

THE PREAMBLE

THE PREAMBLE

TABLE OF CONTENTS

	Page
Pre.1 Overview of the Preamble.....	119
Pre.2 Historical Background on the Preamble	120
Pre.3 Legal Effect of the Preamble.....	124

THE PREAMBLE

Pre.1 Overview of the Preamble

Preamble:

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

The Preamble introduces the American Constitution.¹ Its majestic words are the first words people see when they read the Constitution, and it is a common ritual that school children throughout the Nation memorize the Preamble when learning about the Nation's Founding document.² The Preamble itself imparts three central concepts to the reader: (1) the source of power to enact the Constitution (i.e., “the People of the United States”); (2) the broad ends to which the Constitution is “ordain[ed] and establish[ed]”; and (3) the authors' intent for the Constitution to be a legal instrument of lasting “Posterity.”³ Yet, as discussed in more detail below, the Preamble's origins and its continued relevance in constitutional law are unclear and, for many people, unknown.

The uncertainty surrounding the Preamble may be surprising, as the Constitution's introduction would seem central to any debate over the document's meaning. And, in fact, at least two of the Founding Fathers appeared to view the Preamble as an important feature of the document critical to the legal framework it established. James Monroe, as a delegate to the Virginia ratifying convention, referred to the Preamble as the “Key of the Constitution,”⁴ and Alexander Hamilton argued in the *Federalist No. 84* that the existence of the Preamble obviated any need for a bill of rights.⁵ Nonetheless, the Preamble was not the subject of any extensive debate at the Constitutional Convention in Philadelphia, having been added to the Constitution as an apparent afterthought during the final drafting process.⁶

In the years following the Constitution's enactment, the Supreme Court of the United States cited the Preamble in several important judicial decisions,⁷ but the legal weight of the Preamble was largely disclaimed. As Justice Joseph Story noted in his *Commentaries*, the Preamble “never can be resorted to, to enlarge the powers confided to the general government, or any of its departments.”⁸ The Supreme Court subsequently endorsed Justice Story's view of the Preamble, holding in *Jacobson v. Massachusetts* that, while the Constitution's introductory paragraph “indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded by the Court as the source of any substantive power conferred on” the federal government.⁹ Nonetheless, while the Court has not viewed the Preamble as having any direct, substantive legal effect, the Court has referenced the broad

¹ See U.S. CONST. pmb.

² See HENRY CONSERVA, UNDERSTANDING THE CONSTITUTION 7 (2011).

³ U.S. CONST. pmb.

⁴ See JAMES MONROE, THE WRITINGS OF JAMES MONROE: 1778–1794, at 356 (Stanislaus Murray Hamilton ed., 1898).

⁵ See THE FEDERALIST NO. 84 (Alexander Hamilton).

⁶ See Dennis J. Mahoney, *Preamble*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1435 (Leonard W. Levy et al. eds., 1986) (noting “there is no record of any objection to the Preamble as it was reported by the committee”).

⁷ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324–25 (1816); *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 463 (1793) (Wilson, J., concurring); *id.* at 474–75 (Jay, C.J., concurring).

⁸ See I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

⁹ 197 U.S. 11, 22 (1905).

THE PREAMBLE

Pre.1

Overview of the Preamble

precepts of the Constitution’s introduction to confirm and reinforce its interpretation of other provisions within the document.¹⁰ As such, while the Preamble does not have any specific legal status, Justice Story’s observation that the “true office” of the Preamble is “to expound the nature, and extent, and application of the powers actually conferred by the Constitution” appears to capture its import.¹¹ More broadly, while the Preamble may have little significance in a court of law, the preface to the Constitution remains an important part of the Nation’s constitutional dialogue, inspiring and fostering broader understandings of the American system of government. In this vein, this essay considers the origins of the Preamble, exploring its historical roots and how it came to be a part of the Constitution, before discussing the legal and practical significance of the Constitution’s opening words in the time since the ratification.

