from an anonymous letter purportedly written in reply to a letter from a New Haven correspondent.¹⁶⁰ The letter spoke of positively of the Preamble's high aspirations as proper aims of government and goals that would eventually be achieved, thanks to the framework established by the Constitution.¹⁶¹ It expressed confidence that the guiding purposes set forth in the Preamble would be achieved: "[B]y a wise administration under [the Constitution], it will do all that a wise and good form of government can do. It will by degrees, and in due time, answer all the purposes expressed in the Preamble"¹⁶²

Massachusetts. The day after the convention was seated, "Samuel," an author writing in the *Independent Chronicle*, echoed a concern emanating from other state ratification debates, namely that the "We the People" language of the Preamble was "expressly repugnant to the confederation."¹⁶³ He argued that the choice to use the phrase "We the People" instead of the specific states cast the citizen's allegiance to the federal government over their own states.¹⁶⁴

The Republican Federalist, at the end of the second week, expressed similar concerns to Samuel regarding the loss of state identity. He interpreted the "We the People" language to mean: "[we] do effectually put an end in America, to governments founded in compact—do relinquish that security for life, liberty, and property, which we had in the Constitutions of these states and of the Union—do give up governments which we well understood,

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 153, at 444, 445–47 (“‘We the People’ not ‘We the States.’ From this we could not find out that we were *United States*. . . The Constitution offered to us is a consolidated government and not a confederate republic. It will swallow up eventually all state governments.”).

159. See *The Pennsylvania Convention Wednesday 28 November 1787*, in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 153, at 398.

160. *Commentaries on the Constitution 17 October–12 November 1787*, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: CONNECTICUT 372, 373 (Merrill Jensen ed., 1978).

161. See *Letter from New York, 24, 31 October*, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 160, at 380, 386.

162. *Id.*

163. *Independent Chronicle, 10 January*, in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY STATES: MASSACHUSETTS 683 (Merrill Jensen et al. eds., 1998).

164. *Id.*

for a new system which we have no idea of.”¹⁶⁵

In the last week of the convention, Mr. Dench went so far to argue that the Preamble would result in an “actual consolidation of the States—and that, if he was not mistaken, the moment it took place, a dissolution of the State governments will also take place.”¹⁶⁶ General Brooks, in response, suggested that the fears shared by Mr. Dench were ill-founded. First, “the Congress under this Constitution cannot be organized without repeated acts of the legislatures of the several states—and therefore, if the creating power is dissolved, the body to be created cannot exist.”¹⁶⁷ Second, “it is impossible the general government can exist, unless the governments of the several States are for ever existing, as the qualifications of the electors of federal representatives are to be the same as those to the electors of the most numerous branch of the State legislatures.”¹⁶⁸ Apparently satisfied both overall and that the operation of the Preamble would not threaten the existence of the states, about ten delegates decided to change their votes, and the motion to ratify finally carried on February 6, 1788, by a vote of 187 to 168.¹⁶⁹

Maryland. In Baltimore, a similar frustration was expressed in the *Baltimore Maryland Gazette* over the revised Preamble that had emerged at

165. “*The Republican Federalist*” V, Massachusetts Centinel, 19 January, in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 163, at 748.

166. *Convention Debates*, 24 January, P.M., in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY STATES: MASSACHUSETTS 1339 (John P. Kaminski et al. eds., 2000). Others shared this concern. See *Convention Debates*, 1 February, A.M., in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 1397.

We the people of the United States, do. If this, sir, does not go to an annihilation of the state government, and to a perfect consolidation of the whole union, I do not know what does. . .

We are under oath; we have sworn that Massachusetts is a sovereign and independent state—
How then, can we vote for this Constitution, that destroys that sovereignty?

Id.; *Convention Debates*, 1 February, A.M., in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 1285.

The latter is a mere federal government of states. Those, therefore that assemble under it have no power to make laws to apply to the individuals of the states confederated; and the attempts to make laws for collective societies, necessarily leave a discretion to comply with them or not.

Id.

167. *General Brooks*, Jan. 24, 1778, in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 1397.

168. *Id.* As an interesting aside, one member of the convention—Mr. Turner—“made an observation that there ought to have been made some mention of Religion [in the preamble].” *Monday, 14 January, A.M. and P.M.*, in 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY STATES: MASSACHUSETTS 1801 (John P. Kaminski et al. eds., 2001).

169. See *Winthrop Sargent to Henry Knox*, Boston, 6 February, in 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 166, at 1583.

the very end of the Constitutional Convention.¹⁷⁰ Whereas the original Preamble had listed the states individually, the revised Preamble began with “We the People.” For some, that revision threatened the very existence of state governments.¹⁷¹ Nevertheless, not enough delegates saw this as a problem, and on April 28, 1788, Maryland became the seventh state to ratify the Constitution.

New Hampshire. Writing under the pen name of “Afredus,” Samuel Tenney defended the lack of a bill of rights in the Constitution in part by referring to the language of the Preamble.¹⁷² Responding to “A Farmer,” Afredus reassured readers that the powers of the federal government are limited by the purposes of the Preamble. “To prevent any interference between the federal and state governments, the objects of the former are pointed out in the preamble to the Constitution.”¹⁷³ The Constitution’s enumerated powers exist for the “accomplishment of [the Preamble’s] purposes.”¹⁷⁴ And “every thing not expressly given up is retained by the states.”¹⁷⁵

Virginia. Perhaps the most significant comment about the Preamble coming out of the ratification debates in Virginia, which met in June 1788, was in a publication circulated by James Monroe in which he famously called the Preamble “the key of the Constitution.”¹⁷⁶ When this Convention began, only eight states had ratified the Constitution, one short of the required nine.

As a moderate Anti-Federalist, Monroe published two lengthy explanations of the newly proposed Constitution in 1788.¹⁷⁷ Styling himself “a native of Virginia,” where individual and state rights were highly esteemed, he was concerned about granting the federal government too much power. His first pamphlet began by justifying, historically and legally, why

170. *Baltimore Maryland Gazette*, 3 June 1788, in 12 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND 742, 742 (John P. Kaminski et al. eds., 2015).

171. *Id.*

172. Afredus, *Exeter Freeman’s Oracle*, 18 January 1788, in 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW HAMPSHIRE 86, 86 (John P. Kaminski et al. eds., 2017).

173. *Id.* at 89.

174. *Id.*

175. *Id.*

176. James Monroe, *Observations*, *supra* note 2, at 356.

177. Neither Monroe nor his law teacher, Thomas Jefferson, were one of two delegates from Virginia to the Constitutional Convention. Monroe had served under the Confederation as a member of the Continental Congress. Beginning in 1790, he served as a U.S. Senator from Virginia, and in 1799 became Governor. *See generally*, HARLOW GILES UNGER, THE LAST FOUNDING FATHER: JAMES MONROE AND A NATION’S CALL TO GREATNESS (2009).

the Constitution did not have, and should not have, a written bill of rights: In 1776, the American people needed no bill of rights “to choose the form [of government] most agreeable to themselves. . . . [S]uch [a] declaration [of rights] tends to abridge, rather than preserve their liberties.” Instead, his reasoning went on to assure: “[I]n all disputes respecting the exercise of power, the Constitution or frame of government decides. If the right is given up by the Constitution, the governors exercise it; if not, the people retain it.”¹⁷⁸

In this context, Monroe proceeded to give observations about each part of “The Plan of the Federal Constitution.” For him, that plan began with and necessarily included the Preamble. After quoting it in full, Monroe commented: “The introduction, like a preamble to a law, is the key of the Constitution. Whenever federal power is exercised, contrary to the spirit breathed by this introduction, it will be unconstitutionally exercised, and ought to be resisted by the people.”¹⁷⁹ From his guarded perspective, Monroe saw the Preamble as vitally and substantively limiting the exercise of power by the federal government, preserving all the rights of the people not “given up” by them to the federal government. As a key, he would have understood the Preamble as properly and purposefully aligning all the pins, latches, bars, levers, and moving parts inside the lock mechanism, so that the bolt would slide open or closed, either allowing proper passage or protecting against unwarranted entry. Reassuring arguments such as these no doubt helped tip the scale in the close eighty-nine to seventy-nine vote by the Virginia Convention in favor of ratification.

New York. Speeches in the New York ratification conventions mentioned the Preamble many times. A customer of the *New York Journal* expressed the concern that Congress had the power to make amendments to the Constitution without requiring them to get approval of the people because of the language of the Preamble.¹⁸⁰

An author of a letter published in the *New York Journal* believed that the “We the People” language was a mockery to the members of the several states. Citing John Locke, he wrote that “sovereignty consists in three things—the legislative, executive, and negotiating powers, all of which your

178. James Monroe, *Observations*, *supra* note 2, at 355. This statement is included in, 2 THE FOUNDERS’ CONSTITUTION 14 (Philip B. Kurland and Ralph Lerner, eds., 1987).

179. James Monroe, *Observations*, *supra* note 2, at 356.

180. *New York Journal* 23 November 1787, in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY STATES: NEW YORK 293, 295–96 (John P. Kaminski et al. eds., 2003).

constitution takes absolutely away from the several states.”¹⁸¹ This concern was shared by many citizens of New York.¹⁸²

Some expressed concern that the Preamble’s general purposes were overly broad and would serve to empower the federal government. Writing under the pseudonym Brutus VI, a citizen of New York wrote:

I would ask . . . to define what ideas are included under the terms, to provide for the common defence and the general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by everyone? No one will pretend they will. It will then be a matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter.¹⁸³

George Clinton, in advocating against ratification, summarized what many of New York’s citizens felt about the power the Preamble gave to the federal government.

The objects of this government as expressed in the preface to it, are “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”—These include every object for which government was established amongst men¹⁸⁴

181. *Cincinnatus V: To James Wilson, Esq. New York Journal, 29 November 1787*, in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 180, at 324.

182. *See George Clinton’s Remarks, 27 June 1788*, in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY STATES: NEW YORK 1974 (John P. Kaminski et al. eds., 2008); *George Clinton’s Remarks, 11 July 1788*, in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 182, at 2144 (“We the people of the United States’ hence the government must be considered as an original compact, annulling the State Constitutions as far as its powers interfere with them and thus far destroying their rights.”); Cato III, *New York Journal, 25 October 1787*, in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 180, at 126.

The recital, or premises on which this new form of government is erected, declares a consolidation or union of all thirteen parts, or states, into one great whole, under the firm of the United States, for all the various and important purposes therein set forth.—but whoever seriously considers he immense extent of territory comprehended within the limits of the United States, together with the variety of its climates, productions, and commerce, the difference of extent and number of inhabitants in all; the dissimilitude of interest, morals, and politics in almost every one, will receive it as an intuitive truth that a consolidated republican form of government therein can never *form a more perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to you and your posterity*, for to these objects it must be directed; this unkindred legislature therefore composed of interests opposite and dissimilar in their nature will in its exercise, emphatically be, like a house divided against itself.

Id.

183. Brutus VI, *New York Journal, 27 December 1787*, in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 180, at 470.

184. George Clinton, *Remarks Against Ratifying the Constitution, 11 July 1788*, in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 182, at 2146.

In short, some citizens of New York did not see the Preamble as vacuous, but instead were concerned that the Preamble gave the federal government too much power. Notwithstanding these concerns, New York ratified the Constitution on July 26, 1788.

Rhode Island. On May 29, 1790, Rhode Island became the last state to ratify. Debates were carried on in newspapers as well as in meetings. On March 3, 1790, General Joseph Stanton raised the issue of slavery and argued that the practice was incompatible with the noble aims of the Preamble. He could not “but observe what a Beautiful Introduction the Constitution commences with.”¹⁸⁵ In light of that language, “Why in the Name of Common [Sense] should not this Liberty [spoken of in the Preamble] be extended to the Africans?”¹⁸⁶ Others were less convinced that the Preamble compelled abolition of slavery. As Mr. G. Hazard stated, “[i]f we totally abolish Slavery it will Ruin many persons.”¹⁸⁷ Given society’s current structures, it was not “possible to effect the Full Abolition of Slavery.”¹⁸⁸ Yet no one argued that the Preamble’s praiseworthy aims were compatible with slavery.

In the *Newport Herald*, A. Freeman explained why the Preamble was a necessary part of the Constitution. The years leading up to the Constitutional Convention were marked by “confusion and disorder . . . in several States” marred by “jealousy and suspicion” and lacking unanimity.¹⁸⁹ “[T]his feebleness and incompetency” attributed to the “great and rapid decline of trade and commerce, and those consequential distresses which are deeply felt throughout the United States.”¹⁹⁰ In light of this “melancholy situation,” it was the duty of the state legislatures to frame a “government calculated with the express design[s]” mentioned in the Preamble.¹⁹¹ For Mr. Freeman, the Preamble—“fraught with . . . benevolent and noble ideas”—provided reassurance that the union could succeed.¹⁹²

Though the ratification debates do not reveal exactly what meaning

185. *The Rhode Island Convention Wednesday 3 March 1790*, in 26 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: RHODE ISLAND 916, 926 (John P. Kaminski et al. eds., 2013).

186. *Id.*

187. *Id.*

188. *Id.*

189. A. Freeman, *Newport Herald*, 3 April 1788, in 24 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: RHODE ISLAND 220, 222 (John P. Kaminski et al. eds., 2011).

190. *Id.*

191. *Id.*

192. *See id.*

early Americans assigned the Preamble, one thing is clear: everyone presumed that whatever the Preamble was deemed to mean, it meant something significant. The Anti-Federalists could only have viewed the Preamble as a threat if they, and all others, saw it as functioning in some way to define the powers granted under the Constitution more broadly than those powers would otherwise have been understood. And no one answering the concerns of the Anti-Federalists ever suggested that the Preamble was not a threat because it was not a part of the Constitution, or that it bestowed no power, or that it could serve no purpose other than to resolve patent ambiguities. The Federalists and Anti-Federalists debated the Preamble not because it was meaningless, but precisely because it was a relevant and key part of the Constitution.

Thus, as the nation approached the beginning of the nineteenth century, the Constitution had been ratified and was functioning. It had enjoyed George Washington's illustrious presidency, and it had proudly resisted the extremisms that had led France into the Reign of Terror and had ushered in Napoleon to the throne. But serious challenges still stood ahead for the Constitution in the nineteenth century, including its near collapse in the Civil War (1861–1865). Through all these decades, the Preamble was regarded by federal courts and political actors as a source of strength, purpose, and legal guidance.

H. THE PREAMBLE AND THE NINTH AND TENTH AMENDMENTS

Very little has been said regarding the relationship between the Preamble and the Ninth and Tenth Amendments (ratified in 1791). But the concerns giving rise to these Amendments were already raised in the ratification debates.¹⁹³ Under the Ninth Amendment, “the enumeration in the Constitution, of certain rights,” is not to be “construed to deny or disparage others retained by the people,”¹⁹⁴ as Monroe had worried that any bill of rights would tend to do. In other words, the Ninth Amendment seeks to protect rights of the people from being narrowed by the specific enumeration of certain rights in the Constitution. That protected breadth should be potentially discoverable in several places: natural rights; state constitutions; state laws; or anywhere else, including the words of the Preamble. The federal government may choose to recognize or respect those rights, but may not deny or disparage them, even if they are not mentioned in connection with the enumeration of powers granted under the Articles of the

193. See, e.g., James Monroe, *Observations*, *supra* notes 2, 176–79 and accompanying text.

194. U.S. CONST. amend. IX.

Constitution.

In the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁹⁵ This language tracks Monroe’s assurance that the spirit breathed by the Preamble would respect the reservation of undelegated powers. Conspicuously in this regard, the Articles of Confederation had provided that each state retained “every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States.”¹⁹⁶ Without the word “expressly,” the Tenth Amendment allows that there may be implied powers—powers not expressly delegated—that have not been reserved exclusively to the states or the people.¹⁹⁷ Thus, as Justice Story argued in 1833, by removing the word “expressly” from this reservation clause, the Tenth Amendment apparently intended to leave room for implied powers:

The attempts, then, which have been made from time to time, to force upon this language [of the Tenth Amendment] an abridging, or restrictive influence [on the powers delegated to the federal government] are utterly unfounded. . . . Stripped of the ingenious disguises in which they are clothed, they are neither more nor less, than attempts to foist into the text the word “expressly,” to qualify what is general, and obscure what is clear, and defined.¹⁹⁸

When this amendment was debated before Congress,

it was remarked, that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the Constitution descended to the most minute details. . . . [I]t could not have been the intention of the framers of this amendment to give it effect as an abridgment of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental.¹⁹⁹

Not only does this reading make the Tenth Amendment more than a mere tautology—that which is delegated is delegated—but it also allows more breathing room for the Preamble in constitutional theory. Things may always be implied from the enumerated powers themselves, as may be reasonable, necessary, and proper. But, *a fortiori*, why should necessary

195. U.S. CONST. amend. X.

196. ARTICLES OF CONFEDERATION of 1781, art. II (emphasis added).

197. See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and Expressly Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1938 (2008).

198. JOSEPH STORY, 2 COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES § 1908 (1833).

199. *Id.* §§ 1907–08.

incidental powers and reasonably defining purposes not be implied, just as well, from the words of the Preamble?

In addition, the Preamble (as a part of the Constitution) can also be said to have delegated to the United States as a whole—and not just to one of its branches—certain powers, objectives and purposes. In assigning or delegating the accomplishment of those six purposes, the Preamble is directly a part of what the Tenth Amendment had in mind. Might it then also be said that the Preamble, by not including other things in its six “in order to” phrases, actually speaks—by being silently omitted—to the identification of which powers and purposes “are reserved to the States respectively, or to the people,” namely any that go beyond the six explicitly stated?

This reading gives the Tenth Amendment more meaning and content than simply stating the obvious. The Tenth Amendment (being the last of the original Bill of Rights) can thus be understood as referring back to the entire Constitution, to the very beginning of its whole plan and frame. With the Preamble at least partially in mind, the Tenth Amendment protectively says, in effect, that any other general purposes not so named and thus delegated to the federal government by the Preamble are reserved to the states or are left to “We the People.” The Preamble, together with the Ninth and Tenth Amendments, strikes a unifying balance, neither giving too much power to the federal government nor redirecting too much power back to the people.²⁰⁰ Connor Ewing has so argued, likewise seeing the Preamble as plausibly serving as a “level-one” constraint on the Tenth Amendment: “An argument to this effect would hold that the Preamble articulates the ends for which the national government was established and, as such, should guide the interpretation of national powers vis-à-vis state powers,”²⁰¹ not necessarily as distinct sovereignties but as a union in which the states and the federal government are integral and vital parts of either other.²⁰²

200. For a discussion that tends to overemphasize popular sovereignty, but contains helpful commentary, see AKHIM REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 12–14 (1998); Mike Maharrey, *The Preamble to the Constitution: What It Tells Us and What It Doesn't*, TENTH AMEND. CTR. (June 13, 2017), <http://tenthamendmentcenter.com/2017/06/13/the-preamble-to-the-constitution-what-it-tells-us-and-what-it-doesnt>. For a discussion of *Kansas v. Colorado*, connecting the Preamble and Tenth Amendment, see Himmelfarb, *supra* note 39, at 147–48.

201. Connor M. Ewing, *Structure and Relationship in American Federalism: Foundations, Consequences, and “Basic Principles” Revisited*, 51 TULSA L. REV. 689, 699 (2016).

202. See generally David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 399 (1996) (breathing some new life into the Tenth Amendment).

I. CORPUS LINGUISTICS OF EARLY AMERICAN ENGLISH IN THE PREAMBLE

To understand the Preamble historically, it is essential to investigate the original meanings and uses attached to its words in everyday language. What role historical linguistic analysis should play today regarding the interpretation of the Constitution's provisions is currently debated, but modern judges and lawmakers cannot know how far they have departed or deviated, for better or worse, from the original meanings and purposes of the Constitution until they know as much as possible about the breadth or specificity of the Framers' intentions to begin with.

Even among originalist scholars, there is a disagreement about the appropriate methodology and theoretical framework that should be employed to discover the meaning of the Constitution. "Original intentions" originalists look to the Founding Fathers, believing that the meaning of the text is "fixed by the intentions of the framers of the text."²⁰³ These scholars view statements and commentaries about the Constitution by people such as George Washington, Alexander Hamilton, and James Madison—found in sources such as the Federalist Papers and the minutes of the Constitutional Convention—as authoritative. By contrast, "New Originalists" give priority to the original *public* meaning of the text, which was "necessarily determined in large part by the conventional semantic meanings of the words and phrases that make up the text and the regularities of usage that are sometimes summarized as rules of grammar and syntax," over the views of any particular Founder.²⁰⁴ John McGinnis and Mike Rappaport have also advanced a variation of this approach known as "original methods" originalism, arguing that, as a legal document, the Constitution was written in the "dialect" of eighteenth-century law. In this view, meanings should only be interpreted using the canons of construction typically employed by judges and legal practitioners of the time period.²⁰⁵

Each of these originalist methodologies necessarily rely on what Larry Solum calls the "fixation thesis"—the assumption that "the communicative content of the constitutional text was fixed at the time each provision was framed and ratified."²⁰⁶ As such, each assumes that "[a]ny attempt to give legal meaning to the words of the [Constitution] begins with the linguistic meaning. . . . If the communicative content of the law is clear we give that

203. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015).

204. *Id.* at 28.

205. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Originalism and the Case Against Construction*, 103 NW. UNIV. L. REV. 751, 767 (2009).

206. Solum, *supra* note 203, at 7.

content controlling legal significance.”²⁰⁷ But the would-be interpreter faces a conundrum: the English language has changed over time. How are modern outsiders unfamiliar with many aspects of eighteenth-century English to discover original linguistic meanings?

“This is the problem of linguistic drift—the notion that language usage and meaning shifts over time.”²⁰⁸ Sometimes these changes can be quite dramatic and occur for no apparent reason.²⁰⁹ Consider the following (possibly apocryphal) account of the rebuilding of St. Paul’s Cathedral in 1675, taken from a linguistics column published during the early twentieth century:

When architects’ drawings for the rebuilding of St. Paul’s Cathedral after the fire were submitted, Sir Christopher Wren was told that his design had been chosen because it was “at the same time the most awful and the most artificial.” A modern architect would hardly think such a verdict complimentary. Far from being disparagement, it was the highest praise. “Awful” correctly meant inspiring awe, and “artificial” designed with art.²¹⁰

Such shifts can—and have—occur with words and phrases contained in the Constitution. For example, Article IV, Section 4 states that “[t]he United States . . . shall protect each of [the states] . . . against *domestic violence*.”²¹¹ At the time of the founding, “domestic violence” referred to local civil unrest and public upheaval rather than the abuse of one’s spouse or children as it does today.²¹² Not all such shifts are as obvious to the modern reader. For example, while the Supreme Court has limited the phrase “Officers of the United States” in Article II, Section 2 to only those “appointees who wield ‘significant authority,’” it is likely that in “the Founding era, the term ‘officer’ commonly was understood to encompass any individual who had ongoing responsibility for a government duty.”²¹³

207. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, U. PA. L. REV. (forthcoming) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036206.