Pre.2 Historical Background on the Preamble

Preamble:

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

The Preamble’s origins predate the Constitutional Convention—preambles to legal documents were relatively commonplace at the time of the Nation’s Founding. In several English laws that undergird American understandings of constitutional rights, including the Petition of Rights of 1628,¹ the Habeas Corpus Act of 1679,² the Bill of Rights of 1689,³ and the Act of Settlement of 1701,⁴ the British Parliament included prefatory text that explained the law’s objects and historical impetus. The tradition of a legal preamble continued in the New World. The Declarations and Resolves of the First Continental Congress in 1774 included a preamble noting the many grievances the thirteen colonies held against British rule.⁵ Building on this document, in perhaps the only preamble that rivals the fame of the Constitution’s opening lines, the Declaration of Independence of 1776 announced: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

¹⁰ See, e.g., *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015) (justifying the constitutional legitimacy of the modern initiative process by noting that the “fundamental instrument of government derives its authority from “We the People” ”); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (upholding a law criminalizing the provision of certain forms of material support to terrorist organizations against a First and Fifth Amendment challenge, and noting that “The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to ‘provide for the common defence.’”); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (“[A]llowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a ‘more perfect Union.’”); *McCulloch*, 17 U.S. (4 Wheat.) at 403 (rejecting the argument that the powers of the federal government must be exercised in subordination to the states because the federal “government proceeds directly from the people; is ‘ordained and established,’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity’”).

¹¹ See STORY, *supra* note 8, § 462.

¹ 3 Car. 1, c. 1.

² 31 Car. 2, c. 2.

³ 1 W. & M. c. 2.

⁴ 12 & 13 Will. 3, c. 2.

⁵ THE DECLARATIONS AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), *reprinted in* 1 SOURCES AND DOCUMENTS OF THE U.S. CONSTITUTIONS: NATIONAL DOCUMENTS 1492–1800, at 291 (William F. Swindler ed., 1982) [hereinafter SOURCES & DOCUMENTS].

THE PREAMBLE

Pre.2
Historical Background on the Preamble

The Declaration then listed a series of complaints against King George III, before culminating in a formal declaration of the colonies' independence from the British crown.⁶ Moreover, several state constitutions at the time of the founding contained introductory text that echoed many of the themes of the 1776 Declaration.⁷ The Articles of Confederation that preceded the Constitution had their own preamble—authored by “we the undersigned Delegates of the States”—declaring the “Confederation and perpetual Union” of the thirteen former colonies.⁸

While the concept of a preamble was well-known to the Constitution's Framers, little debate occurred at the Philadelphia Convention with respect to whether the Constitution required prefatory text or as to the particular text agreed upon by the delegates. For the first two months of the Convention, no proposal was made to include a preamble in the Constitution's text.⁹ In late July 1787, the Convention's Committee of Detail was formed to prepare a draft of a constitution, and during those deliberations, Committee member Edmund Randolph of Virginia suggested for the first time that “[a] preamble seems proper.”¹⁰ Importantly, however, Randolph considered the Constitution to be a legal, as opposed to a philosophical document, and rejected the idea of having a lengthy “display of theory” to explain “the ends of government and human politics” akin to the Declaration of Independence's preamble or those of several state constitutions.¹¹ Articulating what would ultimately become the Preamble's underlying rationale, Randolph instead argued that any prefatory text to the Constitution should be limited to explaining why the government under the Articles of Confederation was insufficient and why the “establishment of a supreme legislative[,] executive[,] and judiciary” was necessary.¹²

The initial draft of the Constitution's Preamble was, however, fairly brief and did not specify the Constitution's objectives. As released by the Committee of Detail on August 6, 1787, this draft stated: “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.”¹³ While this draft was passed unanimously by the delegates,¹⁴ the Preamble underwent significant changes after the draft Constitution was referred to the Committee of Style on September 8, 1787. Perhaps with the understanding that the inclusion of all thirteen

⁶ See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), *reprinted in* SOURCES & DOCUMENTS, *supra* note 5, at 321.