208. *Id.* at 4. See generally Rodica Hanga Calciu, *Semantic Change in the Age of Corpus Linguistics*, 3 J. HUMANISTIC & SOC. STUD. 45 (2012).

209. Lee & Phillips, *supra* note 207, at 4.

210. Arthur Ponsonby, *The King’s English*, BALTIMORE SUN, Mar. 18, 1928, at M15.

211. U.S. Const., art. IV, § 4 (emphasis added).

212. See Lee & Phillips, *supra* note 207. Some scholars have also argued that the “domestic violence” clause protected the states against slave revolts. See, e.g., Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 791 (1995); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 n.23, 469 (1999).

213. Jennifer Mascott, *Who Are “Officers of the United States”?* 70 STAN. L. REV. 443, 447, 450 (2018).

Because the emerging field of corpus linguistics can help mitigate the problems associated with linguistic drift, this Section will briefly describe the science of corpus linguistics and set out parameters that make it useful in understanding the Preamble for present purposes. A “corpus” is a vast electronic collection of texts that provides searchable, representative samples of speech and writing patterns within a particular community during a particular period of time. These texts are said to occur “naturally” because they “were not elicited for the purpose of study. . . . Instead the architect of the corpus assembles her collection of speech and writing samples after the fact, from newspapers, books, transcripts of conversations, or interviews, etc.”²¹⁴

These electronic databases (or “corpora”) can be searched the same way one might use Google or Westlaw, producing contextualized examples of real-world uses—called concordance lines—of any word or phrase that appears in the corpus. By analyzing these concordance lines,²¹⁵ the user can generate an empirical snapshot of how the queried term was actually used during the time period in question.

Over the last few years, some judges have cautiously begun applying corpus linguistic tools and techniques to issues of statutory interpretation. For example, in 2011 Justice Ginsburg cited corpus data (provided to the Court in an amicus brief submitted by the Project on Government Oversight) during oral arguments for *FCC v. AT&T, Inc.*²¹⁶ The case boiled down to whether the word “personal” as used in the Freedom of Information Act was “merely the ‘adjectival form’ of the noun *person*” so that the phrase “personal privacy” encompassed corporate privacy.²¹⁷ While the opinion did not cite corpus linguistics directly, its reasoning largely tracked the amicus brief, which did.²¹⁸ The following year, Judge Posner used Google to perform a corpus-like analysis to discern the ordinary meaning of the word “harbor” as used in 8 U.S.C. § 1324(a).²¹⁹ Although his methodology was

214. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1954–55 (2010).

215. Or if too many hits are returned, a random sample sufficiently large to ensure statistically significant results.

216. Transcript of Oral Argument at 37, *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

217. Brief for the Project on Government Oversight, et al. as Amici Curiae Supporting Petitioners, *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011) (No. 09-1279) [hereinafter Brief for the Project on Government Oversight].

218. See *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011); Brief for the Project on Government Oversight, *supra* note 217.

219. *United States v. Costello*, 666 F.3d 1040, 1044 (2012). Rather than use an actual corpus, Judge Posner did a series of Google searches for “several terms in which the word ‘harboring’ appears” including “harboring fugitives,” “harboring enemies,” and “harboring Jews,” believing “that the number

flawed, his desire to seek empirical data to inform his ordinary meaning analysis mirrored the concerns raised by law and corpus linguistics advocates.²²⁰

Justice Thomas Rex Lee of the Utah Supreme Court became the first judge in the country to actually use corpus linguistics in an opinion.²²¹ Since then, a number of other state supreme court justices have followed suit.²²² But all of these cases concerned the interpretation of modern statutes. They therefore relied on corpora built from modern source material that would be unhelpful for constitutional analysis.

Until recently, no nineteenth-century American English corpus existed. In late 2017, Brigham Young University (“BYU”) J. Reuben Clark Law School launched a beta version of the Corpus of Founding Era American English (“COFEA”). COFEA currently contains approximately 150 million words. The texts were mined from the Evans Early American Imprint Series (featuring books, pamphlets, and broadsides covering a broad array of subjects), Hein Online’s Legal Database, and the papers and correspondence of George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, James Madison, and Alexander Hamilton, as contained in the National Archives Founders Online Project.²²³ Future versions of COFEA will broaden the scope of text to include sources such as colonial newspapers, the Records of the Federal Convention of 1787, and the Documentary History of the Ratification of the Constitution.

While COFEA is not perfect,²²⁴ it provides an invaluable starting point for any inquiry into the communicative content of constitutional terminology.²²⁵ Below, we will use it to investigate the original linguistic

of hits per term is a tough index of the frequency of its use.” *Id.*

220. See *State v. Rasabout*, 356 P.3d 1258, 1280 (Utah 2015) (Lee, J., concurring); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788, 852–56 (2018).

221. *In re Adoption of Baby E.Z.*, 266 P.3d 702, 724–26 (Utah 2011) (Lee, J. concurring).

222. *Fire Ins. Exch. v. Oltmans*, 2017 UT 81, ¶ 57 n.9 (2017) (Durham, J. concurring) (“[Corpus linguistic] tools for empirical analysis are readily available for lawyers and should be used when appropriate.”); *People v. Harris*, 885 N.W.2d 832, 839 (Mich. 2016).

223. See Lee & Phillips, *supra* note 207.

224. Building COFEA has been difficult for a number of reasons—chief among them the difficulty of securing digital copies of eighteenth century documents with usable digital text; the complexities of developing the necessary filters to capture particular thought communities from the data set; the lack of standardized spelling during the eighteenth century; and the lack of inexpensive optical character recognition technology for handwritten texts. As of today, the beta version still contains a number of duplicate sources that Brigham Young University (“BYU”) is actively working towards identifying and eliminating. As BYU works through and overcomes these difficulties, future versions of COFEA will be released that will introduce new analytical tools that will lead to more accurate results.

225. We recognize the work of many colleagues at BYU in developing COFEA, especially Gordon Smith, Justice Thomas Rex Lee, Wayne Schneider, James Phillips, Sara White, Carolina Núñez, David

meaning of four key phrases in the Preamble, both before and after ratification. In doing so, we do not endorse any particular method of constitutional interpretation. We recognize that non-originalists may find such data irrelevant. But if, as James Monroe argued, the preamble “is the key of the Constitution,” and thus federal power exercised “contrary to the spirit breathed by this introduction” is unconstitutional, scholars must have some starting-point from which to discuss responsibly its meaning. In that spirit and as a first step in that direction, we will focus here on the phrases “domestic tranquility,” “common defence,” “general welfare,” and “blessings of liberty.”

We have bifurcated the analysis of each of these terms into two time-periods. The first spans from 1754 to 1786—from the start of the French and the Indian War to the year before the Constitution was created. These dates were chosen to provide a snapshot of usage among the colonists once they began to consider themselves “Americans” in an independent political sense, but before the phrases were impacted by the ratification debates. The second time period spans from 1787, the year the Constitution was written, to 1807, the end of the corpus.²²⁶

1. Domestic Tranquility

“Domestic tranquility” appears in the corpus only five times prior to 1787. Three of the concordance lines, or 60% of the sample, use the phrase in a way that clearly refers to the private comforts of an individual’s home, as in quote (1) below. Two of these three hits are in public orations, lauding General George Washington at the time of his (first) retirement from public service, as in quote (2) below. The remaining concordance lines, or 40%, refer to an absence of civil unrest, as in quote (3) below.

(1) A yeomanry like the American . . . are but ill prepared to support the fatigues, dangers and wants of long campaigns; they would soo[n] miss those solaces which domestic tranquility afforded them, and would revert to their pristine avocations and delights.²²⁷

Moore, Curtis Thacker, Charles Draper, and David Armond.

226. We recognize that 1807 is a somewhat arbitrary date. Future researchers may want to further investigate the meaning of the words through the end of the Monroe presidency—the last of the Founder Presidents—using BYU’s Corpus of Historical American English (“COHA”) which contains documents from 1810 to 2009. The COHA could also be used to see if the meaning of these words shifted during the Antebellum period, which could impact 14th Amendment originalists.

227. HENRY BARRY, *THE STRICTURES ON THE FRIENDLY ADDRESS EXAMINED, AND A REFUTATION ATTEMPTED 5* (1775), <https://quod.lib.umich.edu/e/evans/N10951.0001.001?view=toc>.

(2) In your Retirement to the peaceful and pleasing Scenes of domestic Tranquility may America long experience the benign Influence of your Example and benefit by the salutary Suggestions of your Wisdom[.]²²⁸

(3) . . . character is disclosed in the warm affections of whole countries to each other—affections which, it is devoutly to be wished, a just sense of social happiness and national safety may long continue to cherish and preserve, as the most certain means to secure domestic tranquility and foreign respect.²²⁹

The phrase was used more frequently after 1787, appearing in the corpus sixteen times. That said, just under half of all of these instances were direct quotations of the Preamble itself, as in John Adam’s 1797 inaugural address shown in quote (4) below.

(4) [T]he People of America, were not abandoned, by their usual good Sense, presence of Mind, resolution or integrity.—Measures were pursued to concern a Plan, 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.²³⁰

The nine remaining concordance lines are split equally between the private and public senses described above, with the personal benefits of private life being slightly more common. That said, it would be unwise to adopt the “frequency thesis” that corpus skeptics falsely assume corpus linguists advocate for,²³¹ and assume that the sense that appears most commonly in the corpus data is automatically the ordinary meaning of the phrase, especially when, as here, there are two or more competing senses that are both well-attested to. Contextual information must be taken into consideration. Here, it seems logical to interpret the Preamble’s reference to domestic tranquility alongside the “domestic violence” clause in Article IV and conclude that it refers to public peace.

2. Common Defence

During the pre-Constitution era, the phrase “Common Defense”—or as it was more commonly spelled during that time period “Common

228. Letter from J. Foy Chase on behalf of the Mayor Recorder Alderman and Common Council of the City of Annapolis to George Washington (Dec. 22, 1783), <https://founders.archives.gov/?q=In%20your%20Retirement%20to%20the%20peaceful%20and%20pleasing%20Scenes%20of%20domestic%20&s=1111311111&r=1>.

229. James Campbell, Oration to Commemorate the Independence of the United States of North-America (July 4, 1786), <https://quod.lib.umich.edu/e/evans/N15855.0001.001?view=toc>.

230. John Adams, *Inaugural Address March 4, 1797*, in 1 STATESMAN’S MANUAL: PRESIDENTS’ MESSAGES 103 (Edwin Williams ed., 1849).

231. See, e.g., Ethan J. Herenstein, Comment, *The Faulty Frequency Hypothesis: Difficulties in Operationalizing Ordinary Meaning Through Corpus Linguistics*, 70 Stan. L. Rev. 112, 114–16 (2017).

Defence”—appeared in the corpus ninety times. Just under 9% of these hits were quoting all or part of Article VIII of the Articles of Confederation, which reads, “[a]ll charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury . . . ,” and an additional three hits referenced Article VII of the same document: “[w]hen land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively”²³²

More helpful are the concordance lines drawn from documents *not* referencing federal charters, but instead using the phrase “common defence” in everyday discourse. By far, the term was most frequently used to describe the military obligation of individual *politie*s within a broader alliance or confederation to mutually defend one another, as in quote (5) below. This sense appears in nearly two-thirds—65.55% to be exact—of all the concordance lines.

(5) The Canaanites were destroyed by reason they were petty Monarchies, that had no union, no confederacy for their common defence.²³³

The phrase appears to have been a British idiom used to describe a colony or province’s duty to furnish troops and pay for its fair share of the military expenditures to defend the British Empire at large. The House of Commons’ examination of Benjamin Franklin in 1760 epitomizes this usage, as shown in quote (6).

(6) Q: Did you never hear that Maryland, during the last war, had refused to furnish a quota towards the common defence?

A: Maryland has been much misrepresented in that matter. Maryland, to my knowledge, never refused to contribute, or grant aids to the Crown. The assemblies every year, during the war, voted considerable sums, and formed bills to raise them.²³⁴

Use of this idiom in the colonies surged in 1775, but a careful examination of these concordance lines reveals that they are almost all quoting (and responding to) Lord North’s Conciliatory Proposal which reads:

232. ARTICLES OF CONFEDERATION OF 1781, art. VIII.

233. John Warren, Oration Celebrating the Anniversary of American Independence Delivered in Boston (July 4, 1783), in EDWARD WARREN, *THE LIFE OF JOHN WARREN*, M.D. 546 (1874).

234. Benjamin Franklin, *Examination Before the Committee of the Whole of the House of Commons, 13 February, 1766*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-13-02-0035> (last visited Sept. 17, 2018).

[W]hen the Governor, Council, and Assembly, or General Court of any of his Majesty's Provinces, or Colonies in America, shall propose to make provision, according to the condition, circumstance, or situation of such Province or Colony, for contributing their proportion to the common defence . . . it will be proper if such proposal shall be approved by his Majesty and the two Houses of Parliament;²³⁵

Once the revolution began, however, the term is used in this sense almost exclusively to describe efforts of the individual states to work and fight in tandem *against* the British, as in quote (7).

(7) What spirit, short of an heavenly enthusiasm, could have animated these infant colonies, boldly to renounce the arbitrary mandates of a British parliament, and instead of fawning like suppliants, to arm themselves for their common defence?²³⁶

The second most frequent sense of the term “common defence”—comprising about 15% of all concordance lines—references the duties of *individuals* to defend the polity, as in quote (8). This nomenclature appears in state analogues to the Second Amendment, as in quote (9)

(8) The first and great principle of all government, and of all society, is, that support is due in return for protection; that every subject should contribute to the common defence in which his own is included.²³⁷

(9) The people have a right to keep and to bear arms for the common defence.²³⁸

Clearly, these two senses—the polity's duty to the confederation and the individual's duty to the polity—overlap considerably.²³⁹ Both use the word “common” as a synonym for the collective. In fact, COFEA produced only one concordance line, quote (10), which used “common defence” in a way that implied “ordinary defence.”

235. *Lord North in the House of Lords, Feb. 27, 1775*, in 5 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA, 1754–1783, at 432–51 (R.C. Simmons and P.D.G. Thomas, eds., 1982–1987).

236. Jonathan Loring Austin, Oration at the Request of the Inhabitants of the Town of Boston, in Celebration of the Anniversary of American Independence (July 4, 1786), <https://quod.lib.umich.edu/e/evans/N15351.0001.001?view=toc>.

237. Letter from Charles Lloyd to the Lords of Trade (Aug. 15, 1767), <https://quod.lib.umich.edu/e/evans/N08350.0001.001/1:6.12?rgn=div2;view=fulltext>.

238. MASS. CONST. of 1780, art. XVIII.

239. In fact, some of the concordance lines discovered in COFEA could go either way. For example, in a private letter, William Sharpe stated, “[f]rom my particular knowledge of that part of the country I can venture to say that in the fall of [General Davidson] we have lost more than 500 men in the common defence.” Letter from William Sharpe to George Washington (Feb. 27, 1781), <https://founders.archives.gov/documents/Washington/99-01-02-05034>.

(10) In civilized nations, and where civil government hath been established, many cities and places of importance may be found without walls, without guards, and even without weapons or any preparations for common defence.²⁴⁰

Post-1787, the landscape gets a little more complex. “Common defence”²⁴¹ appears in the corpus 109 times during this time period. A plurality of those 109 instances—about 42% of the total—are directly quoting the new federal Constitution. Nearly two-thirds (28%) of these quotations are to Section VIII of Article I: “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”²⁴² The remaining third (14%) quote the Preamble. For obvious reasons, quotations of the Articles of Confederation almost completely disappear, appearing just three times.

As during the pre-Constitutional era, “common defence” most frequently referred to the shared military operations of two or more allied political entities, as in quote (11). This sense appeared in 30% of concordance lines overall, and in about 57% of those that did not specifically quote either the Constitution or Articles of Confederation. While almost all of these were references to the States’ united military efforts, as in (12), it was occasionally used metaphorically, as in (13).

(11) Two monarchies may form an alliance on a like principle, their common defence against a powerful neighbouring republic.²⁴³

(12) [The States] had the sole exclusive right of governing themselves, in such manner as they should choose, not repugnant to the resolves of Congress; and that they were ready to contribute their proportion to the common defence.²⁴⁴

(13) They likewise demonstrate that from causes which are natural, the several branches [of government], instead of forming a perfect check upon each other . . . are to a certain degree impelled in a contrary direction, and

240. Jonas Clark, Pastor for the Church in Lexington, Sermon Preached Before the Senate of the Commonwealth of Massachusetts: Election Sermon (May 30, 1781), <https://quod.lib.umich.edu/e/evans/N13550.0001.001?view=toc>.

241. Interestingly enough, “common defense”—spelled with an “s”—disappears from the corpus all-together.

242. U.S. CONST. art. I, § 8.

243. Memorandum from Alexander Hamilton & Henry Knox to George Washington (Apr. 18, 1793), <https://founders.archives.gov/documents/Hamilton/01-14-02-0262-0002>.

244. JEREMY BELKNAP, 2 THE HISTORY OF NEW HAMPSHIRE: COMPREHENDING THE EVENTS OF SEVENTY FIVE YEARS 337 (1812).

forced together, into a constrained and politic harmony, for common defence.²⁴⁵

The individualistic sense of “common defense”—that is the citizen’s duty to defend the polity—was used far less frequently than it was before 1787, appearing in just 8% of the concordance lines. One of these, quote (14), was a provision in the constitution of the new state of Tennessee, which mirrored the language of the Massachusetts Constitution quoted above. There were no examples of “common defence” being used to describe “ordinary defence.”

(14) That the freemen of this State have a right to keep and to bear arms for their common defence.²⁴⁶

It is worth noting that 37% of all of the hits generated by COFEA were authored or co-authored by Alexander Hamilton. Hamilton had a more expansive view of the federal government than many of his contemporaries. While this is more apparent in the debates about the “general welfare” clause discussed below, it can be seen occasionally in his thoughts about the phrase “common defense.” For example, he argued that the phrase common *defence* “implies a power of war offensive & defence,”²⁴⁷ which requires “[m]oney for domestic Police and the civil Government.”²⁴⁸ The weight given to these statements largely depends on one’s theoretical framework for constitutional interpretation. Because Hamilton was both a signer of the Constitution and the principal author of the Federalist Papers, original intentions originalists may give more credence to these statements than those interested in the original public meaning, who may view the Secretary’s comments as an aberration from the more widely accepted meaning.

3. General Welfare

The term “general welfare” is coupled with “common defence” in both the Articles of Confederation and the Constitution, Article I, Section VIII, clause 1. In fact, the terms co-occur in COFEA 24.1% of the time that either

245. John Taylor, *An Examination of the Late Proceedings in Congress, Respecting the Official Conduct of the Secretary of the Treasury* (Mar. 8, 1793) <https://quod.lib.umich.edu/e/evans/N20034.0001.001/1:2?rgn=div1;view=fulltext>.

246. TENN. CONST. of 1796, art. XXVI. The reference to “freemen” in the Tennessee Constitution made it clear that this right did not extend to slaves.

247. Alexander Hamilton, Address at the New York Ratifying Convention (June 27, 1788), <https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0036>. See also THE FEDERALIST NO. 26 (Alexander Hamilton).

248. Letter from John McKesson to Alexander Hamilton (Jun. 27, 1788), in 5 THE PAPERS OF ALEXANDER HAMILTON, JUNE 1788–NOV. 1789, at 105, 106 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

appears individually,²⁴⁹ with the terms occurring *right* next to each other 15.1% of the time and “common defence” almost always being listed first.²⁵⁰ This suggests that the terms may have become what linguists refer to as a “linguistic multinomial”—terms that occur together in the same context so frequently that they begin to be thought of as a single concept.²⁵¹

Prior to 1787, the phrase “general welfare” appears in COFEA forty times. Four of these instances, or 10%, are references to the same provision of the Articles of Confederation mentioned above: “All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled . . . shall be defrayed out of a common treasury.” Another 7.5% quote Benjamin Franklin’s 1775 draft of the Articles of Confederation:

The said united colonies hereby severally enter into a firm league of friendship with each other binding on themselves and their posterity for their common defence against their enemies for the security of their liberties and properties, the safety of their persons and families and their mutual and general welfare.²⁵²

Franklin’s 1754 Plan of Union—along with his personal commentary—also appears in the corpus, as seen in quote (15).

(15) The power proposed to be given by the plan to the grand council is only a concentration of the powers of the several assemblies in certain points for the general welfare.²⁵³

Almost all of the remaining concordance lines—87.5% to be precise—use the phrase “general welfare” to refer to the wellbeing of some mass-noun, whether it be a country, army, society, or family, as in quote

249. COFEA cannot yet do multinomial collocate searches. To find this number, the raw “.txt” files used in COFEA were loaded into a freeware corpus linguistic platform known as Antconc. Searches were then performed to determine the number of times the word “general” or “welfare” appeared in a source within ten words of “common defence.” The results were then reviewed manually to eliminate any instances in the sample that did not contain the whole phrase “general welfare.” The inverse was then performed for “common” or “defence” within ten words of the phrase “common defence.” The total was then divided by the total number of times “general welfare” or “common defence” appeared individually in the data set, with sources with close collocation only counting once.

250. I.e., the phrases “common defence and general welfare” and “common defence or general welfare.”

251. JOANNA KOPACZYK & HANS SAUER, *BINOMIALS IN THE HISTORY OF ENGLISH: FIXED & FLEXIBLE 1–2* (2017).

252. *Jefferson’s Annotated Copy of Benjamin Franklin’s Proposed Articles of Confederation (June–July 1775)*, <https://founders.archives.gov/documents/Jefferson/01-01-02-0109> (last visited Sept. 17, 2018).

253. Benjamin Franklin, *The Albany Plan of Union, 1754*, <https://founders.archives.gov/documents/Franklin/01-05-02-0104> (last visited Sept. 17, 2018).

(16). Nearly a third of these instances reference the general welfare of the whole British Empire, inclusive of the colonies, as in quote (17).

(16) I do not see that he can be spared from that Station without great Detriment to our Affairs and to the general Welfare of America.²⁵⁴

(17) But the latter have frequent Communications, for the purpose of dropping their private Misunderstandings, and uniting in the public Cause, which at present needs all their joint Assistance, since a Breach with America . . . may be ruinous to the general Welfare of the British Empire.²⁵⁵

Interestingly, before 1787 no examples used the phrase “general welfare” to refer to the well-being of individuals, or even the well-being of individuals within a larger group, as we often imagine it today. In this respect, it appears that “general,” like “common,” was used in a collective rather than generic sense. Ten percent of the concordance lines had too little contextual information to code.