⁷ See, e.g., MASS. CONST. OF 1780, pmbl. (stating the “objects” of the Massachusetts Constitution of 1780 were “to 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 tranquillity their natural rights, and blessings of life” and, to this end, a government was created “for Ourselves and Posterity”); N.H. CONST. OF 1776, pmbl. (creating a government “for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony”); N.Y. CONST. OF 1777, pmbl. (creating a government “best calculated to secure the rights and liberties of the good people of this State”); PA. CONST. OF 1776, pmbl. (stating the government was created for the “protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights”); VT. CONST. OF 1786, pmbl. (establishing a constitution to “best promote the general happiness of the people of this State, and their posterity”); VA. CONST. OF 1776, Bill of Rights, pmbl. (stating “the representatives of the good people of Virginia” created their bill of rights, which “pertain to them and their posterity”).

⁸ See ARTICLES OF CONFEDERATION OF 1781, pmbl., *reprinted in* SOURCES & DOCUMENTS, *supra* note 5, at 335.

⁹ See Morris D. Forkosch, *Who Are the “People” in the Preamble to the Constitution?*, 19 CASE W. RES. L. REV. 644, 688–89 & n.187 (1968) (examining various records of the first two months of the Philadelphia Convention and concluding that “the Preamble was completely ignored” in the early debates).

¹⁰ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 177.

¹⁴ *Id.* at 193.

THE PREAMBLE

Pre.2

Historical Background on the Preamble

of the states in the Preamble was more precatory than realistic,¹⁵ the Committee of Style, led by Gouverneur Morris of Pennsylvania,¹⁶ replaced the opening phrase of the Constitution with the now-familiar introduction “We, the People of the United States.”¹⁷ Moreover, the Preamble, as altered by Morris, listed six broad goals for the Constitution: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty.”¹⁸ The record from the Philadelphia Convention is silent, however, as to why the Committee of Style altered the Preamble, and there is no evidence of any objection to the changes the Committee made to the final version of the Preamble.¹⁹

While the Preamble did not provoke any further discussion in the Philadelphia Convention, the first words of the Constitution factored prominently in the ratifying debates that followed.²⁰ For instance, Anti-Federalists, led by Patrick Henry of Virginia, criticized the opening lines of the Constitution at the Virginia ratifying convention:

Who authorized them to speak the language of We, the people, instead of We, the States? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.²¹

In response, Edmund Pendleton replied: “[W]ho but the people can delegate powers? Who but the people have a right to form government?”²² Similarly, John Marshall declared that both state and federal “governments derive [their] powers from the people, and each was to act according to the powers given it.”²³ Echoing these themes at the Pennsylvania Ratification Convention, James Wilson defended the “We the People” language, arguing that “all authority is derived from the people” and that the Preamble merely announces the inoffensive principle that “people have a right to do what they please with regard to the government.”²⁴

The Preamble also figured into the written debates over whether to ratify the Constitution. For instance, countering criticisms that the Constitution lacked a bill of rights, Alexander Hamilton in the *Federalist No. 84* quoted the Preamble, arguing it obviated any need for an enumeration of rights.²⁵ An Anti-Federalist pamphlet authored under the pseudonym Brutus, noting the Preamble’s references to a “more perfect union” and “establish[ment] [of] justice,”

¹⁵ See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 394 (1928) (arguing it was “necessary to eliminate from the preamble the names of the specific States; for it could not be known, at the date of the signing of the Preamble and the rest of the Constitution by the delegates, just which of the thirteen States would ratify”).

¹⁶ It is generally acknowledged that the Preamble’s author was Gouverneur Morris, as the language from the federal preamble echoes that of Morris’s home state’s Constitution. See CARL VAN DOREN, *THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES* 160 (1948); see also RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION* 90 (2003) (claiming the “Preamble was the one part of the Constitution that Morris wrote from scratch”).

¹⁷ FARRAND’S RECORDS, *supra* note 10, at 590.

¹⁸ *Id.*

¹⁹ See Dennis J. Mahoney, *Preamble*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1435 (Leonard W. Levy et al. eds., 1986) (noting “there is no record of any objection to the Preamble as it was reported by the committee”).

²⁰ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 7 (2005) (“In the extraordinary extended and inclusive ratification process . . . Americans regularly found themselves discussing the Preamble itself.”).

²¹ See JONATHAN ELLIOT, 3 *ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION* 22 (2d. ed. 1996).