After 1787, use of the phrase becomes far less uniform, becoming something of a linguistic black hole. Of the 100 concordance lines generated in the corpus, three quote the Articles of Confederation. Another clearly argues that the term should be construed the same under the Constitution as it was under the old charter. In addition, 27% of the concordance lines quote or paraphrase the Constitution. Fifty-six percent of these (15% of the total) cite the Preamble, while the remainder quote Article I.

In many cases, the phrase seems to have maintained its collective connotations. For example, 23% of the time it clearly refers to the well-being of a mass-noun, usually the “country” or “nation” as a whole, as in quote (18). Nearly half of these carefully distinguish the “general welfare” from the private or parochial interests of those holding office, as in quote (19).

(18) [A]n energetic Government, must doubtless stimulate the Genius of every Citizen to exert those means, by which not only his own Interests will be increas'd, but at the same time will be secur'd with the general welfare [and] Strength of his Country.²⁵⁶

(19) As it respects myself, I have no object separated from the general welfare to promote. I have no predilections, no prejudices to gratify, no

254. Letter from Benjamin Franklin to Cadwalader Evans (Jul. 18, 1771), <https://founders.archives.gov/documents/Franklin/01-18-02-0115>.

255. Letter from Benjamin Franklin to Thomas Cushing (Sept. 27, 1774), <https://founders.archives.gov/documents/Franklin/01-21-02-0166>.

256. Letter from William Drayton to George Washington (Sept. 20, 1788), <https://founders.archives.gov/documents/Washington/04-06-02-0466>.

friends, whose interests or views I wish to advance at the expence of propriety[.]²⁵⁷

But in some contexts, “general welfare” comes to mean almost the exact opposite after 1787—the well-being not of the whole, but of the individuals or subunits that make up the whole. For example, one source discusses the cities of Richmond and Philadelphia entering into an agreement to speed up the delivery of mail between them for their “general welfare.” This sense is especially common when “the people” are discussed, as in quote (20).

(20) [I]t was expressly assumed that the general government has a right to exercise all powers which may be for the general welfare, that is to say, all the legitimate powers of government: since no government has a legitimate right to do what is not for the welfare of *the governed*.²⁵⁸

This shift may have its origins in the language of the Preamble. Unlike the Articles of Confederation in which the states were the actors, the Constitution was written and ratified by “We the People.” If the “blessings of liberty” flow to “ourselves” as individuals, why shouldn’t the general welfare be concerned with “us” too?

This was definitely a minority understanding, representing a little more than 5% of all of the concordance lines. The exact number is hard to pin down because some of the examples could cut either way, depending on how one interprets the use of the first-person plural, as in quote (20). If it is simply the royal-we, it could still refer to the welfare of the collective body. If not, it refers to the well-being of society’s individuals.

(21) That interests of primary importance to *our* general welfare are promoted by [Jay’s Treaty].²⁵⁹

The concordance lines reveal an even greater disagreement about the meaning of the general welfare clause—how wide was its scope? As with “common defence,” Hamilton was at the forefront of the debate, arguing that it bestowed nearly limitless power on the federal government. Among other things, he and his followers argued that the phrase was “as comprehensive as any that could have been used” and extended to all cases—“whatever concerns the general interests of learning, of agriculture, of manufactures,

257. Letter from George Washington to Henry Knox (Apr. 23, 1799), <http://founders.archives.gov/documents/Washington/05-02-02-0003>.

258. Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), <https://founders.archives.gov/documents/Jefferson/01-24-02-0330> (emphasis added).

259. ALEXANDER HAMILTON, A DEFENCE OF THE TREATY OF AMITY, COMMERCE, AND NAVIGATION, ENTERED INTO BETWEEN THE UNITED STATES OF AMERICA & GREAT BRITAIN, AS IT HAS APPEARED IN THE PAPERS UNDER THE SIGNATURE OF CAMILLUS 7 (1795), <https://quod.lib.umich.edu/e/evans/N21866.0001.001?view=toc>.

and of commerce, are within the sphere.”²⁶⁰ These arguments were specifically designed to justify the creation of the controversial Bank of the United States.

In opposition to Hamilton were the Madisonians, who argued that Article I did not bestow a general power to legislate for the general welfare, but was limited to only those specific powers enumerated in the Constitution, as in quote (22), they argued that this “true and fair construction” was too “obvious to be mistaken.”

(22) No argument could be drawn from the terms “common defence, and general welfare.” The power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined.²⁶¹

This debate continues to this day and demonstrates some of the limitations of corpus linguistics. COFEA is not a silver bullet for every interpretive problem. Sometimes opaque constitutional provisions will remain vague or ambiguous even when subjected to empirical analytics. In such instances, judicial construction may still be necessary to operationalize the passage. But, while COFEA cannot answer every question about the original or intended meaning of the phrase “general welfare,” it can limit the range of possibilities. Given both its close association with “common defence” and its typical usage, it seems clear that like the word “common,” the word “general” referred to the collective. Thus, whatever the extent of Congress’s power to legislate pursuant to this clause may have been, it was to be directed at the well-being of the United States as an entity, rather than for individuals or states.

4. Blessings of Liberty

Unlike “common defence” and “general welfare,” the phrase “blessings of liberty” was not borrowed from the Articles of Confederation. Nevertheless, the phrase still appears in the corpus thirty-one times before 1787. Of these, only four actually enumerate specifics. For David Brooks, the blessings of liberty were simply “safety and [p]eace.”²⁶² Phillip Payson’s description was a bit more grandiose, even if somewhat opaque—“to be freed from the jaws of tyranny, to live in freedom ourselves, and leave our

260. FRANCIS G. CAFFEY, *A BRIEF HISTORY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE* 24 (1916).

261. Rep. James Madison, Address Before the House of Representative (Feb. 2, 1791), http://press-pubs.uchicago.edu/founders/print_documents/a1_8_1s20.html.

262. Letter from David Brooks to George Washington (Nov. 11, 1783), <https://founders.archives.gov/documents/Washington/99-01-02-12050>.

posterity after us free.”²⁶³ Pamphleteer Silas Downer listed, “[r]eligion, learning, arts, and industry”²⁶⁴ as blessings of liberty, while Benjamin Rush, one of the signers of the Declaration of Independence, even credited liberty for eradicating disease.²⁶⁵

The meaning of the word “liberty” in this phrase varies between concordance lines. Most frequently, it refers to freedom from tyranny or oppression, as in quote (23). This constitutes 35% of all examples contained in COFEA. Interestingly enough, 63% of the time liberty is used in this context, it is coupled with metaphorical language evoking slavery, oppression, or bondage, as in (24).

(23) You have hitherto risen superior to a thousand difficulties, in giving freedom to a great and oppressed people. . . . Proceed therefore, and let the footsteps of victory open a way for blessings of liberty, and the happiness of well-ordered government, to visit that extensive dominion.²⁶⁶

(24) They have perswaded [sic] themselves, they have even dared to say, that the Canadians were not capable of distinguishing between the Blessings of Liberty and the Wretchedness of Slavery.²⁶⁷

A quarter of the time, “liberty” refers to the accumulated freedoms, personal rights and civic duties, passed from one generation on to another, as a product of living in a democratic society, as in quote (25). In addition, there were two examples of “liberty” meaning freedom from restraint or slavery, as in quote (26). The remaining concordance lines were too ambiguous to code.

(25) Upon this plan, and with these principles, we set out, and intend to proceed, that the present (if not too far degenerated) and future generations may enjoy undiminished all the blessings of liberty.²⁶⁸

263. Phillips Payson, *A Memorial of Lexington Battle, and of Some Signal Interpositions of Providence in the American Revolution. A Sermon Preached at Lexington, on the Nineteenth of April, 1782*, <https://quod.lib.umich.edu/e/evans/N13956.0001.001/1:3?rgn=div1;view=fulltext> (last visited Oct. 1, 2018).

264. Silas Downer, *Son of Liberty, Discourse Delivered in Providence at the Dedication of the Tree of Liberty* (Jul. 25, 1768), <https://quod.lib.umich.edu/e/evans/N08514.0001.001?view=toc>.

265. Benjamin Rush, *Doctor, Oration Before the American Philosophical Society: An Enquiry into the Natural History of Medicine Among the Indians in North-America, and a Comparative View of their Diseases and Remedies, with those of Civilized Nations* (Feb. 4, 1774), <https://quod.lib.umich.edu/e/evans/n10722.0001.001?view=toc>.

266. Letter from John Hancock to Phillip Schuyler (Nov. 26, 1775), in 3 *AMERICAN ARCHIVES: A COLLECTION OF AUTHENTICK RECORDS, STATE PAPERS, DEBATES, AND LETTERS AND OTHER NOTICES OF PUBLICK AFFAIRS, 1717–18* (Peter Force ed., 1840).

267. George Washington, *Address to the Inhabitants of Canada* (Sept. 14, 1774), <https://founders.archives.gov/documents/Washington/03-01-02-0358>.

268. THOMAS PAINE, *THE CRISIS, NUMBER I*, at 4 (1775), <https://quod.lib.umich.edu/e/evans/N10979.0001.001/1:1?rgn=div1;view=fulltext;q1=Great+Britain+++Colonies+++America>.

(26) Shall we ever wish to change Countries; to change conditions with the Africans and the Laplanders for sure it were better never to have known the blessings of Liberty than to have enjoyed it, and then to have it ravished from us.²⁶⁹

Post-1787, the phrase becomes more popular, appearing in the corpus eighty-two times. Unsurprisingly, more than a third of these—about 37%—are quoting the Preamble of the Constitution directly. Like with the pre-Constitutional era, the concordance lines are light on specific “blessings.” Samuel Rockwell provides the only examples in this concordance line: “Your Independence, your Rights and Liberties, [and] your Government.”²⁷⁰ Whether this is what other writers had in mind is anybody’s guess.

Unlike during the pre-Constitutional era, the inherited rights sense of the word “liberty” predominated during this time period, appearing in just under a fifth of all concordance lines, followed by freedom from tyranny at 15%. A smaller percentage of concordance lines used liberty to describe freedom from slavery, but the ones that did were more overt, as in quote (27).

(27) Seven more were now added to our number to . . . partake with us the horrors of unspeakable slavery, and bemoan the loss of the blessing of liberty, dragging out the unwelcome existence of a slave, on Barbary’s hostile coast, and to be persecuted by the hands of merciless Mahometans.²⁷¹

There were also three times the word liberty was used in reference to a nation’s freedom from foreign control, as in quote (28), and two instances of the word specifically referring to religious liberty, as in quote (29).

(28) [George Washington] continued as commander in chief till Dec. 23, 1783; when having by acts of the greatest wisdom and fortitude, vanquished the enemies of his country and thus procured for it the blessings of liberty and independence, he delivered his commission to the President of Congress at Anapolis.²⁷²

(29) I would farther direct you to remember, that though the Revolution was a great work, it was by no means a perfect work; and that all was not then gained which was necessary to put the kingdom in the secure and

269. Letter from Abigail Adams to Isaac Smith Jr. (Apr. 20, 1771), <https://www.masshist.org/publications/apde2/view?id=ADMS-04-01-02-0058>.

270. Samuel Rockwell, Oration Delivered at the Celebration of American Independence, at Salisbury (July 4, 1797), <https://quod.lib.umich.edu/e/evans/N24735.0001.001?rgn=main;view=fulltext>.

271. JOHN FOSS, A JOURNAL, OF THE CAPTIVITY AND SUFFERINGS OF JOHN FOSS 121–22 (1795), <https://quod.lib.umich.edu/e/evans/N25429.0001.001/1:3.5?rgn=div2;view=fulltext>.

272. JAMES HARDIE, THE AMERICAN REMEMBRANCER 37 (1795), <https://quod.lib.umich.edu/e/evans/N21868.0001.001/1:7?rgn=div1;view=fulltext>.

complete possession of the blessings of liberty.—In particular, you should recollect, that the toleration then obtained was imperfect. It included only those who could declare their faith in the doctrinal articles of the church of England.²⁷³

From this data, it is difficult to peg down any particular “blessing” of liberty the Founders may have had in mind, but the reference that the blessings were to be secured for the Founding generation’s “posterity” as well suggest that the term should be understood through the “inherited rights and duties” lens.

The analysis in this section is not intended to be exhaustive, but rather to provide a foundation upon which future scholarship and judicial opinions can build. Future scholars—especially those partial to Fourteenth Amendment Originalism—may wish to use corpus linguistics to chart how the meaning of these terms changed during the Antebellum period. Living constitutionalists may be interested in using corpus linguistics to identify how the terms are used today. We chose to focus on the founding era because we believe that *any* discussion of what these terms *should* mean must by necessity begin with an analysis of what they did mean.

J. EARLY SUPREME COURT DECISIONS CITING THE PREAMBLE

Although the Preamble played a limited role in the Supreme Court’s early jurisprudence—when the Court cautioned against using the Preamble to find explicit powers—the Preamble certainly influenced the Court’s understanding of the Constitution’s enumerated powers, and it played a role in shaping the contours of federalism. Sometimes, the Preamble was merely mentioned as a passing aside, but the Preamble was also used to help in the tough task of interpretation. The following paragraphs review the five main cases in which the Court relied on the Preamble as a guide in its decision making.

One of the earliest significant opinions of the Court, *Chisholm v. Georgia*, sparked a constitutional debate that eventually culminated in the ratification of the Eleventh Amendment in 1798.²⁷⁴ Alexander Chisholm, the executor of Robert Farquhar’s estate, attempted to sue the state of Georgia, seeking payments for goods supplied by Mr. Farquhar—a South Carolinian—to the state of Georgia during the Revolutionary War.²⁷⁵ The

273. RICHARD PRICE, A DISCOURSE ON THE LOVE OF OUR COUNTRY 35 (1789), <http://oll.libertyfund.org/titles/price-a-discourse-on-the-love-of-our-country>.

274. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

275. Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIS. 19, 20–21 (1967).

state of Georgia claimed sovereign immunity and the Circuit Court at Augusta decided that Georgia could not be sued by a citizen of another state.²⁷⁶ The case was appealed to the Supreme Court, which ultimately determined that federal courts have the power to hear cases in which a state was sued by a private citizen of another state.²⁷⁷ The Court first stressed that the plain text of Article III, Section 2, clause 1 of the Constitution grants federal courts jurisdiction to hear cases between “a State and Citizens of another State.”²⁷⁸ Having “the advantage of the letter on [its] side,” the Court proceeded to consider the broad purposes and other wordings in the Constitution to see if there was support or limitation to be found for its ruling.²⁷⁹

After reviewing the general history of the Constitution,²⁸⁰ the Court focused on two parts of the Preamble. First, the phrase “We the People” revealed that the people were “acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform.”²⁸¹ Second, the Court relied on the phrase “establish justice” to support the exercise of federal jurisdiction in this case:

[W]hen we view th[e] object [of establishing justice] in conjunction with the declaration, ‘that no State shall pass a law impairing the obligation of contracts;’ we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controuling [sic] judiciary power?²⁸²

From the Court’s perspective, the Preamble authorized a broad understanding of Article III which empowered federal courts to regulate the sovereignty of the states to the benefit of the people.

This early understanding and use of the Preamble spilled over into the

276. *Id.* at 23.

277. *Chisholm*, 2 U.S. at 420.

278. *Id.* at 420–21.

279. *Id.* at 421 (“[L]et us now advert to the spirit of the Constitution, or rather its genuine and necessary interpretation.”). The Court did acknowledge that treading into the “spirit of the Constitution” comes with risks. *Id.* (“I am aware of the danger of going into a wide history of the Constitution, as a guide of construction; and of the still greater danger of laying any important stress upon the preamble as explanatory of its powers.”).

280. *Id.* at 421–23.

281. *Id.* at 471.

282. *Id.* at 465.

Marshall Court. Here again, the phrase “We the People” played an important role. Beginning with *Martin v. Hunter’s Lessee*, the Preamble was used by the Supreme Court to support conclusions that the federal government was designed to have power to review actions of the states and their governments.²⁸³ In this case, the Court was asked to review a constitutional challenge to Section 25 of the Judiciary Act of 1789, which gave the Supreme Court power to review decisions of the states’ highest appellate courts.²⁸⁴ Justice Story, writing for the Court, stated:

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’ There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority.²⁸⁵

In other words, because the Constitution was established by “the People” and not the states, granting the federal government power over the states was wholly consistent with the Constitution.

This application of the Preamble was used again in 1830 in *Craig v. Missouri*.²⁸⁶ The State of Missouri had passed a statute allowing for the issuance of paper money to debt-burdened farmers as a loan. Hiram Craig, the beneficiary of such a loan, was unable to make his payments and defaulted. In the suit that followed, the Supreme Court of Missouri determined that Craig must fulfill his debt obligations. The Supreme Court reversed, holding that the loan-certificate statute was in violation of Article I, Section X of the Constitution.²⁸⁷ Before reaching this conclusion, Justice Marshall resolved that the Court had jurisdiction to review the decision of the Missouri Supreme Court. Quoting *Hunter’s Lessee*, Justice Marshall stated, “[T]he constitution of the United States was ordained and established, not by the United States in their sovereign capacities; but, as the preamble declares, ‘by the people of the United States.’”²⁸⁸ It was therefore appropriate for the people to confer upon the Court jurisdiction to review decisions of state appellate courts.

Along similar lines, Chief Justice Marshall stated in *Cohens v. Virginia*

283. *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

284. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85–87 (current version at 28 U.S.C. § 1257 (2012)).

285. *Martin*, 14 U.S. at 324–25.

286. *Craig v. Missouri*, 29 U.S. 410 (1830).

287. *Id.* at 437–38.

288. *Id.* at 416 (internal quotations omitted).

that the Preamble supported the conclusion that the Court has jurisdiction to review the decision of a state's highest court interpreting a matter of federal law.²⁸⁹

The framers . . . were convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.²⁹⁰

To “form a more perfect union,” the Framers recognized the need for a central government that could review the decisions of state courts, particularly with regards to questions of national law.

Chief Justice Marshall also used the Preamble to promote the power of the states. In *Barron v. Baltimore*, private citizens of Baltimore sued the mayor, claiming the city owed them for an uncompensated taking.²⁹¹ The Court held that the Bill of Rights—including the Fifth Amendment—only applied to the federal government.²⁹²

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. . . . The powers [the people] conferred on [the federal] government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.²⁹³

Thus, the Preamble's opening phrase—“We the People”—played an important role in defining the boundaries of federalism, both in some ways enhancing and in other ways restraining the power of the federal government.

289. *Cohens v. Virginia*, 19 U.S. 264, 316–18 (1821).

290. *Id.* at 416–17.

291. *Barron v. Baltimore*, 32 U.S. 243, 246 (1833).

292. *Id.* at 247

293. *Id.*

K. USE OF THE PREAMBLE BY POLITICAL ACTORS IN THE NINETEENTH CENTURY

The Supreme Court was far from the only body discussing the role of the Preamble in constitutional law. Nineteenth century legal writers and political actors helped shape the Preamble's meaning in constitutional law. Their thoughts shed important light on the early understanding and intended scope of the Preamble. As a rule, all people at this time assumed the correctness of James Monroe's characterization of the Preamble as the key of the Constitution. For example, in the 1820s, William Rawle published his influential book, *A View of the Constitution*. He spoke of the Preamble as a "distinct exposition of principles" which reveals the motives and intentions that guide readers "in the construction of the instrument," which reading, he insisted, "can only mean the ascertaining the true meaning of an instrument," stressing the importance of deducing the meaning of each provision in the Constitution by taking cognizance of "its known intention and its entire text, and to give effect, if possible, to every part of it, consistently with the unity, and harmony of the whole."²⁹⁴ Rawle's view prevailed throughout the nineteenth century, that the proper interpretation of any part of the Constitution requires references to the Preamble and the document as a whole.

1. The 1830 Debate on the Nature of the Constitution

In January of 1830, one year into the presidency of Andrew Jackson, a prolonged debate erupted in the United States Senate, first between two Senators, Daniel Webster and Robert Hayne, but soon involving nearly the entire Senate.²⁹⁵ This high-level and high-stakes debate tells much about how the Preamble was understood and used in the early Republic. The immediate issues at hand arose over a resolution concerning federal policies on the sale of public lands and out of concerns about high federal tariffs on imports that hurt Southern exports and protected Northern manufacturing.²⁹⁶

This soon embroiled the Senate in polarized constitutional debates over federal debt, sectional interests, conflicts between various understandings of state sovereignty and the federal union, disputes over the presidential veto and removal powers, questions about Supreme Court jurisdiction over claims between the federal government and the states, and arguments about who

294. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 29–32 (1829).

295. See STEFAN M. BROOKS, *THE WEBSTER-HAYNE DEBATE: AN INQUIRY INTO THE NATURE OF UNION* 59 (2009).

296. *Id.*

actually authorized the Constitution. The debate essentially became “a dispute over the nature of the union,”²⁹⁷ ranging from nationalist arguments to erudite defenses of state sovereignty, and many others seeking “to define positions in the middle ground,” reflecting legislative “responsibility for constitutional construction and commitment to constitutional values” at a high level of ethical conviction.²⁹⁸

Throughout this important debate, both sides often quoted and appealed to language from the Preamble. The main words and phrases used were “We the People,” “justice,” “domestic tranquility,” “general welfare,” and “securing the blessings of liberty to themselves and their posterity.” These words were often used in selective, self-serving ways. Usually the debaters did not base their interpretations on detached political or linguistic information, whether or not they were based on either their current or the original usage of these terms. Nonetheless, this extensive use of the Preamble demonstrates the important role it played in construing the meaning of the principles and spirit of the Constitution. A few examples are illustrative.

Having introduced the Preamble’s language into the debate by arguing against the idea that the National debt “has an effect in binding the debtors to the country, and thereby serving as a link to hold the States together,” Hayne contended:

[T]he link which binds the public creditors, as such, to their country, binds them equally to all governments, whether arbitrary or free. In a free government, this principle of abject dependence, if extended through all the ramifications of society, must be fatal to liberty. . . . If this system is carried much further, no man can fail to see that every generous motive of attachment to the country will be destroyed I would teach them to cling to it by dispensing equal justice, and, above all, by *securing the “blessings of liberty to themselves and to their posterity.”*²⁹⁹

While Hayne used alarmist generalities to reject the idea of national debt, his point shows how language from the Preamble could be used to build the bonds of unity between the people and their government, in the present and for future generations as well.

Hayne then launched into a discussion of slavery and how the actions

297. *Id.*

298. HERMAN BELZ, *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION*, at xiii (Herman Belz ed., 2000). The debate technically ended on January 27, 1830, but many Senators continued to comment on its topics for months, even decades to come.

299. Robert Hayne, U.S. Senator from S.C., Speech in the U.S. Senate (Jan. 25, 1830), in *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION* 35, 43 (Herman Belz ed., 2000) (emphasis added).

of the North, in relation to slavery, had violated principles of the Preamble. He stated:

Sir, all our difficulties on this subject have arisen from interference from abroad, which has disturbed, and may again disturb, our *domestic tranquillity*, [sic] just so far as to bring down punishment upon the heads of the unfortunate victims of a fanatical and mistaken humanity.

There is a spirit, which, like the father of evil, is constantly “walking to and fro about the earth, seeking whom it may devour.” It is the spirit of false philanthropy. The persons whom it possesses . . . are employed in lighting up the torches of discord throughout the community. . . . Then it is that he indulges in golden dreams of national greatness and prosperity. He discovers that “liberty is power;” and not content with vast schemes of improvement at home, . . . he flies to foreign lands, to fulfil obligations to “the human race,” by inculcating the principles of “political and religious liberty,” and *promoting* the “*general welfare*” of the whole human race. It is a spirit which has long been busy with the slaves of the South, and is even now displaying itself in vain efforts to drive the Government from its wise policy in relation to the Indians.³⁰⁰

Here again, Hayne conveniently narrows the words “domestic tranquility” and then exaggerates the words “general welfare” to refer to situations to which they need not apply. Although not necessarily a convincing style of argument, his use of language from the Preamble here shows again how readily the Preamble was accepted as an authoritative source for constitutional interpretation in the nineteenth century.

Hayne also defended his position on state sovereignty by, once again, using the Preamble:

The object of the framers of the constitution, as disclosed in that address, was not the consolidation of the Government, but “the consolidation of the Union.” It was not to draw power from the States, in order to transfer it to a great National Government, but, in the language of the constitution itself, “*to form a more perfect union;*” and by what means? By “*establishing justice;*” “*promoting domestic tranquility;*” and “*securing the blessings of liberty to ourselves and our posterity.*” This is the true reading of the constitution. But, according to the gentleman’s reading, the object of the constitution was to consolidate the Government, and the means would seem to be, the promotion of injustice, causing domestic discord, and depriving the States and the people “*of the blessings of liberty*” forever.³⁰¹

Here, Hayne attacked the idea, put forth by Webster, that one of the purposes of the Constitution was consolidation of the Government. Webster

300. *Id.* 48–49 (emphasis added).

301. *Id.* at 51 (emphasis added).

had quoted President Washington's words to support that notion.³⁰² Both Webster and Hayne, however, may be overstating their cases. Neither a central consolidation nor a maintenance of state powers need be seen as unlimited or uncontained.

Arguing against the tariff, Hayne, quoting Webster, suggested that Congress might be acting, "somewhat against *the spirit and intention of the Constitution*, in exercising the power to control essentially the pursuits and occupations of individuals, not as incidental to the exercise of any other power, but as a substantial and direct power."³⁰³ But, he did not detail what he meant by "the spirit" of the Constitution, which in this case could be a relevant concern, since the phrase "general welfare" appears not only in the Preamble but also in Article I, Section 8, clause 1.

On the issue of state sovereignty, some argued that "the Constitution was not formed by *the States*, in their sovereign capacity, but by *the People*, and it is therefore inferred that the Federal Government, being created by all the People, must be supreme"³⁰⁴ Hayne rejected that argument and used the Preamble to attack the argument's source, insisting that the Constitution

was framed by the States acting in their sovereign capacity. When, in the preamble of the Constitution, we find the words "*we, the People of the United States*," it is clear, they can only relate to the People as citizens of the several States, because the Federal Government was not then in existence.³⁰⁵

Hayne then took aim at the idea that states must submit to unconstitutional laws until an appeal is made "to her sister States, by a proposition to amend the Constitution."³⁰⁶ Hayne argued that when there is a difference in opinion on the proper exercise of federal power between a state government and the federal government, an appeal should be made to the "common superior," which he defined as three-quarters of the states.³⁰⁷ In cases that involved state action that was "deemed indispensable to the *general welfare*, as among the most sacred of our obligations," Hayne wanted the other states, instead of the Supreme Court, to act as an arbitrator between, what he viewed as, two equal sovereigns, the federal government and the state government, for the idea that the federal government, as he say

302. *Id.* at 24.

303. Robert Hayne, U.S Senator from S.C., Speech in the U.S. Senate (Jan. 27, 1830), in *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION* 155, 163 (Herman Belz ed., 2000) (emphasis in original).

304. *Id.* at 167 (emphasis in original).

305. *Id.* (emphasis added).

306. *Id.* at 175.

307. *Id.*

it set forth in the Preamble, “was intended to be a government of limited and specific, and not general powers, must be admitted by all; and it is our duty to preserve for it the character intended by its framers.”³⁰⁸

In this assertion, Hayne quoted Andrew Jackson, then President of the United States, who had used the term “*general welfare*” from the Preamble, when discussing the importance of adhering to the written Constitution. Jackson, later in his speech, warned against the encroachment of the federal government into the realm of state power and reaffirmed that the federal government was one of limited powers.³⁰⁹

Others in the debate explored the meaning of forming a “more perfect Union.” John Rowan, a Senator from Kentucky, entered the debate to support the sentiments of Hayne and to directly speak against Webster. Rowan argued that “The Constitution is not adapted to the People, in any condition, which as one People they could occupy, while it is admirably adapted for their use, in their State capacities—the purpose for which it was formed.”³¹⁰ Interestingly, Rowan also used parts of the Preamble to rebut Webster’s use of the Preamble. Rowan continued:

The word *Union* can relate to nothing but the States. The object, as I have before stated, was to unite them, not the People, more perfectly: Besides, *a more perfect union* of the People cannot be produced by a constitutional, than by the social compact. It is not the object of a Constitution to unite the people.³¹¹

William Smith, a Senator from South Carolina, also joined the debate.³¹² Smith pointed out that “the division between the Federalists and the Republicans first took place” over a controversy concerning language partly found in the Preamble, namely “to provide for the public good and general welfare.”³¹³ Smith went on to explain that the Republicans had attacked the expansion of federal power, gained power themselves, and then used the “general welfare” language to do the same thing the Federalists had been doing.³¹⁴ Near the end of his speech, seeing achieving unity as the main objective, Smith stated, “I was not sent here to enlist under party banners,

308. *Id.* (emphasis added).

309. *See id.*

310. John Rowan, U.S. Senator from Ky., Speech in the U.S. Senate (Feb. 4, 1830), in *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION* 206, 268 (Herman Belz ed., 2000) (emphasis added).

311. *Id.* at 272 (emphasis added).

312. William Smith, U.S. Senator from S.C., Speech in the U.S. Senate (Feb. 25, 1830), in *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION* 307 (Herman Belz ed., 2000).

313. *Id.* at 337–38. It is not clear that “public good” and “general welfare” are synonymous.

314. *Id.* at 340–41.

but to serve my country upon the *principles of the Constitution*, from which I hope General Jackson will never depart.”³¹⁵

John Clayton, a Senator from Delaware, added his input specifically on the topic of the Supreme Court’s reputed inability to properly settle disputes between a state government and the federal government.³¹⁶ He argued that the states had ceded some of their rights to the United States in order “to provide for the general welfare.”³¹⁷ Regarding the President’s removal power, Clayton used this same language from the Preamble to argue for a strict limitation and distinct definition of the removal power, to be used only “when *really necessary for the general welfare*” and not for “party uses, or for personal aggrandizement.”³¹⁸

Also finding middle ground, this time in the sovereignty discussion, Edward Livingston, from Louisiana, attacked the view that the Preamble supports the notion that the federal government is strictly a “popular Government.”³¹⁹ Regarding the words, “We the People:”

[I]t never has been imagined or asserted that the people of the United States collectively, as a whole people, gave their assent or were consulted in that capacity; the people of each State *were* consulted to know whether *that State* would form a part of the United States under the articles of the Constitution, and to that they gave their assent, simply as citizens of that State.

This Government, then, is neither such a federative one, founded on a compact, as leaves to all the parties their full sovereignty, nor such a consolidated popular government, as deprives them of the whole of that sovereign power. It is a compact by which the people of each State have consented to take from their own Legislatures some of the powers they had conferred upon them, and to transfer them, with other enumerated powers, to the Government of the United States, created by that compact; these powers, so conferred, are some of those exercised by the sovereign power of the country in which they reside.³²⁰

Ultimately, this classic debate covered a number of topics outside of the legislation that was in front of the Senators. However, the topics discussed

315. *Id.* at 346 (emphasis added).

316. John Clayton, U.S Senator from Del., Speech in the U.S. Senate (Mar. 4, 1830), in THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION 349 (Herman Belz ed., 2000) [hereinafter Clayton Speech].

317. *Id.* at 359.

318. *Id.* at 372 (emphasis added).

319. Edward Livingston, U.S Senator from La., Speech in the U.S. Senate (Mar. 9, 1830), in THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION 409, 462 (Herman Belz ed., 2000).

320. *Id.* at 462–63.

are not nearly as important for present purposes as are the numerous times the Senators appealed to the language of the Preamble to support their various understandings of the legal operation and requirements of the Constitution. Interestingly, people tried—some more successfully than others—to use the Preamble to support their side of the issues. While developing a strong jurisprudence of the Preamble is an important task which still lies in the future, the fact that the Preamble’s language was readily appealed to in this 1830 debate shows that it has been and can be used in order to arrive, by a preponderance of well-reasoned perceptions, at the most plausible application of the law in a number of situations. The Preamble carried such weight that in his eulogy of George Washington, delivered on February 22, 1832, the centennial of Washington’s birth, Daniel Webster did not pass up the opportunity to attribute the first President’s immortal success to his adherence to his North Star for the whole nation, namely the Preamble, whose six specific objectives Webster quoted in full.³²¹

2. Justice Joseph Story’s *Commentaries on the Constitution* (1833)

Born on September 18, 1779,³²² Joseph Story was exactly eight years old when the Constitution was signed on September 17, 1787.³²³ He graduated from Harvard Law in 1801 and subsequently practiced law in Massachusetts.³²⁴ He was appointed to the United States Supreme Court by James Madison in 1811 and began teaching at Harvard in 1829. While a member of the Supreme Court, Story worked alongside Chief Justice John Marshall for twenty-four years until Marshall’s death in 1835. Upon Marshall’s death, Story assumed the title of Chief Justice of the Supreme Court.³²⁵ Based on his background, Story’s long chapter on the Preamble and his interpretation of its purposes provide can provide authoritative insights in how the early founders and prominent legal minds viewed the proper role of the Preamble in constitutional interpretation.

Joseph Story’s writings on the Preamble are found in his well-known *Commentaries on the Constitution of the United States*.³²⁶ This magnum

321. Daniel Webster, U.S. Senator from Mass., Speech at Public Dinner in Honor of Washington (Feb. 22, 1832), in *THE SPEECHES OF DANIEL WEBSTER AND HIS MASTER-PIECES* 247, 257 (1880).

322. *Joseph Story*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Joseph-Story> (last visited Sept. 17, 2018).

323. *On this Day, the Constitution Was Signed in Philadelphia*, CONST. DAILY (Sept. 17, 2018), <https://constitutioncenter.org/blog/it-was-229-years-ago-today-the-constitution-was-signed-in-philadelphia>.

324. *Joseph Story*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Joseph-Story> (last visited Sept. 17, 2018).

325. *Id.*

326. JOSEPH STORY, *COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES* (1833).

opus, written in 1833, is widely viewed as one of the more authoritative treatises on the Constitution ever written.³²⁷ Story's coverage of the Preamble is extensive, covering sixty paragraphs with sixty-eight footnotes.

Because Story's writing about the Preamble is referenced briefly in *Jacobson v. Massachusetts's* opinion and because this Article argues below that the Preamble should be restored to the role it historically held, the key points in Story's writings on the Preamble will be quoted and explained in some detail to bring to light his understanding of the Preamble's legal roles as an integral part of the Constitution.

Before he discussed the historical context and legal meanings of each of the words and phrases in the Preamble, Story explained important roles that preambles typically play in statutory interpretation:

The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that *the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute . . .* [T]he will and intention of the legislature is to be regarded and followed. It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, *or to a direct overthrow of the intention expressed in the preamble.*³²⁸

Story believed that preambles provided a key that could unlock the framers' intentions and could also serve as a salutary limit on any excessive exercise of power. Story was, in modern terms, an originalist who believed that a statute's or constitutional provision's meaning should be determined by looking at the intention of the framers. He explains, "[t]here does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, *as stated in the preamble.*"³²⁹

327. Chief Justice John Marshall wrote of Justice Story's work, "I have finished reading your great work, and wish it could be read by every statesman, and every would-be statesman in the United States. It is a comprehensive and an accurate commentary on our Constitution, formed in the spirit of the original text." *Joseph Story*, 3 CHI. L. TIMES 1, 6 (1889). Justice Story's Commentaries has been cited in hundreds of cases dealing with important questions of constitutional law. Ronald D. Rotunda & John E. Nowak, *Introduction*, in JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at xix (Carolina Acad. Press 1987) (1833).

328. STORY, *supra* note 326, § 459 (emphasis added).

329. *Id.* § 460 (emphasis added).

Upon this foundation, Story made the following statement on how the Preamble should not be used:

The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its *true office is to expound the nature, and extent, and application of the powers actually conferred* by the constitution, and not substantively to create them.³³⁰

And it is this statement, in isolation, that was cited in *Jacobson* as support for Justice Harlan's brief statement that the preamble should not be used to interpret the Constitution.³³¹

Far from saying that the Preamble serves no purpose when interpreting the powers the Constitution grants, Story explains that the Preamble is to be used to "expound" on and find the "extent" of the powers granted. Story then concluded his overall observations about the Preamble:

We have the strongest assurances, that this preamble was *not adopted as a mere formulary*; but as *a solemn promulgation of a fundamental fact*, vital to the character and operations of the government. The obvious object was to substitute a government of the people, for a confederacy of states; a constitution for a compact. . . . The people therein declare, that their design in establishing it comprehended six objects: (1.) To form a more perfect union; (2.) to establish justice; (3.) to insure domestic tranquility; (4.) to provide for the common defence; (5.) to promote the general welfare; (6.) to secure the blessings of liberty to themselves and their posterity.³³²

Without rehearsing all of his points, Story obviously saw the Preamble serving many functions in constitutional law. Although writing from an avowed Federalist position, he gave full and fair exposition of opposing views. Overall, he saw the Preamble as providing the needed cohesion and hope necessary to hold the whole constitution together, cementing the extensive domestic and geostrategic debates of the convention. In section 462, while warning against resorting to the Preamble to enlarge confided governmental powers, Story stressed its importance in construing and resolving ambiguities, even allowing the interpreter liberty to reject a restrictive meaning which would defeat an avowed purpose of the

330. STORY, *supra* note 326, § 462 (emphasis added).

331. See *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

332. *Id.* § 463 (emphasis added).

constitution. He insisted that all of the six objects of the Preamble were to be fully honored and that legal interpreters should trace the relations that each of these objects bears to the others, recognizing that they comprise collectively everything necessary for popular prosperity and happiness. In sections 466, 467 and 483, he maintained it was necessary to revisit the Preamble in order to maintain the union in the face of those who stir up disaffection, exaggerate unavoidable inequalities, and promote division and disunion that are caused by prejudices, disappointments, ambition, party strife, rivalries, local pressures, and corruption, because thinking about the Preamble will “induce each state to sacrifice many of its own objects for the general good.”³³³ Although he addressed at some length each of the Preamble’s six stated objectives, he spent most time on the mandate “to form a more perfect union.” Regarding “securing the blessings of liberty,” he was most interested in how these blessings and liberties will be secured, by a strong central government protecting against foreign invasions and state subversions.

Consequently, for Story, the Preamble was purposefully placed at the beginning of the Constitution to not only emphasize the type of government formed by the Constitution, but to solemnly and efficaciously delimit purposes of that Constitution to the adopted six. Thus, the purpose of the Preamble was seen, and is to be seen, as vital in understanding and interpreting its provisions and as a check on the several purposes and attendant powers given to the federal government.

3. Former President John Quincy Adams and Others

Marking the Fiftieth Anniversary in 1839 of George Washington’s Inauguration in 1789, John Quincy Adams further reflected this lofty view of the Preamble at the end of a lengthy speech about the purposes and development of the Nation since the Constitution’s ratification. Adams referred frequently to the “principles” of the Constitution and reflected on the Preamble and its relevance:

The first object of the people, declared by the Constitution as their motive for its establishment, to form a more Perfect Union, had been attained by the establishment of the Constitution itself; but this was yet to be demonstrated by its practical operation in the establishment of justice, in the ensurance of domestic tranquility, in the provision for the common defence, in the promotion of the general welfare, and in securing the blessings of liberty to the people themselves, the authors of the Constitution, and to their posterity.

333. *Id.* § 483.

These are the great and transcendental objects of all legitimate government. The primary purposes of all human association. For these purposes the confederation had been instituted, and had signally failed for their attainment. How far have they been attained under this new national organization?³³⁴

President Adams clearly viewed the Preamble as declaring “the first object of the people” and “their motive” for establishment of the Constitution, namely “to form a more Perfect Union,” but he also soberly observed that this declaration in 1787 still left this primary goal to be demonstrated and attained in “practical operation” by carrying out the Preamble’s five further provisions.³³⁵ Thus, Adams not only saw the principles of the Preamble as theoretical ideals, as “the great and transcendental objects of all legitimate government” and “the primary purposes of all human association,” but he also insisted on the practical attainment of these goals. For him, the Preamble was the measuring stick against which the behaviors of government could be assessed, and he celebrated many reasons for his belief that the innovative American “national organization” was “triumphantly accomplish[ing]” these aims.³³⁶

In the second half of his lengthy jubilee speech, Adams drew attention to unprecedented prosperity, westward expansion, harmonizing command, and meekness in the model set by George Washington, who strengthened the virtue of the people, perpetuated the states’ league of friendship, negotiated international treaties, and limited the powers of the federal government “to concerns interesting to the whole people.”³³⁷ Any challenges to this continuing success, Adams declared, would need to be met by “reverting to the precedents” that led to the adoption of the Constitution as found in the Preamble, “to form a more perfect union,” and “to establish justice,” which he noted was defined “as the constant and perpetual will of securing to everyone his *right*,” which necessarily “includes the whole duty of man in the social institutions of society, toward his neighbour.”³³⁸

In his conclusion, former President Adams saw the Constitution as a “*return* to the principles of the Declaration of Independence, and the exclusive constituent power of the people” which “was the work of the ONE

334. JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION: A DISCOURSE 46–47 (1839), <https://archive.org/details/jubileeofconst1839adam> (based on a speech given by Adams on April 30, 1839).

335. *Id.*

336. *Id.* at 47–48.

337. *Id.* at 60.

338. *Id.* at 69–70 (emphasis in original). For his definition of justice, Adams draws here upon the Institutes of Justinian.

PEOPLE of the United States.”³³⁹ And then, returning to the biblical origins of the concept of Jubilee, Adams ended his passionate address with a consonant ancient allegory to the principles of the Constitution: “Fellow-citizens, the ark of *your* covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States.”³⁴⁰ All of “the blessings and cursings” foretold in the formation of the ancient Israelite state are to be suffered or enjoyed by “your posterity,” contingent upon “your and their adherence to, or departure from, the principles of the Declaration of Independence, practically interwoven in the Constitution of the United States.”³⁴¹

In this same post-Jacksonian era, other examples of the ready use of the Preamble in public discourse come from Senator Calhoun from South Carolina, who spoke in the Senate on February 28, 1842 against the President’s use of the veto power. He claimed that an improper use of the veto would violate the substantive foundational legal principles, operations, and purposes of the entire constitutional government, articulated especially in the Preamble.³⁴² And likewise, Joseph Smith, an influential presidential candidate in 1844,³⁴³ used the Preamble as the heart of his campaign pamphlet, *General Smith’s Views of the Powers and Policy of the Government of the United States*.³⁴⁴ Its first page quoted the Preamble in full, and then, it went on to argue for the sovereign voice of the united people, mentioning most of the words in the Preamble at least once and some of them (especially “the people,” “union,” and “liberty”) numerous times, finding in the Preamble reasons to decry disunity, partisan discord, and sectional politics. At the same time, he also insisted on federal duties to “provide for the common defense” and the “common welfare” and to “secure” the people

339. *Id.* at 118.

340. *Id.* at 119 (referring to *Deuteronomy* 11:29).

341. *Id.* at 119.

342. John C. Calhoun, U.S. Senator from S.C., Speech delivered to Senate (Feb. 28, 1842), in *SPEECHES OF JOHN C. CALHOUN* 74, 81 (Richard K. Cralle ed., 1883).

343. JOSIAH QUINCY, *FIGURES OF THE PAST* 317 (1883). *See also* Jed Woodworth, *Josiah Quincy’s 1844 Visit with Joseph Smith*, 39 *BYU STUD. Q.* 71, 71-87 (2000); Margaret C. Robertson, *The Campaign and the Kingdom: The Activities of the Electioneers in Joseph Smith’s Presidential Campaign*, 39 *BYU STUD. Q.* 147, 148 (2000); Brian C. Cannon, *John C. Calhoun, Jr., Meets the Prophet Joseph Smith Shortly Before the Departure for Carthage*, 33 *BYU STUD. Q.* 773, 774 (1993).

344. These views were either originally his or were approved by him. Joseph Smith, *Journal, December 1842–June 1844; Book 3, 15 July 1843–29 February 1844*, THE JOSEPH SMITH PAPERS, <http://www.josephsmithpapers.org/paper-summary/journal-december-1842-june-1844-book-3-15-july-1843-29-february-1844/265> (last visited Sept. 17, 2018) (material located on pp. 256, 258, 259). This brochure was published both separately and in a Nauvoo newspaper, *TIMES & SEASONS*, Feb. 15, 1844, at 441.

in “their rights properly respected,” while also setting “limitations” upon the government’s powers and authorities.³⁴⁵

4. President Abraham Lincoln

To this selected list of references to the Preamble in the nineteenth century, one can rightfully add the following statements by President Abraham Lincoln. They require little comment.

In a speech on the campaign trail in Cincinnati, Ohio, September 17, 1859, he used the Preamble to create a legally compelling duty upon the federal government:

This government is expressly charged with the duty of providing for the *general welfare*. We believe that the spreading out and perpetuity of the institution of slavery impairs the *general welfare*. We believe, nay, we know that that is the only thing that has ever threatened the perpetuity of the Union itself. The only think which has ever menaced the destruction of the government under which we live, is this very thing. To repress this thing, we think is providing for the *general welfare*.³⁴⁶

In his First Inaugural Address (March 4, 1861), Lincoln continued his finding of legal authority in the Preamble:

And finally, in 1787 one of the declared objects for ordaining and establishing by the Constitution was “to form a more perfect Union.” But if the destruction of the Union by one or by a part only of the States be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity. It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void . . .³⁴⁷

In Lincoln’s Special Session Message (July 4, 1861), he pointed out the eradication of the legal authority of the people by the Confederate southern states:

Our adversaries have adopted some declarations of independence in which, unlike the good old one penned by Jefferson, they omit the words “all men are created equal.” Why? They have adopted a temporary national constitution, in the preamble of which, unlike our good old one signed by Washington, they omit “We, the people,” and substitute “We, the deputies of the sovereign and independent States.” Why? Why this

345. See generally John W. Welch, *Joseph Smith and the Constitution*, in JEFFREY N. WALKER ET AL., EDS., *SUSTAINING THE LAW: JOSEPH SMITH’S LEGAL ENCOUNTERS* 1–38 (2014).