²² See *id.* at 37.

²³ *Id.* at 419.

²⁴ *Id.* at 434–35.

²⁵ See *THE FEDERALIST* No. 84 (Alexander Hamilton) (“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.”).

THE PREAMBLE

Pre.2
Historical Background on the Preamble

argued that the Constitution would result in the invalidation of state laws that interfered with these objectives, resulting in the abolition of “all inferior governments” and giving “the general one complete legislative, executive, and judicial powers to every purpose.”²⁶ While not disputing the need for national union in the wake of their experience under the Articles of Confederation,²⁷ supporters of the Constitution rejected the notion that their proposed government was truly a “national one” because “its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”²⁸

In particular, those writing in support of the Constitution’s ratification cited the Preamble’s language. The Constitution’s goals of “establish[ing] justice” and “secur[ing] the blessings of liberty”—prompted by the perception that state governments at the time of the framing were violating individual liberties, including property rights, through the tyranny of popular majorities²⁹—was a central theme of the *Federalist Papers*. For instance, in the *Federalist No. 51* James Madison described justice as “the end of government . . . [and] civil society” that “has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”³⁰ Similarly, the Constitution’s goals of “ensur[ing] domestic tranquility” and “provid[ing] for the common defence” were noted in the *Federalist Papers* later attributed to John Jay and Alexander Hamilton, who described both the foreign threats and interstate conflicts that faced a disunited America as an argument for ratification.³¹ Finally, the Preamble’s references to the “common defence” and the “general welfare,” which mirrored the language of the Articles of Confederation,³² were understood by Framers like James Madison to underscore that the new federal government under the Constitution would generally provide for the national good better than the government it was replacing.³³ For example, calling the Confederation’s efforts to provide for the “common defense and general welfare” an “ill-founded and illusory” experiment, Alexander Hamilton in the *Federalist No. 23* argued for

²⁶ See *Brutus No. XII* (Feb. 7 & 14, 1788), reprinted in *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO: JANUARY TO AUGUST 1788*, at 174 (Bernard Bailyn ed., 1993).

²⁷ See *THE FEDERALIST NO. 5* (John Jay) (“[W]eakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves.”).

²⁸ See *THE FEDERALIST NO. 39* (James Madison).

²⁹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 409–13 (1969) (noting that the Framers’ experience of government under the Articles of Confederation, including the famous debtors’ uprising called Shay’s Rebellion, led to fear that, unless checks were imposed on majority rule, the debtor-majority might infringe the rights of the creditor-minority).

³⁰ See *THE FEDERALIST NO. 51* (James Madison).

³¹ See *THE FEDERALIST NOS. 2–5* (John Jay) (describing foreign dangers posed to America); see *id.* Nos. 6–8, at 21–39 (Alexander Hamilton) (describing concerns over domestic factions and insurrection in America).

³² See *ARTICLES OF CONFEDERATION OF 1781*, art. III, reprinted in *SOURCES & DOCUMENTS*, *supra* note 5, at 335 (“The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves 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 pretense whatever.”); *id.* art. VIII, reprinted in *SOURCES & DOCUMENTS*, *supra* note 5, at 338 (“All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.”).

³³ See Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), reprinted in *2 THE FOUNDERS’ CONSTITUTION* 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987) (contending that the terms “common defence” and “general welfare,” “copied from the Articles of Confederation, were regarded in the new as in the old instrument, . . . as general terms, explained and limited by the subjoined specifications”).

THE PREAMBLE

Pre.2

Historical Background on the Preamble

a central government with the “full power to levy troops; to build and equip fleets; . . . to raise revenues” for an army and navy; and to otherwise manage the “national interest.”³⁴

Nonetheless, there is no historical evidence suggesting the Constitution’s Framers conceived of a Preamble with any substantive legal effect, such as granting power to the new government or conferring rights to those subject to the federal government.³⁵ Instead, the founding generation appeared to view the Constitution’s prefatory text as generally providing the foundation for the text that followed.³⁶ In so doing, the Preamble ultimately reflects three critical understandings that the Framers had about the Constitution. First, the Preamble specified the source of the federal government’s sovereignty as being “the People.”³⁷ Second, the Constitution’s introduction articulated six broad purposes, all grounded in the historical experiences of being governed under the Articles of Confederation.³⁸ Finally, and perhaps most critically, the Preamble, with its conclusion that “this Constitution” was established for “ourselves and our Posterity,” underscored that, unlike the constitutions in Great Britain and elsewhere at the time of the founding, the American Constitution was a written and permanent document that would serve as a stable guide for the new nation.³⁹