346. Abraham Lincoln, *Speech at Cincinnati, Ohio, September 17, 1859*, in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 438, 460 (Rutgers Univ. Press 1953).

347. Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp.

deliberate pressing out of view the rights of men and the authority of the people?³⁴⁸

And at the end of his Gettysburg Address (November 19, 1863), Lincoln turned once again to the Preamble at that poignant moment of unthinkable death but in hopes of life and rebirth: “[T]hat this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people shall not perish from the earth.”³⁴⁹ His immortal words call out for a second formation of the ideal union, based on popular sovereignty by the people, for the purpose of acting for the common benefit of the people, that will be ordained and established not to perish from the earth.

L. PREAMBLES IN STATE CONSTITUTIONS IN THE NINETEENTH CENTURY

Just as many aspects of the federal Constitution were derived in 1787 from then-existing state constitutions,³⁵⁰ in reciprocal fashion, nineteenth century state constitutions, and especially their preambles, were often based on the federal Constitution.³⁵¹ Though most state constitutional preambles do not perfectly mirror the federal Preamble, they often share similarities. Their differences in language, along with state courts decisions interpreting them, can shed further light on the received significance and meanings of words and phrases in the federal Preamble.

Variation in terminology among state preambles shows that people viewed them as serving a particular function. They were not included as idle mantras; rather, they functioned as the Federal Preamble, which stressed national interests and aims.³⁵²

348. Abraham Lincoln, President of the United States, Special Session Message (July 4, 1861), <http://www.presidency.ucsb.edu/ws/?pid=69802>.

349. Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863), <https://www.britannica.com/event/Gettysburg-Address>.

350. See RICHARD BEEMAN, BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 3, 18 (R. Beeman, S. Botein & E. Carter eds., 1987); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 128–29, 203–04 (1913).

351. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 46 (1998).

352. The following analysis concerning the state preambles was accomplished by looking at the first state constitution adopted by a given state—for all fifty states—after the Federal Constitution went into effect; however, some states still use a state constitution adopted prior to the Federal Constitution, and in those cases, we used the latest constitution available. See generally ALA. CONST. of 1819; ALASKA CONST. of 1959; ARIZ. CONST. of 1912; ARK. CONST. of 1836; CAL. CONST. of 1849; COLO. CONST. of 1876; CONN. CONST. of 1818; DEL. CONST. of 1792; FLA. CONST. of 1839; GA. CONST. of 1789; HAW. CONST. of 1959; IDAHO CONST. of 1890; ILL. CONST. of 1818; IND. CONST. of 1816; IOWA CONST. of 1846; KAN. CONST. of 1859; KY. CONST. of 1792; LA. CONST. of 1812; ME. CONST. of 1819; MD. CONST. of 1851; MASS. CONST. of 1780; MICH. CONST. of 1835; MINN. CONST. of 1857; MISS. CONST. of 1817; MO. CONST. of 1820; MONT. CONST. of 1889; NEB. CONST. of 1866; NEV. CONST. of 1864; N.H. CONST.

Some follow the United States' Preamble closely (Alabama, Maine, Colorado, Nebraska, South Dakota, and Wisconsin), but many include other various words and phrases, often accentuating regional or local cultural preferences.

Thirty-eight begin "We, the People," usually with the comma. Only two begin with historical "Whereas" clauses (Virginia contains three; South Carolina has two).

No need is ever expressed in any of these state constitutions to form "a more perfect union," evidence that the "union" in the United States' Preamble was understood to refer to the union of the thirteen original states. Five state preambles, however, speak of forming a "more perfect government" (Colorado, Nebraska, Nevada, South Dakota, and Wisconsin).

"Establish justice" appears only in eight state preambles (Alabama, Colorado, Illinois, Indiana, Maine, Ohio, Oregon, South Dakota), and curiously "justice" alone never appears in any.

"Domestic tranquility" shows up three times (Nebraska, Nevada, and Wisconsin), with "tranquility" alone three times (Alabama, Massachusetts (1780), and South Dakota). This may be relevant in confirming that "domestic" refers primarily to the national peacefulness, as opposed to international, since the states generally do not see it as their purpose to promote domestic tranquility.

The word "welfare" is found in twelve state preambles: four have the unmodified word "welfare" (Delaware, Illinois, Indiana, and Ohio); two "*our* common welfare" (Idaho and Maine); one speaks of "*our* mutual welfare and happiness" (Oklahoma); and five preambles follow the U.S. Preamble, using the phrase "general welfare" (Alabama, Colorado, Nebraska, South Dakota, and Wisconsin). This finding fairly strongly indicates that "*general* welfare" in the U.S. Preamble speaks of something national—on a wider scale—rather than welfare within state or smaller political units.

"*Common* defense" is even rarer (only in Alabama, Colorado, and South Dakota), indicating that the common (usually national) defense was not typically a responsibility of individual states.

of 1784; N.J. CONST. of 1884; N.M. CONST. of 1911; N.Y. CONST. of 1821; N.C. CONST. of 1868; N.D. CONST. of 1889; OHIO CONST. of 1802; OKLA. CONST. of 1907; OR. CONST. of 1857; PA. CONST. of 1790; R.I. CONST. of 1843; S.C. CONST. of 1778; S.D. CONST. of 1889; TENN. CONST. of 1796; TEX. CONST. of 1845; UTAH CONST. of 1895; VT. CONST. of 1793; VA. CONST. of 1830; WASH. CONST. of 1889; W. VA. CONST. of 1863; WIS. CONST. of 1848; WYO. CONST. of 1889.

Interestingly, the word “blessings” appears in twenty state preambles. Seven of those refer to securing or preserving the “blessings of liberty” (“secure:” Colorado, Illinois, Indiana, Maine, and Ohio; “preserve:” South Dakota and New Jersey). The other thirteen preambles aim to secure many other kinds of blessings, which may be civic, secular, personal, or religious.

Some, as in the Federal Preamble, speak of “liberties” in the plural (Arizona, Connecticut, North Carolina, Washington, and Wyoming), but five mention protecting or securing “liberty,” as in “life, liberty, and property,” following the original formula of John Locke (Alabama, Arkansas, Florida, Louisiana, and Michigan).

Many state preambles adopt from the Federal Preamble the operative enacting language “do ordain and establish” (thirty-three states).

How all these words might be understood yet remains to be explored. But it appears that some degree of purposefulness went into the drafting and adopting of these state preambles, as was also the case with the U.S. Preamble. Furthermore, given their reliance on the Federal Preamble, it seems the states viewed it as having some substantive value and merit.

Nineteenth-century state courts had very little to say about their states’ constitutional preambles. Although litigants sometimes referenced their preamble to bolster legal arguments,³⁵³ only a couple of state courts have relied on constitutional preambles to affirm their decisions. In *Ex parte Martin*, the Arkansas Supreme Court read into the state constitution a prohibition barring the taking of private property without just compensation.³⁵⁴ “The preamble to the constitution of this State, declares the purpose of the people . . . in the ordaining of a constitution for their government, to secure to them and their posterity, the enjoyment of all the rights of life, liberty, and property, and the free pursuit of happiness.”³⁵⁵ The court reasoned that these purposes—along with other purposes detailed in the constitution’s declaration of rights—imply that the taking of private property without just compensation is unconstitutional.³⁵⁶ In short, the preamble was used to secure rights and decide an important constitutional question.

In Maine, in *In re Opinion of the Justices*, the Supreme Judicial Court

353. *People ex rel. Caldwell v. Reynolds*, 10 Ill. (1 Gilm.), 9 (1848) (“The legislative power of the State is limited by the nature of our State constitution, and the restrictions thereby imposed. . . . It is limited by the general objects mentioned in the preamble.”).

354. *Ex parte Martin*, 13 Ark. 198, 198 (1853).

355. *Id.* at 207.

356. *Id.*

was asked to decide whether the state legislature had the authority to pass laws enabling towns to tax citizens to assist the manufacturing efforts of private parties.³⁵⁷ The court responded in the negative. In support of its reasoning, the court noted that the preamble corrals the powers of the legislature, “[a]ny object which cannot be classed under one or other of [the preamble’s purposes] is beyond the proper scope of legislation.”³⁵⁸ Lawyers in the *Jacobson* case, as it was arising in Massachusetts, one of Maine’s sister states, could well have noted this language from the Supreme Judicial Court of Maine, offering them some ground for arguing that at least in certain cases the power of a state legislature needs to be located within one of the objects set forth and adopted in the preamble to the state’s constitution.

In sum, preambles in state constitutions carried some legal status in the nineteenth century. People used them to guard against governments overstepping their roles or powers. If any government action contradicted the general principles announced in a preamble, it could be seen as ineffectual and even be deemed unconstitutional. Additionally, when drafting their state preambles, the states drew inspiration from the Federal Preamble, suggesting they viewed it as playing an important role in preserving constitutional restraints and protections.

II. LIMITING *JACOBSON*’S STATEMENTS REGARDING THE PREAMBLE

In light of the foregoing legal history of the Preamble, readers may be surprised, if not distressed, by the 7-2 majority opinion of the United States Supreme Court in *Jacobson v. Massachusetts*.³⁵⁹ In *Jacobson*, the Supreme Court, with minimal consideration and no written dissents, ignored and departed from the previously consistent applications and understandings of the Preamble as an important legal part of the Constitution. Whether intended this way or not, the typical upshot of *Jacobson* is found in a widely used student guide to the Constitution, which teaches: “it is worth noting that the Preamble itself, unlike the rest of the Constitution, is not regarded as part of the supreme law of the land. It is merely an introduction.”³⁶⁰ Whatever else

357. *In re Opinion of the Justices*, 58 Me. 590, 590–91 (1871).

358. *Id.* at 607.

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

360. TIMOTHY HARPER, *THE U.S. CONSTITUTION* 15 (2007). One of Random House’s *Idiot’s Guides*, this publication dismisses the Framers as, “by our standards today . . . not especially enlightened,” and as “old, rich, white guys,” who wrote the Constitution “for themselves” and people like them who ran the country. *Id.* Nevertheless, the preamble which they produced managed to “emphasize the democratic nature of the new nation;” as they were “obviously thinking about their legacy,” it “was written to offer hope, both in 1787 and today.” *Id.*

it may be, it is not merely an introduction.

To assess *Jacobson's* precedential value with respect to the Preamble, this study now turns to an examination of what was actually argued in the briefs, in the District Court, in the Circuit Court, and in the Supreme Court.³⁶¹ Because this opinion has exerted seminal force in marginalizing the Preamble, the following analysis provides greater discussion of this case than has ever been given before. Because the legal status and meaning of the Preamble was not briefed or argued at all, and because the facts and issues actually addressed in *Jacobson* were deemed irrelevant to the Preamble, the Supreme Court's Preamble language is dicta. The court has several options it could, and should, follow in limiting or clarifying the force and effect of its cursory paragraph about the Preamble found only on the opening page of this lengthy opinion.

A. FACTS AND ARGUMENTS IN *JACOBSON*

In *Jacobson v. Massachusetts*, a Massachusetts statute empowered any municipality, at its discretion, to “enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them, with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit \$5.”³⁶² On February 27, 1902, the Cambridge city board of health, acting under color of this statute, adopted a resolution to eliminate smallpox that read in part, “be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1st, 1897 be vaccinated or revaccinated.”³⁶³ Henry Jacobson, the defendant, refused to be vaccinated. Consequently, he was indicted and found guilty by the Third District Court of Massachusetts for violating the regulation.³⁶⁴ The district court ordered that “he stand committed until this sentence be performed” and that he pay the five-dollar fine.³⁶⁵ The defendant appealed the ruling, and the case was brought before the Massachusetts Superior Court.

In superior court, the defendant made a plethora of superficial arguments in the hope that the court would accept one of them. He attempted

361. Previously difficult to obtain, the briefs in this case are now available on line. See Transcript of Record, *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905) (No. 70-175) (accessed through the “Making of Modern Law Digital Archive: U.S. Supreme Court Records and Briefs, 1832–1978” database, hosted by the Princeton University Library). As far as we have been able to determine, no law review article or other examination of *Jacobson* has ever been published.

362. *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

363. *Id.* at 12–13.

364. Transcript of Record at 3–4, *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905) (No. 70-175).

365. *Id.* at 4.

to put forth evidence supporting a number of theories: vaccines can cause injury or death; it is impossible to know the results of a vaccine before it is given; the smallpox vaccine consists of introducing to the human system another disease known as cowpox; vaccines are ineffective at preventing the spread of contagious diseases; the defendant has previously endured extreme pain as a result of a vaccine; and the defendant's son had suffered a number of adverse effects as a result of a vaccine.³⁶⁶ However, the superior court ruled that all such facts were immaterial and excluded them.³⁶⁷ The defendant also asked the court to give the jury the following instructions: "[t]hat section 137 of chapter 75 of the Revised Laws is unconstitutional and void, and the refusal by defendant to comply with the requirements of the board of health here in evidence, constituted no offence [sic]"³⁶⁸ As support for this requested instruction, the defendant argued that the state statute upon which the Cambridge ordinance was based violated the

rights secured to the defendant by the preamble to the Constitution, . . . Article V[] of the amendments of the Constitution, . . . Article XIV[] of the amendments of the Constitution, . . . articles I, X, and XIV of Part the First of the Massachusetts Constitution, . . . [and] article IV of chapter one [of the Massachusetts Constitution].³⁶⁹

The defendant also argued four other reasons, including that it violated the spirit of the Massachusetts Constitution and that it was unconstitutional under both the United States Constitution and the Constitution of Massachusetts.³⁷⁰ The superior court saw through the smoke and disregarded all of these arguments. They refused to give any of the requested instructions.³⁷¹ The defendant was found guilty,³⁷² and an appeal was taken to the Supreme Judicial Court of Massachusetts.³⁷³

On appeal, the defendant's assignment of errors repeated the same superficial claims from the lower court and asserted that the superior court erred in refusing to instruct the jury "that section 137 of the Revised Laws chapter 75, under which section said complaint was brought, was unconstitutional and void" because

said section is in derogation of the rights secured to the defendant by the

366. *Id.* at 6–7.

367. *Id.*

368. *Id.* at 7.

369. *Id.* at 7–8.

370. *Id.* No mention of the Massachusetts Preamble is made. *Id.*

371. *Id.* at 8.

372. *Id.* at 8–9.

373. *Id.* at 11.

preamble, . . . said section violates and infringes the rights secured to the defendant by article 5 of the amendments, . . . said section is in derogation of the rights secured by the defendant by article 14 of the amendments, . . . [and] said section was repugnant to the spirit of the Constitution of the United States.³⁷⁴

Additionally, the defendant claimed the superior court erred in ruling that the facts the defendant offered to prove were immaterial. The defendant argued the facts were material because they demonstrated that the statute infringed on the defendant's constitutional rights. Specifically, the defendant claimed the facts demonstrated a violation of "article 5 and section 1 of article 14 of the amendments of said Constitution" because the law was not applied equally to children and adults.³⁷⁵

The Massachusetts Supreme Judicial Court also saw through the smoke and rejected all of these arguments. It held, without commenting on or mentioning the preamble directly, that the act was constitutional and the facts the defendant wanted to prove were immaterial to the analysis.³⁷⁶ The Supreme Judicial Court explained the act in question was enacted for "the prevention of smallpox" and "[t]hat such an object is worthy of the intelligent thought and earnest endeavor of legislators is too plain for discussion."³⁷⁷ The court then held: "Under the police power there is general legislative authority to make laws for the common good. Article 4 of chapter 1 of the constitution of Massachusetts states more fully than most constitutions the nature of this power" and that "this power extends to the protection and preservation of the public health is not questioned."³⁷⁸ The court explained that "the liberty of the individual may be interfered with whenever the general welfare requires a course of proceedings to which certain persons object because of their peculiar opinions or special individual interests."³⁷⁹ Interestingly, in mentioning "liberty" and "general welfare," the Massachusetts Supreme Court was implicitly balancing the impact of two key words in the Preamble to the United States Constitution. Regarding the defendant's proffer of evidence, the court reasoned that even if experts would testify against the vaccination, the judge would still have "considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination,

374. *Id.* at 12.

375. *Id.*

376. *Id.* at 19.

377. *Id.* at 16.

378. *Id.*

379. *Id.* at 17.

repeated after intervals, as preventative of small pox” and therefore, “if the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result.”³⁸⁰ Thus the court ruled that there was “no reason for regarding the present statute as outside the legislative authority to enact it.”³⁸¹ In regards to the Fourteenth Amendment claim, the court simply held that the argument was “not well founded” and that “the statute is constitutional.”³⁸² The defendant then appealed to the Supreme Court of the United States.

In the defendant’s brief to the Supreme Court, the defendant argued again that the statute was unconstitutional because “it is contrary to the preamble of the Constitution of the United States” and “it is contrary to the Fourteenth Amendment of the Constitution.”³⁸³ However, despite the preamble’s prominent position at the beginning, it was mentioned only one other time in the defendant’s thirty-one page brief. Furthermore, there was no case law cited that related to the preamble of the Constitution and no affirmative argument made that the preamble possessed independent substantive authority to limit or expand government action. Instead, the brief focused heavily on the police power of the state and argued extensively that compulsory vaccination was not within the state’s police power.³⁸⁴ Admittedly, within the defendant’s police power argument, he did rely on the Constitution; however, it is the Fourteenth Amendment, and not the preamble, that is quoted and used to defend his position.³⁸⁵

The one time the Preamble is mentioned, after the introduction, is short and is quoted here in full.

The preamble of the Constitution declares *it to be one of the purposes* of the instrument to “secure the blessings of liberty to ourselves and our posterity.” Liberty of citizen in the very first analysis is immunity of his person from seizure or injury, except for the commission of an offence against the state, and the vaccination law of Massachusetts is a violation of his fundamental right to liberty *as guaranteed to English speaking*

380. *Id.* at 18.

381. *Id.* at 19.

382. *Id.*

383. Brief for Petitioner at 5, *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905) (No. 70-175) (although not mentioned in the transcript’s index, the briefs for this case, both Petitioner and Respondent, are appended to the transcript of record on The Making of Modern Law database). The petitioner dropped his challenges involving the Massachusetts Constitution after the Massachusetts Supreme Court found the law did not violate the state’s constitution. *See supra* notes 374–78 and accompanying text.

384. *See generally id.*

385. *Id.* at 12.

people from the Magna Charta, *through the* Constitution of the United States to the *Fourteenth Amendment*.³⁸⁶

It is evident from this quote that the argument for or against any independent substantive or other authority of the Preamble was not developed, or even argued, by the defendant. The defendant's real constitutional arguments concerned the Fourteenth Amendment, and it was exclusively on this basis that the case was heard in federal court. The last sentence in the defendant's brief asserts, "[a]s the Fourteenth Amendment has so often been appealed to for the protection of property, this plaintiff appeals to it with confidence for the protection of his freedom."³⁸⁷ The Preamble was only being used to inform the spirit or purpose of the Constitution in a way that would support the defendant's position that was fully-debated in the briefs—that this vaccination law violated the Fourteenth Amendment.

In response, Massachusetts, understanding what was being argued, offered no case law arguing or showing that the Preamble has no independent substantive authority to grant or restrict government action. Instead, Massachusetts responded to the Preamble argument made by the defendant, stating, "[i]t is no argument that the conviction was repugnant to the spirit or to the preamble of the constitution."³⁸⁸ Massachusetts then cites case law to explain that an appeal to the spirit of the Constitution would be fruitless and moved onto the real issues involving the Fourteenth Amendment and the state's police power.

Appealing to the spirit of the Constitution and informing what that spirit is through the language of the Preamble is not tantamount to arguing that the Preamble grants or limits government authority. Although some language within the briefs may point to a substantive rights argument,³⁸⁹ when taken as a whole, it quickly becomes apparent that neither party was so arguing. Indeed, the final sentence of the Massachusetts' brief sums up the real argument in the case very well: "[s]ince the statute authorizing vaccination, the order of the board of health in conformity with the statute and the discretionary administration of the order, so far as appears, were all free from *arbitrary* or *unequal* operation, the judgment of the Superior Court of

386. *Id.* at 20 (emphasis added).

387. *Id.* at 31.

388. Brief for the Defendant in Error at 3, *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905) (No. 70-175).

389. Arguably, the introduction of the defendant's brief which states that "[the statute] is contrary to the preamble" implies a substantive argument of rights. However, that implication is eliminated because the defendant only used the Preamble to argue the purpose and spirit of the Constitution. *See generally id.*

Massachusetts ought to be affirmed.”³⁹⁰ The words arbitrary and unequal demonstrate that the gravamen of the argument was focused on the police power and the Fourteenth Amendment. Consequently, it can be concluded that the substantive authority of the preamble to grant rights or to limit government action was not fully debated in this case. Indeed, it was not debated in the briefs at all.³⁹¹ Any opining by the Court on the Preamble’s grant of rights or substantive governmental authority or power is thus appear to be dicta.

B. THE OPINION OF THE UNITED STATES SUPREME COURT

Just as the briefs in *Jacobson* completely lacked any reasoned analysis of the legal status and functions of the Preamble, so Justice Harlan’s opinion itself also yields no indication that the legal roles, powers, or functions of the Preamble were ever materially considered. On several grounds, the statements in this opinion about the Preamble lack authority and should be discounted.

The opinion actually says very little about the Preamble. Only in its first two brief paragraphs is it even mentioned. Harlan’s opinion begins by summarily stating: “[w]e pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (section 137, chap. 75) is in derogation of rights secured by the Preamble of the Constitution of the United States.”³⁹² Indeed, the Court moved on with hardly any discussion at all. As has been demonstrated in the foregoing discussion, the mentioned “suggestion” was never truly advanced or developed in the briefs. More accurately, what the defendant had actually suggested was only that the Preamble supported his particular argument that the Massachusetts’s statute should be found in derogation of his rights granted by the Fourteenth Amendment.³⁹³ Instead of addressing that supportive use of the Preamble, Harlan immediately and universally proclaimed:

Although that 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 conferred on the government of the United States, or on of any of its departments. Such powers embrace *only* those expressly granted *in the body* of the

390. *Id.* at 17 (emphasis added).

391. Records of oral arguments were not kept by the Supreme Court at the time this case was argued, so it is impossible to know how much was argued about the Preamble in oral arguments.

392. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

393. *See* Brief for Petitioner, *supra* note 383, at 31.

Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, *no power* can be exerted to that end by the United States, unless, apart from the preamble, it be found in some *express delegation* of power, or in some power to be *properly implied therefrom*.³⁹⁴

That this statement represents the opinion of Justice Harlan, and probably the Justices who joined him, cannot be doubted. However, this statement is problematic in several ways.

As shown above, never in any of the briefs or lower court opinions was it argued that the Preamble grants, or was needed to grant, substantive authority to the federal government in this case. Instead, the defendant argued that the Preamble informs the spirit of the Fourteenth Amendment to restrict, not grant, the authority given to the government.³⁹⁵ Harlan's logic seems to be that because (A) the Supreme Court (like any other department of the United States government) must look to express power-granting sections of the Constitutions—such as Article III or the Fourteenth Amendment—to find federal power, and, in this case, to overturn a state statute, it then follows that (B) the Preamble can have nothing to do with Jacobson's petition or, for that matter, neither can the Preamble have anything to do with any other case. But conclusion (B) does not follow from premise (A). The defendant was asserting that rights had been promised or secured to him by the Preamble, not that judicial powers needed to be found there by the federal court system.

Moreover, Harlan's logic in this opening paragraph is circular. It assumes its conclusion and contains overstatements. It reasons that because the Preamble has (supposedly) never been seen in any way as a "source of any substantive power," then any power to be exerted by the United States must be found in some other source of power in the body of the Constitution "apart from the preamble."³⁹⁶ But is it true that the Preamble "has *never* been regarded as the source of *any* substantive power," or that it never might or should be so used?³⁹⁷ Is it true that the Preamble is not a legal part of the Constitution from which powers to achieve its purposes can never be implied? In support of this premise, Harlan only selectively cites Joseph Story. But as has been explained above and will be mentioned below, Story's lengthy discussion of the Preamble in his *Commentaries of the Constitution*

394. *Jacobson*, 197 U.S. at 22 (citing STORY, *supra* note 326, § 462) (emphasis added).

395. See *supra* notes 388–90 and accompanying text.

396. *Jacobson*, 197 U.S. at 22.

397. *Id.*

does not fully support this questionable premise.³⁹⁸ Furthermore, this is the only time that the Preamble is even mentioned in this opinion.³⁹⁹

Several observations and questions should and could have been explored and considered by the Court before speaking categorically about the Preamble—about what rights it may or may not grant; which purposes and roles it may or may not serve; how it might function to limit or aid in defining federal government authority and power; and under what circumstances the retained right of liberty secured by the Constitution can or cannot be restrained in this particular case. Consequently, the first half of Harlan’s opening paragraph regarding the Preamble goes beyond the scope of this case. As dicta it may be respected, but is not controlling.

Moreover, the holding regarding the constitutionality of the Massachusetts statute did not require any discussion of the Preamble. It only required answers to the two questions that were actually argued:⁴⁰⁰ (1) did its requirement of vaccination come within the authority of the state’s police power, and (2) did it contravene the rights guaranteed by the Fourteenth Amendment of the United States?⁴⁰¹ These two questions are discussed in the rest of the Supreme Court’s lengthy *Jacobson* opinion.⁴⁰² In answering the first question, Justice Harlan concludes, “[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁴⁰³ In framing the second question, Harlan explained, “[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.”⁴⁰⁴ Applying the facts of this case to the statements above, the Court ruled in favor of the state, holding that this statute was within its police power and that “this legislation has [not] invaded any right secured by the Federal Constitution.”⁴⁰⁵

398. See *supra* Section I.K.2.

399. See *Jacobson*, 197 U.S. at 11–39.

400. It is worth noting that the Supreme Judicial Court of Massachusetts, when it wrote its opinion in this case, was able to resolve the issue by answering these two questions and not referring to the Preamble, although it was brought up in the arguments submitted to them as well. See *supra* notes 376–82 and accompanying text.

401. *Id.*

402. There is also a brief discussion about the evidence that the defendant attempted to put forth to support his position, but Justice Harlan simply defers to the lower court’s judgment that such evidence was immaterial to the analysis. See *Jacobson*, 197 U.S. at 23–24.

403. *Id.* at 25.

404. *Id.* at 26 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

405. *Jacobson*, 197 U.S. at 38.

Returning to Justice Harlan's opening paragraph about the Preamble, he supports his view simply by citing generally one section (Section 462) from Joseph Story. However, other parts of Story's treatise actually support the use of the Preamble in the way it was understood and used in the briefs, especially by the defendant Jacobson. In Section 459, Story says, "the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished."⁴⁰⁶ In Section 460, he explains:

There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists *to aid them in the exposition of its provisions*.⁴⁰⁷

In Section 462, after the line quoted by Harlan, Story continued: "[The Preamble] can never be the legitimate source of any implied power, *when otherwise withdrawn from the constitution*. Its true office is to *expound the nature, and extent, and application* of the powers actually conferred . . ."⁴⁰⁸ Far from attempting to remove the Preamble from a position of importance in constitutional analysis and interpretation, Story advanced the idea that the Preamble can enlighten one's understanding of the framer's intentions and should be used in several ways on par with any other section of the Constitution in deciphering the meanings of provisions within the Constitution as a whole, including the Fourteenth Amendment.

Somewhat ironically, Justice Harlan himself supports this general interpretive proposition when he uses the preamble of the Massachusetts Constitution within the *Jacobson* opinion. Five pages into the text of the opinion, in explaining the police power and that appropriate restrictions on liberty are necessary to live within a society, Harlan supports his ruling by stating:

In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men." The good and

406. JOSEPH STORY, 1 COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES § 459 (1833).

407. *Id.* § 460 (emphasis added).

408. *Id.* § 462.

welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts.⁴⁰⁹

Here, Harlan quotes the Massachusetts preamble, as well as other sections, of the Massachusetts Constitution. Not using this state preamble to grant any government entity substantive authority, he instead uses it to support his opinion regarding the contours of Massachusetts's police power. At the same time, neither did the defendant attempt to use the federal Preamble to grant any government entity substantive authority, but to support his view of the contours of the Fourteenth Amendment. Consequently, Harlan's supportive use of the preamble of the Massachusetts Constitution is similar to the defendant's desired use of the Preamble of the U.S. Constitution. It would seem that this use by Harlan cuts against his opening dismissal of any possible legal use of the Preamble in defining and limiting the powers of the government its constitution controls.

In the second paragraph of the *Jacobson* opinion, Justice Harlan added one passing comment about the "spirit of the Constitution," saying:

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges v. Crowninshield*, "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.⁴¹⁰

But Harlan's dismissive statement here assumes that, when John Marshall spoke of "its words," Marshall meant to exclude the words of the Preamble and consider only the words found "in those provisions" in the Articles of the Constitution. Once again, Harlan's reading is historically dubious.⁴¹¹ While it is true that any court's decision should strive to look *chiefly* to "the plain, obvious meaning of the words in those provisions . . . which . . . must control [that case],"⁴¹² it is not self-evident which collection of "words" and "provisions" bear on that decision or not, and how much weight each word should be given.

409. *Jacobson*, 197 U.S. at 27 (quoting MASS. CONST. of 1780, pmbl., art. VII, pt. I). This preamble further explains that laws "for the common good" must be adopted by "an equitable mode of making laws, as well as for an impartial interpretation and faithful execution of them." MASS. CONST. of 1780, pmbl.

410. *Jacobson*, 197 U.S. at 22 (internal citations omitted).

411. For the comments of Monroe, Rawle, and others, see *supra* Sections I.G. and I.K.1.

412. *Jacobson*, 197 U.S. at 22.

Moreover, later in the opinion, when Harlan needed to define “the liberty secured by the Constitution,” he made sure that liberty was not understood as “an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint,” but must be restrained “for the *common* good . . . in order to secure the *general* comfort, health, and prosperity of the state.”⁴¹³ Without Harlan saying so, it would appear, somewhat ironically, that he found his authority for this understanding of liberty in the Preamble’s communitarian promotion of common goods and of the general welfare.

Perhaps most controlling of all, Harlan himself restricted the scope of his holding in *Jacobson*, although this important language is completely overlooked by those who wish to see in *Jacobson* a controlling precedent. In his final paragraph, Justice Harlan states: “[w]e now decide *only* that the statute covers the present case, and that *nothing clearly appears* that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.”⁴¹⁴ Even though this concluding statement seems to be aimed at limiting this holding to this one petitioner in this one statutory matter, this restricting language has achieved no such effect regarding the received perception of the Preamble’s non-binding legal status.

Unconvinced or uncomfortable, two of Justices, Brewer and Peckham, dissented, but filed no dissenting opinion. Thus, it is unknown whether they found the compulsory vaccination law to be unreasonable as applied to *Jacobson* or thought that the majority’s dismissal of the Preamble was premature and preemptive. Because the reasonableness of the statute was strongly supported throughout the opinion, one might suspect that their concerns involved the larger constitutional issues arising out of Harlan’s cursory statements about the Preamble.

C. JUDICIAL OPTIONS FOR LIMITING *JACOBSON*’S STATEMENTS ABOUT THE PREAMBLE

Having shown above that Justice Harlan’s opening language in *Jacobson* is flawed, if not meaningless, one must consider what options the Supreme Court has today in clarifying or rectifying this past situation. In attempting to avoid or overcome one of its past precedents, the Court has several options: (1) it can narrow the precedent or distinguish it;⁴¹⁵ (2) overturn it; or (3) declare it to be dicta (and thus of no precedential value to

413. *Id.* at 26.

414. *Id.* at 39 (emphasis added).

415. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1869 (2014).

begin with).⁴¹⁶ Each of these options can be used at the Court's discretion with varying amounts of pushback and social costs. While overturning a case can be quite dramatic and lead to sweeping changes in the legal community, distinguishing a case on the facts or identifying a statement as dicta can be done with little to no ripple effect. In an effort to demonstrate the paths the Court can take with its language in *Jacobson*, the following Section considers each of these options using examples from the Court's own jurisprudence.

Narrowing the interpretation of past precedent happens when the Court simply "declines to apply a precedent, even though, in the court's own view, the precedent is best read to apply."⁴¹⁷ In *Boumediene v. Bush*,⁴¹⁸ the Court reviewed *Johnson v. Eisentrager*'s broad language, which explained that the writ of habeas corpus is not a right granted to a foreign combatant who "at no relevant time and in no stage of his captivity, has been *within its territorial jurisdiction*."⁴¹⁹ While accepting that *Eisentrager* informed the analysis by applying, what they perceived as, its rule, the *Boumediene* Court held that *Eisentrager* was not a categorical bar against habeas corpus claims by foreign combatants on foreign soil.⁴²⁰ Instead, they viewed the geographical location language in *Eisentrager* as one of the "practical considerations" of the time period.⁴²¹ When looking at practical considerations in *Boumediene*, the Court came to the opposite conclusion and held habeas corpus did apply to foreign combatants who had not been within the territorial jurisdiction.⁴²² This is a clear example of the Court taking straightforward language from a previous case, acknowledging that the best reading of the precedent points to a certain outcome,⁴²³ and then refusing to reach that outcome in its application of identical facts.⁴²⁴ It is possible that the Court could narrow

416. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

417. Re, *supra* note 415, at 1861. Some scholars categorize narrowing precedent as "stealth overruling." See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 *Geo. L.J.* 1, 1 (2010). However, for the purposes of this paper, overturning or narrowing precedent are viewed as two distinct options the Supreme Court has when overcoming precedent.

418. *Boumediene v. Bush*, 553 U.S. 723, 762 (2008).

419. *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950) (emphasis added).

420. See *Boumediene*, 553 U.S. at 762.

421. *Id.* at 761.

422. See *id.* at 798.

423. See *id.* at 762 ("True, the Court in *Eisentrager* denied access to the writ, and it noted the prisoners 'at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.'") (internal citation omitted).

424. Richard M. Re boldly defends this practice and argues it "promot[es] traditional stare decisis values like correctness, fidelity, and candor [and] legitimate narrowing represents the decisional-law

Jacobson's words that the Preamble is not a "source of any substantive power" so that this language only applies to cases where the Preamble is being used to expand the federal government's enumerated powers or the powers of any of its departments, as granted expressly in the Constitution.

Distinguishing occurs when the Court does not apply past precedent because certain facts in the case make the best reading of the precedent inapplicable.⁴²⁵ For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court rejected the proposition that a regulatory taking fell under the same analysis as a physical taking.⁴²⁶ The Court explained, "[t]his longstanding distinction between acquisition of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa."⁴²⁷ The Court here did not attempt to apply past precedent, as it normally does when it is narrowing; rather, it simply stated that the facts of the case do not fit within the precedent's framework and disregarded it completely. Distinguishing *Jacobson* from most other cases in a similar manner would not be difficult, because the case can be easily limited to its facts regarding due process, state legislation, and police powers. But if the problematic language is going to be easily distinguished in virtually all cases, little value remains in retaining it, without further clarification of some kind.

Overturning a case is the Court's most extreme option. In these cases, the Court does not attempt to navigate around the past precedent but simply rejects it and deems it no longer controlling. In *Roper v. Simmons*, the Court addressed the constitutionality of imposing the death penalty upon defendants who had committed a capital crime while they were juveniles.⁴²⁸ The court acknowledged that it had previously addressed this question in *Stanford v. Kentucky*⁴²⁹ and had deemed the practice constitutional.⁴³⁰ However in *Roper*, the Court explained that *Stanford* "should be deemed no

analogue to the canon of constitutional avoidance." *Re, supra* note 415, at 1861.

425. *See id.* at 1869.

426. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (internal quotations omitted).

427. *Id.* at 323.

428. *See Roper v. Simmons*, 543 U.S. 551, 555–56 (2005).

429. *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

430. *Roper*, 543 U.S. at 551 ("[T]he Eight and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18. . . .").

longer controlling on this issue” because times had changed.⁴³¹ Thus, the holding in *Stanford* is no longer binding or good law. This approach would not cleanly apply to *Jacobson*, since it correctly found that the Cambridge board of health had taken reasonable care and exercised amply due process in issuing its vaccination ordinance. Therefore, the outcome of that case need not be overturned.

Regarding dicta, when the Supreme Court expressly or implicitly rejects dicta, it becomes “dead dicta” and has no more controlling or persuasive authority.⁴³² In *United States v. Salerno*, the court identified and expressly rejected dicta from one of its earlier cases, *Stack v. Boyle*.⁴³³ In *Salerno*, the constitutionality of the Bail Reform Act was challenged because it allowed a judge to take into account a defendant’s future dangerousness when setting bail.⁴³⁴ Historically, a judge could set the bail amount based only on the flight risk a defendant posed and the Court, in *Stack*, had endorsed that limitation. The *Stack* court stated that “[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”⁴³⁵ In rejecting that language, the Court in *Salerno* explained:

While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted dictum in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees’ presence at trial.⁴³⁶

Here the Court not only identifies and rejects its dicta in a previous case, it explains why it qualified as dicta. The language went beyond the specific question presented, and consequently the language was not controlling when

431. *Id.* at 554.

432. See Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 188 (2010). Arguably, before dicta is expressly rejected, it may be so persuasive on the Court and lower courts that it is perceived as controlling. See *id.* at 185.

433. See *United States v. Salerno*, 481 U.S. 739, 752–53 (1987) (rejecting dicta from *Stack v. Boyle*, 342 U.S. 1 (1951)).

434. *Salerno*, 481 U.S. at 744 (quoting *Stack*, 342 U.S. at 5).

435. *Stack*, 342 U.S. at 5 (alterations in original).

436. *Salerno*, 481 U.S. at 753.

the “very point [was] presented for a decision.”⁴³⁷ In finding language to be dicta, the Court does not use language in a previous opinion to get around a problematical precedent, but essentially holds that the precedent does not exist. The Supreme Court has explained, “[w]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”⁴³⁸ Chief Justice Marshall established this point early on in Supreme Court jurisprudence when he stated,

[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.⁴³⁹

Statements within Supreme Court opinions that are found to be dicta are not controlling in subsequent cases if the point had not been “fully debated” or if the statement goes “beyond the case.” All of this applies to the Preamble language in *Jacobson*, since the issue was clearly raised by the parties in their briefs, but was not dealt with at all, let alone fully debated.

Dicta from the Supreme Court can also be “killed” by lower courts. In *Bartkus v. Illinois*, a defendant challenged his conviction on double jeopardy grounds.⁴⁴⁰ He had been charged for the same crime under a federal and state robbery statute, but the Court rejected the claim under the dual sovereignty exception.⁴⁴¹

However, after doing so, the Court went onto state:

The record . . . does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition . . . against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.⁴⁴²

This language implied that if there had indeed been facts showing a “sham” prosecution, then the dual sovereignty exception may not have applied. Subsequent to this ruling, multiple circuit courts rejected the sham exception dicta. The Seventh Circuit stated its rejection poignantly, when it explained, “[i]n *Bartkus* the Supreme Court, in dicta, suggested that it would

437. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

438. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

439. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

440. *Bartkus v. Illinois* 359 U.S. 121, 122–23 (1959).

441. *Id.*

442. *Id.* at 123–24.

be impermissible for one sovereign to use the other as a ‘tool’ to bring a successive prosecution, thereby making the second persecution ‘a sham and a cover’ for the first prosecution . . . [W]e have uniformly rejected such [a statement.]”⁴⁴³ Multiple other circuits have also recognized this Court’s language as dicta and have declined to follow it.⁴⁴⁴ Consequently, the effect of dicta—even Supreme Court dicta as in *Jacobson*—can be eliminated by a sufficient number of lower courts.

III. THE PREAMBLE IN THE TWENTIETH CENTURY

A. *JACOBSON* IN THE FEDERAL COURTS

Though *Jacobson* has been cited in a number of prominent Supreme Court cases,⁴⁴⁵ the dicta concerning the Preamble and its place in constitutional jurisprudence has rarely been referenced explicitly or reinforced overtly.⁴⁴⁶ More specifically, the Supreme Court rarely, if ever, has cited *Jacobson* for the idea that the Preamble cannot be used to make sense of the Constitution’s enumerated powers and limitations. To the contrary, members of the Court somewhat regularly—albeit often in dissenting and concurring opinions—mention the Preamble as if it can be used in support of their opinions or views.⁴⁴⁷

In lower courts, however, some opinions have cited *Jacobson*. Some cite its dicta in passing, while others discuss the role of the Preamble in adjudication more generally. All of these cases seem to treat *Jacobson*’s dicta as controlling authority, but most courts do not see *Jacobson*’s dismissal of

443. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).

444. *See e.g.*, *United States v. Moore*, 370 F. App’x. 559, 560 (5th Cir. 2010) (per curiam), *cert denied*, 562 U.S. 898 (2010).

[I]t is unclear whether such an exception to the dual-sovereignty exists in this circuit. This exception originated from *Barkus v. Illinois*, where the Supreme Court suggested in dicta that there may be an exception the dual-sovereignty doctrine when one sovereign is ‘merely a tool’ of the other in bringing a second prosecution that . . . would otherwise be barred under the Double Jeopardy Clause. We have not formally recognized or applied the exception; when confronted with issue, we have held that, even if the exception exists, the facts do not merit its application.

Id. (internal citations omitted).

445. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 354 (1997); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 655 (1943).

446. Using Westlaw, forty-four cases were found that both cited *Jacobson* and used the word “preamble.” Of those forty-four, only thirteen cases discussed *Jacobson*’s dicta concerning the Constitution’s Preamble.

447. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 562 (1989) (Blackmun, J., dissent); *EEOC v. Wyoming*, 460 U.S. 226, 267 (1983) (Powell, J., dissent); *Roe v. Wade*, 410 U.S. 113, 168–70 (1973) (Stewart, J., concurrence) (surveying the meaning of the word “liberty”); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969) (Black, J., concurrence).

the Preamble as useless rhetoric. Rather, they acknowledge *Jacobson* to argue that the Preamble does not confer any substantive powers on the federal government. Given the overall thesis that the Preamble does not grant substantive powers, but still may serve other legal roles, these circuit court opinions do not detract from our overall thesis.

Most cases that cite *Jacobson* usually use it to dismiss an argument that the Preamble somehow confers substantive powers or individual rights. For example, in *Carter v. Carter Coal Co.*, the Court reasoned that Congress is a body endowed only with enumerated powers.⁴⁴⁸ The Constitution's drafters were careful when deciding what powers to give and not give Congress; they "made no grant of authority to Congress to legislate substantively for the general welfare, and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted."⁴⁴⁹ Though the Court cited *Jacobson* in support of this proposition, it did little more to expound on the Preamble's relevancy.

In *Tinsley v. Methodist Hospital of Indiana, Inc.*, the Seventh Circuit rejected the plaintiff's constitutional claim. "According to Tinsley, Methodist Hospital denied her the 'Blessings of Liberty' and infringed her 'general Welfare,' thereby violating her constitutional rights."⁴⁵⁰ But, according to this court, the Preamble "does not guarantee any rights; instead, it describes the goals and aspirations behind the text of the Constitution."⁴⁵¹ The text of the Constitution, and not the Preamble, is the source of rights or restraints. Again, *Jacobson* served as nothing more than case support for the court's limited analysis.

Jacobson has also been referenced to support a limited reading of state constitutional preambles. For example, in *In re Opinion of the Justices*, the Supreme Judicial Court of Massachusetts responded to a request from the legislature regarding the constitutionality of pending legislation prohibiting married women from public service employment.⁴⁵² The court ultimately declared such laws were generally not constitutional, but before doing so, it addressed the specific question of whether the Preamble barred the state legislature from enacting the prohibitions.⁴⁵³ "Without considering whether the Preamble constitutes either a grant of power or a limitation upon its

448. *Carter v. Carter Coal Co.*, 298 U.S. 238, 292 (1936).

449. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905)).

450. *Tinsley v. Methodist Hosp. of Ind., Inc.*, 70 F.3d 1275, 1995 WL 695960 at *2 (7th Cir. 1995) (unpublished table opinion).

451. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905)).

452. *In re Opinion of the Justices*, 22 N.E.2d 49, 55 (Mass. 1939).