Pre.3 Legal Effect of the Preamble

Preamble:

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

In the years following the Constitution’s ratification, the Preamble has had a relatively minor role as a matter of legal doctrine, but an outsized role, particularly outside of the courtroom, in broadly embodying the American constitutional vision. With regard to the legal effect of the Constitution’s preface, in the early years of the Supreme Court, it did reference the Preamble’s words in some of the most important cases interpreting the Constitution. For

³⁴ See THE FEDERALIST No. 23 (Alexander Hamilton).

³⁵ See I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

³⁶ See *id.* (concluding the Preamble’s “true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution”); see also 1 ANNALS OF CONG. 717–19 (1789) (noting several Members of the First Congress described the Preamble as comprising “no part of the Constitution”); Letter from James Madison to Robert S. Garnett (Feb. 11, 1824), in 9 THE WRITINGS OF JAMES MADISON 176–77 (Gaillard Hunt ed., 1910) (“The general terms or phrases used in the introductory propositions . . . 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 specifications . . .”).

³⁷ See STORY, *supra* note 35, § 463 (“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.”).

³⁸ FARRAND’S RECORDS, *supra* note 10, at 137 (“[T]he object of our preamble ought to be to briefly declare, that the present federal government is insufficient to the general happiness [and] that the conviction of this fact gave birth to this convention.”).

³⁹ See Erwin Chemerinsky & Michael Stokes Paulsen, Common Interpretation: The Preamble, Interactive Constitution, CONST. CTR. (last visited Nov. 1, 2018), <https://constitutioncenter.org/interactive-constitution/interpretation/preamble-ic/interps/37> (“[T]he Preamble declares that what the people have ordained and established is ‘this Constitution’—referring, obviously enough, to the written document that the Preamble introduces. . . . The U.S. Constitution contrasts with the arrangement of nations like Great Britain, whose ‘constitution’ is a looser collection of written and unwritten traditions constituting the established practice over time. America has a written constitution, not an unwritten one.”); see also Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 N.W. U. L. REV. 857, 869 (2009) (“[T]his Constitution’ means, each time it is invoked, the written document.”).

THE PREAMBLE

example, in 1793, two Members of the Court cited the Preamble in *Chisholm v. Georgia* to argue that the “people,” in establishing the Constitution, necessarily subjected the State of Georgia to the jurisdiction of the federal courts in exchange for accomplishing the six broad goals listed in the Constitution’s Preamble.¹ Similarly, in *Martin v. Hunter’s Lessee*, the Court relied on the Preamble in concluding that the Constitution permitted the Court to exercise appellate jurisdiction over the final judgments of the highest court of a state when adjudicating questions of federal law, noting that the Constitution was established by the “people of the United States” who, in turn, “had a right to prohibit the states” from exercising any powers that were incompatible with the “objects of the general compact.”² And in *M’Culloch v. Maryland*, Chief Justice John Marshall echoed these themes in upholding the constitutionality of a national bank, quoting the words of the Preamble when arguing for the supremacy of the law of the “people” over the laws of the states.³

Nonetheless, while the Court during the first century of the Nation’s existence referenced the Preamble’s language while interpreting the Constitution, it does not appear that the Court has ever attached any legal weight to the Preamble standing alone. Chief Justice John Jay, while serving as a circuit judge, concluded that a preamble to a legal document cannot be used to abrogate other text within it; instead, introductory language can be used to resolve two competing readings of the text.⁴ Similarly, Justice Joseph Story argued in his *Commentaries* that the Preamble, while generally providing the ability to “expound the nature, and extent, and application” of the powers created by the Constitution, “never can be resorted to, to enlarge the powers confided to the general government, or any of its departments.”⁵