453. *Id.* at 57.

exercise,” the justices quickly dismissed the question in the negative, in part relying on *Jacobson* and reasoning that “no grant of power or limitation thereon is to be found in the Preamble that is not embodied in the other provisions of the Constitution.”⁴⁵⁴

A few other courts have referred to *Jacobson*, but likewise do so only in passing.⁴⁵⁵

Two of the more prominent cases in which *Jacobson* is discussed and expounded upon are *United States v. Kinnebrew Motor Co.* and *Hockett v. State Liquor Licensing Board*. In *Kinnebrew*, the deciding court was asked to rule on the constitutionality of the National Industry Recovery Act. Under that Act, the President was vested with the power to establish codes fixing the prices of certain goods.⁴⁵⁶ One such code established the price at which new cars could be sold, and *Kinnebrew*, an auto dealer, had allegedly sold a car at a different price.⁴⁵⁷ The court ultimately concluded that the enforced code represented an exercise of “power not possessed by Congress nor contemplated by Congress in the National Industry Recovery Act.”⁴⁵⁸ Ruling in the defendant’s favor, the court relied on *Jacobson* to reject the government’s argument that the Welfare Clause of the Preamble gave Congress certain powers. Speaking frankly, the court declared that there was “no such thing as the ‘Welfare Clause’ of the Constitution.”⁴⁵⁹ Although the Preamble states that the Constitution was established to “Promote the general Welfare,” the court noted that in the *Jacobson*, the Supreme Court had rejected the idea that the Preamble could be supply the government with substantive powers.⁴⁶⁰ And to the court, *Jacobson*’s Preamble analysis was more than just dicta; it “is the accepted construction placed upon the Preamble to the Constitution by our highest court.”⁴⁶¹

The *Hockett* court took a similar approach to the Preamble and *Jacobson*. There, the plaintiff alleged that a controversial “Home Rule

454. *Id.*

455. *E.g.*, *Duke Power Co. v. Greenwood Cty.*, 10 F. Supp. 854, 870 (W.D.S.C. 1935), *supplemented by*, 12 F. Supp. 70 (W.D.S.C. 1935) (overturned on other grounds); *Miss. Utilities Co. v. City of California, Mo.*, 8 F. Supp. 454, 459 (W.D. Mo. 1934); *Amazon Petroleum Corp. v. R.R. Comm’n of Tex.*, 5 F. Supp. 639, 647–48 (E.D. Tex. 1934) (overturned on other grounds); *Nat’l Pride At Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 539 (Mich. 2008); *Cheaney v. State*, 285 N.E.2d 265, 273 (Ind. 1972); *Ace Bus Transp. Co. v. S. Hudson Cty. Boulevard Bus Owners’ Ass’n*, 177 A. 360, 368–69 (N.J. Ch. 1935).

456. *United States v. Kinnebrew Motor Co.*, 8 F. Supp. 535, 535 (W.D. Okla. 1934).

457. *Id.* at 535–36.

458. *Id.* at 544.

459. *Id.* at 539.

460. *Id.*

461. *Id.*

Amendment,” which allowed local municipalities to regulate liquor, was unconstitutional.⁴⁶² As part of his argument, the plaintiff argued that the Welfare Clause of the Preamble nullified the amendment.⁴⁶³ The court flatly disagreed with the plaintiff; it was “unable to find a single citation or authority which would authorize any court to declare any statute or provision of any state Constitution invalid because the same was held contrary and repugnant to the preamble of the federal Constitution.”⁴⁶⁴ To the court, the Preamble was nothing more than a “generic” statement of “the great cardinal purposes of government.”⁴⁶⁵ The court cited a number of authorities in support of this conclusion, including *Jacobson*, before concluding, “inasmuch as we have no delegation or denial of power in the preamble, how can it be said that any exercise of governmental power by the state by virtue of its state Constitution can be violative of any grant of power or denial of power in the preamble of the federal Constitution?”⁴⁶⁶ What follows is a discussion regarding the “spirit” of the Constitution, but suffice it to say that the court was unconvinced that the Preamble could be used to restrict the application of state constitutional amendments.

In *Hart Coal Corp. v. Sparks*, *Jacobson* was cited to support the court’s related, but independent, analysis. Defending against plaintiffs’ claims that certain orders passed in accordance with the National Industrial Recovery Act were unconstitutional, the government—in related actions—argued that its exercise of power was, among other things, “an exercise of the inherent power of the national government to accomplish the purposes set forth in the Preamble.”⁴⁶⁷ The court dismantled this argument:

It would hardly seem necessary to demonstrate the fallacy of the claim that there is any inherent or general power unmentioned in the Constitution to accomplish the purposes set forth in the preamble to that instrument. It would seem perfectly apparent that the objects set forth in the preamble were intended by the fathers to be attained through the exercise of the powers granted to the national government in the Constitution; otherwise the national government is not one of limited delegated powers, but of unlimited powers, with Congress free to accomplish the purposes set out in the preamble in whatever way may

462. *Hockett v. State Liquor Licensing Bd.*, 110 N.E. 485, 486 (Ohio 1915).

463. *Id.* at 489.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16, 26 (W.D. Ky.), *vacated*, 74 F.2d 697 (6th Cir. 1934).

appeal to the judgment of that body. Of course, the statement of this proposition carries with it its own refutation.⁴⁶⁸

Jacobson alone was then cited and quoted in support of this reasoning.⁴⁶⁹

While the foregoing survey of lower court usage of *Jacobson* seems to strengthen the precedential mandate of that case, it is remarkable that *Jacobson* has been conveniently ignored, rather than distinguished or overruled, in at least nine Supreme Court opinions since 1946, especially prominently in *Goldberg v. Kelly*, in which the Preamble added value to the Court's opinion, but it was not discussed specifically.⁴⁷⁰ In Douglas's *Doe v. Bolton* concurrence, the Preamble was invoked as potentially speaking of certain rights that should be protected by the Ninth Amendment.⁴⁷¹ Although used most often in dissenting opinions, such references to the Preamble have not been thought to be precluded by *Jacobson*, as it is often not mentioned in these cases.⁴⁷² In certain cases, the Preamble serves in a role that goes beyond merely interpreting the meaning of other provisions in the body of the Constitution.⁴⁷³ And this same pattern of simply ignoring *Jacobson* also appears in federal circuit court opinions⁴⁷⁴ and district court opinions.⁴⁷⁵ This

468. *Id.* at 27.

469. *Id.*

470. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

471. *Doe v. Bolton*, 410 U.S. 179, 210 (1973).

472. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting); *McGautha v. California*, 402 U.S. 183, 246 (1971) (Douglas, J., dissenting); *Duncan v. Kahanamoku*, 327 U.S. 304, 338 (1946) (Burton, J., dissenting).

473. *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting); *Lichter v. United States*, 334 U.S. 742, 782 (1948) (Burton, J.).

474. *Bissonette v. Haig*, 800 F.2d 812, 818 (8th Cir. 1986) (en banc) (dissent), *aff'd*, 485 U.S. 264 (1988) (using the Preamble to support the argument that military officials on trial were ensuring domestic tranquility); *Wiggins Bros., Inc. v. Dep't of Energy*, 667 F.2d 77, 88 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 905 (1982) (noting that "the federal rule permits and requires consideration of preambles in appropriate cases" when interpreting the Constitution, statutes, or regulations); *NLRB v. Highview, Inc.*, 590 F.2d 174, 178 (5th Cir. 1979) (using the Preamble to support its holding that the NLRB has jurisdiction over a nursing home, substantively to "promote the general welfare"); *Turley v. Wyrick*, 554 F.2d 840, 844 (8th Cir. 1977) (conurrence), cert. denied, 434 U.S. 1033 (1978) (in arguing that double prosecutions are unconstitutional); *LeFlore v. Robinson*, 434 F.2d 933, 955 (5th Cir. 1970) (dissent) (asserting that the Preamble, "serves as a key to an interpretation" of responsibilities and rights conferred by the Bill of Rights); *United States v. Josephson*, 165 F.2d 82, 90 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948) (the Preamble has substantive value, imposing duties on Congress). None of these cases mention *Jacobson*.

475. *See, e.g.*, *Berry v. School Dist.*, 467 F. Supp. 695, 709 (W.D. Mich. 1978) (reasoning that its holding helps fulfill the goals of the Preamble); *In re DeToro*, 247 F. Supp. 840, 843 (D. Md. 1965), cert. denied sub nom. *DeToro v. Maryland*, 390 U.S. 992 (1968) (arguing that the Preamble substantively assures that the "blessings of Liberty" will be secured to all, though not dispositive to this case's outcome).

vacuum may explain the sparse but steady stream of articles advocating possible substantive uses for the Preamble, based on its venerable history and utility, *Jacobson* notwithstanding.

B. LEGAL SCHOLARSHIP AND THE PREAMBLE

In the aftermath of the overstatement of *Jacobson* in 1905, the Preamble has fared a better in the scholarly literature than it has in court, although not at first. As early as 1929, Willoughby's treatise on Constitutional law absolutely stated "[t]hat the Preamble may not be resorted to as a source of Federal authority is so well established as scarcely to need the citation of authorities," echoing the familiar line that its only value arises "in cases of ambiguity, where the intention of the framers does not clearly and definitely appear."⁴⁷⁶

But after the heyday of the New Deal and the victories in World War II, people were beginning to expect something more from the Preamble, especially on the eve of the Civil Rights era. In 1953, Crosskey saw through the implications of empty rhetoric when he rightly observed: "[t]he suggestion that the preamble is 'universally regarded as an empty verbal flourish' seems plainly wrong."⁴⁷⁷ By the mid-1960s, many people had begun asking, "[w]ho are the 'People'" at the top of the Preamble?"⁴⁷⁸

Yet it was not until the late 1980s and early 1990s that a first wave of productive thinking began to roll in about the Preamble. In 1985, *Sutherland's Statutes and Statutory Construction* began to be a little more encouraging and permissive about welcoming use of the Preamble. Although cautionary reservations and *Jacobson's* dictum were not far behind: "When considering the purpose of the legislation, purposes stated in the preamble are entitled to weight, although they are not conclusive. . . . The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute,"⁴⁷⁹ but "in case any doubt arises in the enacted part, the preamble may be resorted to help discover the intention of the law maker."⁴⁸⁰

476. WESTEL WILLOUGHBY, 1 *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 62 (2nd ed., 1929).

477. WILLIAM WINSLOW CROSSKEY, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 374 (1953).

478. Morris D. Forkosch, *Who Are the "People" in the Preamble to the Constitution?* 19 *CASE W. RES. L. REV.* 644, 644 (1968).

479. 1A *SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION* § 20.03 (N. Singer 4th ed. 1985) (footnotes omitted) (emphasis added).

480. 2A *SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION* § 47.04 (N. Singer 4th ed. 1984) (footnotes omitted) (emphasis added).

Nevertheless, during the bicentennial of the drafting of the Constitution, instead of seeing the Preamble as the main interpretive guide to the purposes of the Constitution, a 1987 book argued that the Constitution must be understood in light of principles of the Declaration of Independence.⁴⁸¹

By the early 1990s, the Cold War had ended and all the states in the former Soviet Union and its spheres of influence were vigorously engaged in the process of drafting and adopting constitutions. The developments of that time may have spawned a cluster of articles recognizing the foundational relevance and formative potentials of the Preamble. The first of this quartet was a remarkable plea in 1990 by Milton Handler and his coauthors for courts and legal authors to think again about the relevance and materiality of the Preamble. This legacy article, written by an emeritus law professor and two coauthors, argued that “the fate of the preamble in constitutional jurisprudence is inexplicably anomalous when compared to the well-established interpretive significance accorded preambles and preamble-like provisions in the construction of other legal instruments.”⁴⁸² Suggesting that all readers of the Constitution—whether explicit language “interpretivists,” ethical “contextualists,” or historical “originalists”—should find a common-law approach to the Preamble to be congenial, this dynamic and elastic approach would allow for “inclusion and exclusion, expansion and contraction, case-by-case determination” to “cope with new problems, arising at different times under ever-changing conditions and circumstances.”⁴⁸³

Despite these authors’ probing look at *Jacobson*, at the use of preambles in contracts and treaties, the principles and spirit of statutory construction, early American directives for construing the Constitution, and into some applications in four Constitutional areas, their conclusion, however, fades: “[i]f the preamble to the Constitution were given the status we advocate, the course of our constitutional jurisprudence would not change drastically,” for the Preamble makes no demands but simply “serves as a signpost, marking the course of constitutional common law.”⁴⁸⁴ While the authors may have thought that this cautious understatement was necessary at that time to even get a foothold into the minds of people who thought that the classic statement in *Jacobson* rendered the Preamble completely insubstantial, it also might explain why this article did little to move the Preamble out of its relegated

481. See generally WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987).

482. Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 *CARDOZO L. REV.* 117, 118 (1990).

483. *Id.* at 119.

484. *Id.* at 163 (emphasis added).

obscurity.

That same year, however, a stronger argument appeared, arguing for the concept of “unalienable right” as the footing beneath the Preamble and the spirit of the entire Constitution.⁴⁸⁵

Then two years later in 1992, Dan Himmelfarb produced a substantial work, concluding that “the best view probably lies somewhere between the ‘legal realist’ and ‘constitutional common law’ extremes (though closer to the former).”⁴⁸⁶ Himmelfarb’s treatment embraces *Jacobson* and favors a limited, non-originalist, role for the Preamble. He argued that the unique procedural stature of the Preamble makes it substantively unique and so different from the remainder of the document that it cannot be said to grant substantive rights.⁴⁸⁷ His survey of the basic historical documents led him to conclude that the framers “gave little thought to the preamble,” which was neither debated nor voted on by the delegates of the Constitutional convention,⁴⁸⁸ which means that that the drafters viewed it as something different from the actual Constitution.⁴⁸⁹ He also argued that the Preamble is too vague to be of any use in interpretation, although recognizing that its phrases are just as “abstract and open-ended as the due process and equal protection clauses.”⁴⁹⁰ Offering an extensive survey of the ways in which all of the phrases of the Preamble have been variously construed by courts, Himmelfarb saw the Preamble as having little value. Its terms are so broad that they “can be used to support both sides of almost any constitutional issue. This is so not only because the Preamble’s language is so abstract and open-ended, and hence susceptible of more than one plausible interpretation, but also because the six objects of government enumerated in the preamble are often in conflict.”⁴⁹¹ While the readings promoted by this article are not always persuasive, this study served a cautionary role in encouraging the many countries adopting constitutions at that time to be deliberate and

485. Gilbert Paul Carrasco & Peter W. Rodino, Jr., “Unalienable Rights,” *the Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL L. REV. 498, 523 (1990) (“Those responsible for governing and interpreting the Constitution are subject to the commands of the Preamble to help in the establishment of a more perfect union and to help secure the blessings of liberty.”).

486. Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127, 160–66, 193–201 (1992).

487. *Id.* at 132–35.

488. *Id.* *But see supra* Section I.B.

489. Himmelfarb, *supra* note 486, at 135. *But see supra* Section I.B.

490. Himmelfarb, *supra* note 486, at 203.

491. *Id.* Himmelfarb continues: “[I]n addition to the problem of determining with any degree of confidence the precise meaning of ‘Justice’ or ‘general Welfare,’ there is the problem of deciding whether to uphold a law because the ‘common defence’ requires it or to invalidate the law because it is inconsistent with the ‘Blessings of Liberty.’” *Id.*

explicit in the formulation and adoption of their naturally influential preambles.

Not dissuaded by any potential weaknesses in the Preamble, another article appeared the year later attempting to make strong use of the Preamble's mention of "posterity" in opposing *Roe v. Wade*.⁴⁹² In 2000, a second article on the Preamble and the Ninth Amendment began to expand the Preamble's value, seeing in it (in conjunction with specific amendments or provision) non-enumerated rights of the people, specifically rights of privacy.⁴⁹³ Its author, Eric M. Axler, acknowledged the Supreme Court's holding in *Jacobson*, while he (for the first time) questioned its validity.

In 2005, still deep in national traumas of 9/11, an article by Dean McGrath turned to the Preamble for power in mobilizing the war on terror.⁴⁹⁴ In his article, McGrath emphasized that the Preamble provides useful insights into the aspirations of the Founders that can "guide our government in the use of its enumerated powers."⁴⁹⁵ As the war on terrorism then took the battle for freedom into political arenas in war-torn and politically unstable areas of the world, interest soared in preambles and their role in stabilizing popular, national governments—Liav Orgad's groundbreaking work on preambles in comparative constitutional law appeared in 2010,⁴⁹⁶ followed soon by Justin Frosini's treatise on the political and legal roles of preambles in constitutions around the world.⁴⁹⁷

At home in 2013, the health care battle raged, and liberal causes generally turned to the Declaration of the Independence—but also to the Preamble—for liberal equality.⁴⁹⁸ Also that year, Kenneth Shuster, in an article discussing American's right to health care, argued that a government

492. Raymond Marcin, "Posterity" in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 281, 283 (1993) ("In light of the case law on Preambles in general and on the Preamble to the Constitution of the United States in particular, it would seem that some limited use may be made of the 'Blessings of Liberty to . . . our Posterity' clause in shedding light on the spirit behind the fifth and fourteenth amendments' rights to life and liberty.").

493. Eric M. Axler, Note, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 435–37 (2000).

494. C. Dean McGrath Jr., *The Genius of the Constitution: The Preamble and the War on Terror*, 3 GEO. J.L. & PUB. POL'Y 13, 18 (2005).

495. *Id.* at 13, 18 ("The Preamble provides clear guidance concerning the underlying aspirations that the Constitution's framers had for the Constitution and the new United States of America. Those aspirations have continued to guide our government in the use of its enumerated powers . . .").

496. Orgad, *supra* note 48. This article is discussed in the following Section.

497. Justin O. Frosini, *Constitutional Preambles: More than Just a Narration of History*, 2017 ILL. L. REV. 603.

498. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013).

attempting to bring about the Preamble's mandatory purposes could not fail to provide health care for its citizenry.⁴⁹⁹

After the opening of the National Constitution Center in Philadelphia, with the words of the Preamble prominently lettered on its towering front wall, the tide seems to have shifted somewhat toward a recognition of stronger roles for Preamble. A recent three-part essay by Erwin Chemerinsky and Michael Stokes Paulsen about the Preamble, posted on the Center's interactive text about the Preamble, may yet be strengthened, but still is helpful. For each of them, the Preamble embodies more than just "aspirations," and the word "Preamble" means more than "an opening rhetorical flourish or frill without meaningful effect."⁵⁰⁰ As they both agree, "[t]he boundaries of what may be said and done in the name of the Constitution are marked by the words, phrases, and structure of the document itself," and they find little reason why the words of the Preamble, as part of the wording of the Constitution, should not be included in Constitutional analysis, as much as any other part of the Constitution.⁵⁰¹ Chemerinsky rightly laments that the Preamble's role as a guide "has been largely ignored" and "overlooked," but he concedes that *Jacobson* has firmly held that no laws can "be challenged or declared unconstitutional based on the Preamble" and that the Supreme Court has actually "denied its relevance to constitutional law."⁵⁰² Paulsen sees even less daylight for the Preamble, other than in its formal role in enacting the written body of the Constitution by the people and in its limited legal force in assisting in interpreting the specific powers listed in the Articles.⁵⁰³

While differing on the exact role the phrases of the Preamble should play, scholars and many others agree that "[i]f the Preamble is read carefully and taken seriously, basic constitutional values can be found within it that

499. Kenneth Shuster, *Because of History, Philosophy, the Constitution, Fairness & Need: Why Americans Have a Right to National Health Care*, 10 IND. HEALTH L. REV. 75, 89–91 (2013) ("[The Preamble] does explain the 'why' of the Constitution, namely, the six ends for which the Constitution was created. . . . It is inconceivable that Americans, who possess constitutional rights to speak freely and assemble, have speedy and public trials, and vote, do not have a constitutional right to have their government provide them with health care.").

500. Erwin Chemerinsky & Michael Stokes Paulsen, *The Preamble*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/preamble/the-preamble-by-erwin-chemerinsky-and-michael-stokes-paulsen/interp/37> (last visited Sept. 19, 2018).

501. *Id.*

502. Erwin Chemerinsky, *Giving Meaning to the Preamble*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/preamble/giving-meaning-to-the-preamble-by-erwin-chemerinsky/interp/37> (last visited Sept. 19, 2018).

503. See Michael Stokes Paulsen, *The Preamble's Significance for Constitutional Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/preamble/the-preambles-significance-for-constitutional-interpretation-by-michael-sto/interp/37> (last visited Sept. 19, 2018).

should guide the interpretation of the Constitution.”⁵⁰⁴ While contrary opinions exist, legal scholars in increasing numbers are expressing dissatisfaction with the lack of current use of the Preamble in constitutional interpretation. It has more valuable and important roles than are currently assigned or availed of by the courts, in the United States as well as abroad.

C. PREAMBLES IN COMPARATIVE CONSTITUTIONAL LAW

As Liav Orgad has rightly noted—and as this Article has sought to make clear—despite the Preamble’s legendary status, it has largely been ignored in the study of constitutional theory and interpretation.⁵⁰⁵ But though ignored domestically, the Preamble has served as a template for several constitutional preambles across the globe.⁵⁰⁶ And often, these prologues are substantively utilized in constitutional analysis. The following comparative constitutional survey suggests similar possibilities for the U.S. Preamble.

The United States was the first country to adopt a written constitution, let alone one with a preamble.⁵⁰⁷ Of the almost 200 constitutions in nations around the world today, only about thirty-five have no preamble.⁵⁰⁸ In many of these countries, preambles are not only used to aid courts in the task of constitutional interpretation, but serve as a source for un-enumerated rights.⁵⁰⁹ A few questions can and should be asked regarding the preambles of other countries: Are they similar to the U.S. Preamble? Can these numerous preambles be categorized? Do these categorizations shape how preambles are viewed by adjudicative bodies? What sort of weight are preambles given by countries’ constitutional courts? Though the answers to

504. Chemerinsky, *supra* note 502.

505. Orgad, *supra* note 48, at 714.

506. See generally *Oxford Constitutions of the World*, OXFORD CONST. L., <http://oxcon.ouplaw.com/home/OCW> (last visited Sept. 19, 2018).

507. In 1849, the constitutional monarchy of Denmark was the first to use the written United States Constitution as a model, although with no preamble. See generally *The Constitutional Act of Denmark*, DANISH PARLIAMENT, <https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark> (last visited Sept. 19, 2018).

508. Though sources differ as to the exact number of countries whose constitutions begin with a preamble, the number is well over one hundred. Vladan Kutlesic, *Preambles of Constitutions: A Comparative Study of 194 Current Constitutions*, CONST. MAKING & CONST. CHANGE (Nov. 1, 2016), <http://constitutional-change.com/preambles-of-constitutions-a-comparative-study-of-194-current-constitutions> (stating that 134 of the 194 studied countries have constitutional preambles). See also WIM VOERMANS ET AL., CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS (2017) (noting that 85% of studied constitutions have a preamble; 158/190); ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD (2014); Tom Ginsburg et al., “*We the Peoples*”: *The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT’L L. REV. 101, 106, 109 (2014) (finding that of a sample of 742 coded constitutions, 596 contained preambles; 80% of all constitutions have a preamble).

509. Orgad, *supra* note 48, at 715.

these questions do not create legal mandates for how the United States should treat its Preamble, they give reason to reconsider the Preamble's possible roles in federal constitutional law.

While it is clear that the United States Constitution has exerted influence in many countries, it is difficult to conclude how many preambles follow or share language found in the U.S. Preamble.⁵¹⁰ “We the People” is the most common phrase among preambles (found in 14.7% of all preambles).⁵¹¹ “Establish justice” is used in the preambles of Iraq and Spain; “blessing of liberty” or “secure the blessings of liberty” appears in Argentina, Bhutan, Ghana, and Japan; the preambles of Argentina, Bhutan, the Philippines, and Venezuela use “ordain” as the performative verb of enactment. Many other close similarities can be found (e.g., many preambles include the word “justice”). While it is hard to categorize and capture all such relationships, the Preamble seems to be taken as an integral part of the substance of the Constitution when it is being used as a model.

Preambles vary significantly in length, language, and purpose. For example, the preamble of Greece is merely eighteen words.⁵¹² In contrast, Iran's preamble stretches on for 3,002 words.⁵¹³ Some preambles refer heavily to deity.⁵¹⁴ Others read as historical narratives.⁵¹⁵ Given this variety, it is difficult to categorize preambles.

That being said, a few attempts at classification have been made. Liav Orgad has grouped preambles into five categories: 1) preambles that concern the concept of sovereignty; 2) preambles that contain a historical narrative; 3) preambles that describe supreme goals; 4) preambles that establish national identity; and 5) preambles that discuss deity.⁵¹⁶ And Justin Frosini has categorized preambles into the following groups: 1) preambles that serve as a gateway of entry for other sources of law; 2) preambles that stress the sovereignty of the people; 3) preambles that establish the form of state and form of government; 4) preambles rich in historical references; 5) preambles

510. Ginsburg et al., *supra* note 508, at 119.

511. This study identified 596 preambles in 742 coded constitutions. This total includes repeat countries, or revisions of preambles from the same country.

512. 1975 SYNTAGMA [SYN.] [CONST.] pml. (Greece).

513. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] pml. [1980]. *See also* Ginsburg et al., *supra* note 508, at 110.

514. *See, e.g.*, BUNDESVERFASSUNG [BV] [CONST.] April 18, 1999, pml. (Switz.); pml., CONSTITUCIÓN NACIONAL [CONST. NAT'L] (Arg.).

515. *See, e.g.*, S. AFR. CONST. of 1996; КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] June 28, 1996, pml. (Ukraine).

516. Orgad, *supra* note 48, at 716–18.

that reference God; and 6) preambles that establish territorial identity.⁵¹⁷ As Professor Frosini rightly notes, many preambles will fall into multiple categories,⁵¹⁸ not only due to ambiguity but also because some clearly serve more than one of these purposes. He adds, “[t]he truth of the matter is that these classifications are useful for knowing more about what preambles contain, but their usefulness essentially stops there,”⁵¹⁹ for it does not appear that a preamble’s language or length significantly shapes what weight preambles are given by societies and courts.⁵²⁰

Though a preamble’s classification may do little to uncover its relevancy to the courts, some of their identifiable functions are clearly substantively legal. A review of select countries’ constitutional decisions quickly reveals that some courts place significant legal emphasis on preambles in deciding questions of constitutionality, and that “preambles do not simply contain flowery introductory language, but are present to remind the reader why the constitution was approved in the first place.”⁵²¹

1. South Africa

South Africa’s current constitution was adopted in 1996, replacing the 1993 interim constitution. The newer constitution contains a provision that requires courts to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” when interpreting the Bill of Rights.⁵²² A similar aim is discussed in the 1996 and 1993 preambles,⁵²³ and both preambles have been given authoritative weight by

517. Frosini, *supra* note 497, at 605.

518. *Id.* (“Indeed, it can often be very difficult to make the distinction, for example, between references to the identity of a nation or territory and a historical narration.”).

519. *Id.*

520. As will be shown below, there are exceptions to the general rule. For example, the content of South Africa’s preamble, which contains specific commands and a rich historical narrative, clearly has influenced the court’s decision making.

521. Frosini, *supra* note 497, at 603.

522. S. AFR. CONST. of 1996.

523. *Id.*

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to: Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Id. S. AFR. (INTERIM) CONST., 1993.

Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

Id.

the South African Constitutional Court.⁵²⁴ For example, in *Mhlungu*—referencing the 1993 preamble—Justice Sachs stated:

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.⁵²⁵

In *Makwanyane*, where the court struck down capital punishment as unconstitutional, the court reaffirmed this principle:

In broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution. . . . The preamble, postamble and the principles of freedom and equality espoused in sections 8, 33 and 35 of the Constitution, require such an amplitude of vision.⁵²⁶

South Africa's preamble sets forth a paramount agenda for the government. The constitutional court will no doubt be asked in future cases to measure the strengths and weaknesses of many claims based on its mandates. Those opinions may well show how preambles can be judicially used for controlling legal guidance in developing an explicit and more perfecting preamble jurisprudence.

2. Germany

Although the preamble to *Grundgesetz*, the constitution of the Bundesrepublik Deutschland (Federal Republic of Germany), plays a lesser role in German constitutional interpretation, it has been used to support court holdings. Quite early in its history, the German Court held that the Basic Law's preamble was binding and justiciable law. In 1956, for instance, the Court held the concluding line of this preamble, which called upon “the entire German people . . . to accomplish, by free self-determination, the unity and freedom of Germany”⁵²⁷ to constitute a formal “reunification command” (*Wiedervereinigungsgebot*) that was binding on all organs of government.⁵²⁸

524. ANNE HUGHES, HUMAN DIGNITY AND FUNDAMENTAL RIGHTS IN SOUTH AFRICA AND IRELAND 17–21 (2014); Lourens M. du Plessis, *The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court's Approach to Constitutional Interpretation*, 62 SASK. L. REV. 299, 314–15 (1999) (noting that the constitution's preamble is “consulted quite readily”).

525. *S v. Mhlungu* 1995 (3) SA (CC) at 867 para. 112 (S. Afr.).

526. *S v. Makwanyane* 1995 (3) SA (CC) at 391 para. 362–63 (S. Afr.). For a more recent example where the Constitutional Court discussed the value of the Preamble, see *City of Tshwane Metropolitan Municipality v. Afriform and Another* 2016 ZACC 19 (S Afr.).

527. GRUNDGESETZ [GG] [BASIC LAW]. In the original: “Das gesamte Deutsche Volk bleibt aufgefordert, in freier Selbstbestimmung die Einheit und Freiheit Deutschlands zu vollenden.”

528. Communist Party Case, BVerfG, Aug. 17, 1956, 5 BVERFGE 85, 128–29 (Ger.). In that case,

In 1973, the Court clarified that the preamble required the federal government to make reunification an explicit, non-negotiable aim of its foreign policy.⁵²⁹ Even before the Berlin Wall came down, the Court similarly invoked the preamble in support of its holding that anyone holding German citizenship in the German Democratic Republic (East Germany) was a “German citizen” under the West German constitution as well.⁵³⁰

Although German reunification is now a well-established fact, the Court continues to invoke the preamble as binding law in other contexts such as European integration. In 2009, the Court referenced the preamble and thereby reasoned that it was the will of the German people to be part of the EU. Relevant language in the preamble included: “not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner of a united Europe.”⁵³¹ Relying on that language, the Court determined that Germany’s constitution and the Treaty of Lisbon (clarifying and solidifying the basis for the European Union) were not in conflict, relieving Germany of the need to pursue a constitutional amendment.⁵³²

3. India

The Supreme Court of India has regularly turned to its preamble to make sense of its constitution. When the preamble was adopted, one of the members of the Assembly, Thakurdas Bhargava, famously said, “[t]he Preamble is the most precious part of the Constitution. It is the soul of the Constitution. It is a key to the Constitution. It is a jewel set in the Constitution.”⁵³³

the Court concluded that banning the German Communist Party would not violate the preamble’s command to pursue reunification.

529. Basic East-West Treaty Case, 1973 BVerfG, 36 BVERFGE 1, 17–18 (Ger.). For more on this case, see JUSTIN COLLINGS, *DEMOCRACY’S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001*, at 134–44 (2015).

530. BVerfG, Oct. 21, 1987, 77 BVERFGE 137, 148–53 (Ger.). See also COLLINGS, *supra* note 529, at 219–22.

531. *Id.* See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] pmbL., translation at https://www.gesetze-im-internet.de/englisch_gg. Though the court could have reached its decision without reference to the preamble. See Micheal Silagi, *The Preamble of the German Grundgesetz: Constitutional Status and Importance of Preambles in German Law*, 52 ACTA JURIDICA HUNGARICA 54, 60–61 (2011). For a discussion involving the preamble’s relevancy in German constitutional law, see COLLINGS, *supra* note 529, at 134–44.

532. BVerfG, June 30, 2009, 2 BvE 2/08, translated at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html. I thank Justin Collings for drawing these German cases to my attention and for his expertise in helping formulate these two paragraphs.

533. Colonel M.M. Nehru, *Is Preamble a Part of the Constituion*, NO FRILLS ACADEMY, <http://nofrillsacademy.com/preamble-part-constitution.html> (last visited Sept. 19, 2018) (attributing the

As a general rule of interpretation, India's Supreme Court has announced that "if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble."⁵³⁴ In the lengthy opinion of *Kesavananda*, the court detailed the basic structures of the constitution en route to holding that constitutional amendments were subject to judicial review.⁵³⁵ As part of his opinion, Chief Justice Sikri contrasted statutory preambles in general with the Constitution's preamble:

Regarding the use which can be made of the preamble in interpreting an ordinary statute, there is no doubt that it cannot be used to modify the language if the language of the enactment is plain and clear. If the language is not plain and clear, then the preamble may have effect either to extend or restrict the language used in the body of an enactment. . . .

We are, however, not concerned with the interpretation of an ordinary statute. As Sir Alladi Krishnaswami, a most eminent lawyer said, "so far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has[] to be attached to the Preamble in a Constitutional statute." Our Preamble outlines the objectives of the whole Constitution. It expresses "what we had thought or dreamt for so long."⁵³⁶

The Chief Justice continued: "[i]t seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."⁵³⁷

Although foreign judicial decisions such as these do not bind the courts of the United States, the fact that so many countries find value and responsibility in emphasizing the preamble in their constitutional jurisprudence gives good reason for the people of the United States to pause and ask if federal and state courts in the United States might not do well to follow suit. Claimants and litigants should have confidence in making well-reasoned arguments based on the Preamble and on the meanings of its words as recognized by historical considerations, ordinary language analysis, and established judicial precedents. Such argumentation style is common around

quote to Thakurdas Bhargava). See also SHUBHAM BORKAR, NAT'L L. INST. UNIV., ROLE OF PREAMBLE IN THE INTERPRETATION OF CONSTITUTION 12 (2012), <https://www.slideshare.net/ShubhamBorkar3/role-of-preamble-in-the-interpretation-of-constitution-55890820>.

534. *Berubari Union & Others v. Unknown*, (1960) 3 SCR 250 para. 32 (India).

535. *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.*, (1973) 4 SCC 225 (India).

536. *Id.* para. 100–01 (internal citations omitted).

537. *Id.* para. 124. For further discussion on the substantive roles of preambles in other countries, including Bosnia and Herzegovina and Columbia, see Frosini, *supra* note 497, at 618–23.

the globe. There is no reason it should not become more welcomed and commonplace in America, of all places, where the idea of a constitutional preamble was born.

IV. TAKING THE PREAMBLE MORE SERIOUSLY

The impetus behind this article was to critique the 1905 Supreme Court decision in *Jacobson v. Massachusetts* and how it has been generally interpreted. For many reasons, including those which that court could have and should have thought of, its dicta that the Preamble makes no substantive legal contribution to the Constitution should be expressly corrected and counteracted. Its oft-quoted mantra should not be allowed to chill the numerous important legal uses that the Preamble was intended to serve in Constitutional law and politics.

There can be no question that the Preamble has been largely ignored, and it is rarely cited or discussed in legal literature. As Akhil Amar has lamented, “[t]he modern Supreme Court has had almost nothing to say about the Preamble, and modern law students likewise skate past this text with Olympic speed. Earlier generations paid far more attention to the document’s grand opening.”⁵³⁸ “By lavishing some fifty pages on a single constitutional sentence,” Amar hoped, as do I, “to restore the Preamble to its proper place as the Founder’s foundation.”⁵³⁹ It is much more than window-dressing, empty rhetoric, or vague aspirational idealism. This study has so demonstrated, using a number of approaches: historical; textual; political; judicial; linguistic; religious; rhetorical; and comparative.

A. LEGAL ROLES OF THE PREAMBLE IN CONSTITUTIONAL LAW

Throughout this article, several possible legal roles for the Preamble have been identified or intimated. Some are obvious, others not so obvious. Some were intended by the framers, others have come to light as times and needs have changed. The possibility of actualizing any of these legal roles exposes the short-shrift given to the Preamble by the *Jacobson* court. Briefly drawn together, the Preamble can and should serve many legal functions.

In a *clarifying or interpretive* role, it serves as “a signpost, marking the course of constitutional common law.” All words in the Constitution are potentially ambiguous; they need context and purpose in order for their meanings to be discerned and for the living spirit of Constitution to be

538. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 471 (2005).

539. *Id.*

“construed dynamically.”⁵⁴⁰ Where else is that spirit and its principles to be found except in the Preamble?

At the same time, each term in the Constitution must at some point also be constrained. Definitions—by definition—must go far enough, but not too far. The Preamble establishes a *defining* list of purposes that restrain how constitutional powers should or should not be applied in order to accomplish the purposes of the Constitution. As a mission statement, the Preamble sets forth the overriding purposes and undergirding foundations for the government of the United States of America, stating what the nation as a whole stands for.

In the Preamble’s *limiting* function, any interpretation of any section of the Constitution not consonant with this key should be resisted. In this regard, the Preamble limits what can be done. These tasks, and no more, are the duties that the federal government is charged to accomplish, and the people have committed themselves to support.

Because all the purposes set forth in the Preamble are, in theory, equally important, the Preamble also sets forth the elements of a legally *balancing* function. Public actions in support of one of the Preamble’s purposes should not to impinge unnecessarily or improperly on its other purposes. Just as every word of the Constitution carries weight, so does every word of the Preamble.

Recognizing that polarization is natural in the world—hot and cold, left and right, states and union, the individual and the majority—the Preamble sets out to *harmonize* a matrix of competing civic virtues and values. Its more perfect union embraces both defense and welfare, justice and compassion, individual liberty and general order, present needs and future well-being, inherent rights and legislative determinations. This coalescing is found in the connective tissues, channels, and bridges implicit in the Preamble.

Serving a *uniting* function, the Preamble puts in first place the overriding goal of creating “one out of many” (“e pluribus unum”). As the word “union” denotes, a union must somehow unite previously disparate parts; and as the word “parties” connotes, parties are only parts of a whole, partial, incomplete, and partisan. Both the one and the many are essential.

The Preamble engenders this unity by its *performative* function. Its enacting speech-act does something more than simply declare. By it the People bind and commit themselves to each other. By it, they ordain. By it, they establish the United States of America for these specific purposes.

540. Handler, *supra* note 482, at 163.

And in doing this, the Preamble serves *obliging* functions. It obligates all its parties: the people, as they act individually and collectively; the states, as they ratify; and the entrusted officers of the federal government, as they undertake the charge given them to accomplish these purposes. The words “in order to” introduce the specific purposes that are to be achieved by the federal government. The Preamble can thus be understood as a quasi-Bill of Duties. Just as there are no rights without powers, and no powers without duties, the Bill of Rights presupposes a set of correlative duties.⁵⁴¹

Even should the Preamble not bestow, in so many words, enumerated substantive powers upon any branch of government, it serves a *guiding* purpose, directing and ensuring that the legitimate objectives of government are achieved, as well as the good conduct and civic sentiments of every citizen and public servant. Not insignificantly, the Preamble stands as the creative beginning of the Constitution, just as the fulfilling Bill of Rights comes at its end.

In addition to these formative functions, the Preamble also serves *persuasive* functions. It is more than a single-phrase motto or bumper sticker. It engenders cohesion. All can all look at the Preamble, and at each other, in the United States and say this is who we are and what we are striving to achieve together. Preambles serve to motivate, inspire, and focus people on good purposes. As Plato expounded, every constitution of any city-state—“both the permanent body of laws and the individual subdivisions”—must be supplied with preambles; preambles should not be dictatorial nor prescriptive, but persuasive, so as “to make the person to whom the legislator promulgated his law accept his orders.”⁵⁴²

As the primary self-expression of the people, the Preamble serves to shape the national character, to build civic identity, and to define citizen rights and duties. Its ennobling and hopeful spirits are the values of civic virtue which are taken for granted in its communitarian words such as “we the people,” “perfect union,” “common,” “general,” and “and our posterity.” The importance of public virtue was persuasively acknowledged by Aristotle, John Locke, John Winthrop, Adam Smith, Thomas Jefferson, Joseph Smith, and Abraham Lincoln.⁵⁴³ Thus, the Preamble should be

541. See *supra* notes 125–31 and accompanying text. See generally John W. Welch, *The 21st Century as the Century of Duties?* CLARK MEMORANDUM, Spring 2013, at 32–33.

542. PLATO: THE LAWS 723a at 139 (Penguin Books, Trevor J. Saunders trans., 1970). It is possible that this dialogue was known to some of the framers, but unlikely. Either way, Plato’s prescription can carry weight in constitutional theory today.

543. See *supra* notes 128–30 (on Locke), 322–30 (on Story), 334–40 (on Founding Fathers), 343–45 (on Joseph Smith) and accompanying text. On others, see MATTHEW S. HOLLAND, BONDS OF

taught, memorized, and implemented in public schools at all levels. In the Preamble, civic virtue is prominently on display. It should well be posted on governmental buildings, civic monuments, post offices, and all kinds of public facilities.

B. RESPONDING TO OBJECTIONS AGAINST LEGAL ROLES FOR THE PREAMBLE

Of course, despite these many legal purposes, objections can be (and have been) raised against seeing the Preamble as a legal part of the Constitution. These detractions, however, are not dispositive.

The Preamble was a brilliant headline to the Constitution and should be counted today as an integral part of the Constitution.⁵⁴⁴ Justice Harlan, however, declined to “exert any power . . . unless, *apart from the Preamble*, it be found in some express delegation of power or in some power to be properly implied therefrom,”⁵⁴⁵ as if the Preamble were not a part of the Constitution. But it is possible that the purposes of the Preamble might properly serve as the basis for defining implied powers necessary and proper to accomplish the purposes to be achieved through the use of powers granted in the Articles of the Constitution.⁵⁴⁶ What these implied powers or duties might look like is hard to imagine, since we have not even entertained this possibility. Might we come to realize that we have been playing card games with only forty-six cards in our deck?

The assertion that the Preamble is not law and is not “the source of any substantive power”⁵⁴⁷ should also be rethought. This objection derives from the restricted views of legal positivism and legal realism that prevailed at the beginning of the twentieth century. Of course, the Preamble is not a set of commands issued by a sovereign coupled with sanctions—the rubric used at that time to define “law.” The concept of law today, however, is seen as broader and more complex than was assumed under the rigidity of legal realism at the time of *Jacobson*. The Americans’ understanding of law and nature in 1787, however, was “considerably richer, more subtle, and more informed by experience” than was the more strictly rational theories that

AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA—WINTHROP, JEFFERSON, AND LINCOLN (2007); ARISTOTLE: POLITICA 3:1275a–1278b, at 1176–1184 (Random House, Benjamin Jowett trans., 1941); ADAM SMITH, THEORY OF MORAL SENTIMENTS (1759).

544. See *supra* notes 142–44 and accompanying text.

545. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (emphasis added).

546. See *supra* Section I.H. (relevant to the Tenth Amendment).

547. *Jacobson*, 197 U.S. at 22.

guided the French Revolution⁵⁴⁸ or views of the early twentieth century. Of necessity, the objectives of the Preamble need to be read in concert with the powers granted in the Articles of the Constitution, but at the same time, so should the enumerated powers not be read except in conjunction with the legitimizing objectives undertaken in the Preamble. Textual interpretation should be based, first and foremost, on the text itself. The burden of persuasion should fall on the party arguing that the Preamble should be ignored. The presumption should run in favor of the Preamble's relevance, even if the weight it should bear remains to be determined.⁵⁴⁹

Anti-Federalists and others in the ratification debates feared that the Constitution would give too much power to the central government, and that the Preamble would only open the floodgates of power further.⁵⁵⁰ Logically, those concerns assumed that the Preamble would have some legal role that could (like any other provision of the Constitution) be overextended. But practically, those worries have not materialized. Giving the Preamble its rightful role need not open any floodgates of judicial over-expansionism or turn the law into a "purposivists' playground," for permissible readings of ambiguous terms cannot go beyond meanings "that they cannot bear."⁵⁵¹ Any powers implied from or imputed to the Preamble only need to be recognized commensurate with the duties it articulates, and seeing the Preamble as limiting the purposes of the United States to its expressly stated goals also guards against it overstepping its stated roles. Thus, this objection is far from establishing that the Preamble should play no legal role at all. Indeed, as the "key of the Constitution," the Preamble was counted on to serve several legal purposes. If any government action contradicted the general principles announced in the Preamble, it was to be seen as ineffectual and resisted as unconstitutional.

Some have wished that the Preamble was based more on factual "whereas" clauses.⁵⁵² But the Preamble is what we have to work with. Introductions to several other constitutions in the world are based more on

548. Ralph C. Hancock, *Conclusion: Two Revolutions and the Problem of Modern Prudence*, in *THE LEGACY OF THE FRENCH REVOLUTION* 257 (Ralph C. Hancock & L. Gary Lambert eds., 1996). "The American understanding of self-government was buttressed by a rational understanding of natural rights but also grounded in practical political experience and limited by inherent moral and religious beliefs," including seeing the Creator (and not rationality or the legislated will of the people) as "the very source of man's natural equality and liberty." *Id.* at 268. The French were impatient "with the American doctrine of separation of powers," with its "inelegant limiting and balancing" that to them "made no sense," *id.* at 264, but which is the essence of civic virtue as reflected in the Preamble.

549. SCALIA, *supra* note 142, at 218.

550. See, e.g., *supra* notes 147–48 and accompanying text.

551. SCALIA, *supra* note 142, at 35, 218.

552. As the Committee on Detail had initially preferred.

factual “whereas” clauses. But it has been argued that factually based preambles can be more problematic than general preambles: “The fact is that unwritten constitutions often give rise to less argument than those that are written down. It is easier to prove an antecedent fact than to discern the intention of a legislator and the spirit of the written law.”⁵⁵³

Others might object that the terms of the Preamble are too vague, broad, and general to be of legal value, but these concepts are no broader than the ideas of equal protection, separation of powers, due process, free speech, establishment of religion, and many other Constitutional terms. The semantic range of each noun and verb in the Preamble has a discernable linguistic history and a contained legal pedigree to be studied and explicated. Over the course of the past century, Constitutional law has developed workable definitions for many terms relating to civil rights. One should expect it to take a similar time to develop a jurisprudence of the Preamble. Accomplishing that end will not be easy, but it will happen only if the nation keeps that goal clearly in sight. Even if we wander around a bit, one does not throw a compass away just because it only points in one orienting direction.

In sum, the Preamble was carefully composed to include each of its fifty-two words. It served as the unifying legal banner raised confidently and decisively in 1787. Its principles reverberate through the preambles of states and nations around the world. It should not be forgotten or ignored.

553. Alexis de Tocqueville, *On Common Law, on the Mississippi*, in *THE TOCQUEVILLE READER: A LIFE IN LETTERS AND POLITICS* 63 (Oliver Kunz, ed., 2002).