In 1908, the Supreme Court squarely adopted Justice Story’s view of the Preamble in *Jacobson v. Massachusetts*, holding that while the Constitution’s introductory paragraph “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 federal government.⁶ Instead, “[s]uch powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted.”⁷ In this vein, the Court has rarely cited the Preamble in its decisions interpreting the Constitution,⁸ and the Court continues to interpret prefatory text in the Constitution as announcing general purposes of the text that follows.⁹

¹ See 2 U.S. (Dall.) 419, 463 (1793) (Wilson, J., concurring) (“In order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, Judicial power is vested.”); *Id.* at 474–75 (Jay, C.J., concurring) (listing the six “objects” of the Constitution and concluding that a state could be sued by citizens of another state in federal court).

² 14 U.S. (1 Wheat.) 304, 324–25 (1816).

³ 17 U.S. (1 Wheat.) 316, 403–05 (1819) (“The government proceeds directly from the people; is ‘ordained and established,’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.’ The assent of the States, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people.”).

⁴ *Jones v. Walker*, 13 F. Cas. 1059, 1065 (C.C.D. Va. 1800) (Jay, C.J.) (“A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.”).

⁵ See I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

⁶ 197 U.S. 11, 22 (1905).

⁷ *Id.*

⁸ One study concluded that from 1825 to 1990, the Supreme Court cited the Preamble only twenty-four times, mostly in dissenting opinions. See Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 120–21 n.14 (1991).

THE PREAMBLE

Pre.3

Legal Effect of the Preamble

While the Supreme Court has not viewed the Preamble to have much direct, legal effect, the Court continues to rely on the broad precepts of the Constitution's introduction to confirm and reinforce its interpretation of other provisions within the document. For instance, in 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that Arizona's process for redistricting, which was created not by an act of the state legislature, but by a popular initiative, was constitutionally permissible.¹⁰ In doing so, the Court declared that the "fundamental instrument of government derives its authority from 'We the People.'"¹¹ Likewise, the Court referenced the Preamble's language proclaiming that the "United States ordained and established that charter of government in part to 'provide for the common defence'" in upholding a law criminalizing certain forms of material support to terrorist organizations.¹² And in *United States Term Limits, Inc. v. Thornton*, the Court, in concluding that states could not "craft their own qualifications for Congress," reasoned that the alternative would "erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'"¹³

The Preamble appears to have had a more significant influence outside of judicial opinions in statements from the leaders of the political branches of government, often factoring in various debates during the early history of the nation. For instance, during the debates in the First Congress over the constitutionality of the Bank of the United States, congressional leaders, like Elbridge Gerry of the Massachusetts, quoted the Preamble to note the broad "objects for which the Constitution was established" and to justify the establishment of a national bank to promote the "general welfare."¹⁴ And the Preamble featured in early congressional debates over the role of the new government in foreign affairs. For example, during the Tenth Congress, Henry Southard of New Jersey cited the Preamble in arguing in favor of Congress arming and equipping the militia of the United States, recognizing that it was the "object of the establishment of [the federal] government" to provide for the "common defence" against "foreign enemies."¹⁵ Perhaps one of the most famous references to the Preamble in the halls of Congress came in a speech of Senator Daniel Webster in the midst of the nullification debates of the 1830s, wherein he quoted the Preamble to argue that the Constitution was "perpetual and immortal," establishing a union "which shall last through all time."¹⁶

While the Preamble may have had particular relevance to a number of isolated questions before the Congress in the Nation's early years, Presidents and congressional leaders have

For an extensive discussion of the Court's citations to the Preamble, see Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127 (1992).

⁹ Cf. *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."); see also *id.* at 578 n.3 ("[I]n America the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." (internal citations and quotations marks omitted)).

¹⁰ 135 S. Ct. 2652, 2659 (2015).

¹¹ *Id.* at 2675.

¹² *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010); see also *Wayte v. United States*, 470 U.S. 598, 612 (1985) (remarking that the "Framers listed '[providing] for the common defence,' . . . as a motivating purpose for the Constitution" in noting the values promoted by the challenged policy of passively enforcing the selective service registration requirement); *Greer v. Spock*, 424 U.S. 828, 837 (1976) (noting "[o]ne of the very purposes for which the Constitution was ordained and established was to 'provide for the common defence,'" in upholding a law restricting political campaigning on a military base).

¹³ 514 U.S. 779, 838 (1995).

¹⁴ See 2 ANNALS OF CONG. 1947-48 (1791).

¹⁵ See 17 ANNALS OF CONG. 1047 (1807).

¹⁶ Daniel Webster, *The Constitution Not a Compact Between Sovereign States* (Feb. 16, 1833), reprinted in 3 THE WORKS OF DANIEL WEBSTER 452, 471 (9th ed. 1856).

THE PREAMBLE

more generally relied on the Preamble's laudatory phrases in exploring the broader import of the Constitution and the general purposes of American government. For instance, President James Monroe referred to the Preamble as the "Key of the Constitution,"¹⁷ and in his inaugural address, President John Quincy Adams described the "first words" of the Constitution as declaring the purposes for which the government "should be invariably and sacredly devoted."¹⁸ Echoing these themes in his own first inaugural address, President Abraham Lincoln invoked the Preamble's "perfect union" language to note the importance of national unity as the country faced the brink of civil war.¹⁹ In the midst of another constitutional crisis—that which arose in 1937 amid clashes over the constitutionality of the New Deal—President Franklin Roosevelt stated the need to "read and reread the preamble of the Constitution," as its words suggested that the document could be "used as an instrument of progress, and not as a device for prevention of action."²⁰ Decades later, Representative Barbara Jordan, the first African-American woman elected to the House of Representatives from the South, quoted the Preamble in a statement before the House Judiciary Committee as it considered the Articles of Impeachment for President Richard Nixon.²¹ In that statement, she noted that "through the process of amendment, interpretation, and court decision" she had been included in "We, the people" and was now serving as an "inquisitor" aiming to preserve the goals of the Constitution.²²

In more recent years, the political branches have continued to look to the Preamble, not so much for answering specific legal questions, but more so for discussing broad constitutional norms. Indeed, in a 2007 speech on the House floor discussing the modern view of the Preamble, Representative Scott Garrett of New Jersey described the preface to the Constitution as a "condensed version [of] what the Founders were intending in" the Constitution and for the Nation.²³ In this vein, President Ronald Reagan described the Preamble of the Constitution and its opening words of "We the People" as embodying "the genius, the hope, and the promise of America forever and for all mankind."²⁴ And President Barack Obama called the vision of the Preamble's reference to a "more perfect union" to be the vision of a "true United States of America, bound together by a recognition of the common good, [that] guided our country through its darkest hour and helped it re-emerge as a beacon of freedom and equality under law."²⁵ As a result, while the Preamble may have little legal weight in a court of law and may not be dispositive in resolving particular legal disputes before the political branches, the preface to the Constitution remains an important facet of the national dialogue on the country's founding document, inspiring and fostering deeper understandings of the American system of government.

¹⁷ See JAMES MONROE, *THE WRITINGS OF JAMES MONROE: 1778–1794*, at 356 (Stanislaus Murray Hamilton ed., 1898).

¹⁸ John Quincy Adams, Inaugural Address (Mar. 4, 1825), *reprinted in* THE ANNALS OF AMERICA 509 (Abiel Holmes ed., 2d ed. 1829).

¹⁹ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 265 (Roy P. Basler ed., 1953) ("In 1787, one of the declared objects for ordaining and establishing the Constitution, was 'to form a more perfect union.'").

²⁰ See 81 CONG. REC. 84 (1937).

²¹ *Debate on Articles of Impeachment: Hearings on H. Res. 803 Before the H. Comm. on the Judiciary*, 93d Cong. 111 (1974) (statement of Rep. Jordan).

²² *Id.*

²³ 153 CONG. REC. H2722 (daily ed. Mar. 20, 2007) (statement of Rep. Garrett).

²⁴ Proclamation No. 5634, 50 Fed. Reg. 13,622 (Apr. 21, 1987).

²⁵ Proclamation No. 8367, 74 Fed. Reg. 20,861 (May 5, 2009).

