THE PREAMBLE IN CONSTITUTIONAL INTERPRETATION

Dan Himmelfarb[*]

---

[*] Law Clerk to Judge J. Michael Luttig, United States Court of Appeals for the Fourth Circuit. A.B., Princeton University (1987); J.D., Yale Law School (1991).

I. INTRODUCTION

In *Jacobson v. Massachusetts*,[1] a defendant who had been convicted for refusing to comply with a statutory vaccination requirement challenged the constitutionality of the Massachusetts statute. Among other provisions of the Constitution that allegedly rendered the statute invalid was the preamble:[2] the defendant claimed that the statute was "in derogation of the rights secured ... by the Preamble to the

---

[1] 197 U.S. 11 (1905).

[2]

> 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.

U.S. CONST. preamble.

Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its Preamble."[3] Justice Harlan, writing for the Court, rejected this claim summarily:

> We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question . . . is in derogation of rights secured by the Preamble of the Constitution of the United States. 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. Such powers embrace only those expressly granted in the body of the 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.[4]

Justice Harlan did not cite any case law to support this proposition, but he did cite Joseph Story's *Commentaries on the Constitution*.[5] In his *Commentaries*, Story argued that while it is not impermissible for judges to rely on the preamble in order to resolve close questions of constitutional interpretation, it must be remembered that the preamble creates no substantive rights or powers that are not secured or granted by the body of the Constitution. The preamble "is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part," since

> [i]t 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.[6]

---

[3] 197 U.S. at 13-14 (statement of the case).

[4] *Id.* at 22.

[5] *Id.* (*citing* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (2d ed. 1851)).

[6] 1 J. STORY, *supra* note 5, § 459, at 326.

On the other hand,

> we must guard ourselves against an error, which is too often allowed to creep into the discussions upon this subject. The preamble . . . cannot confer any power *per se* . . . . 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.[7]

The observations of Justices Story and Harlan seem unexceptionable, and consistent with general principles of statutory construction.[8] But are they consistent with the practice of the Supreme Court? Have Supreme Court Justices always regarded the preamble as, at most, a means of resolving close questions of constitutional law? Or has the preamble, in the hands of the Supreme Court, taken on a life of its own, and served as an independent basis for defeating or vindicating government action?

The purpose of this article is to describe how the Supreme Court has used (and arguably misused) the preamble since it first began interpreting the Constitution in *Chisholm v. Georgia*.[9] At least three themes emerge from this project. First, while the Framers and ratifiers of the Constitution appear to have foreseen a limited role for the preamble, and while the Supreme Court has for the most part been faithful to this "original understanding," the preamble has occasionally played more than a limited role in the Supreme Court's interpretation

---

[7] *Id.* § 462, at 327; *accord* 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 37, at 62 (1929) ("The value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute. It may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, where the intention of the framers does not clearly and definitely appear. . . . That 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." (citing 1 J. STORY, *supra* note 5, § 459, at 326, and Jacobson v. Massachusetts, 197 U.S. at 22)).

[8] *See, e.g.*, 1A C.D. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 20.03, at 81 (N. Singer 4th ed. 1985) ("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." (footnotes omitted)); 2A *id.* § 47.04, at 127 (N. Singer 4th ed. 1984) ("In case any doubt arises in the enacted part, the preamble may be resorted to help discover the intention of the law maker.").

[9] 2 U.S. (2 Dall.) 419 (1793).

of the Constitution. Second, while the Framers and ratifiers of the Constitution were neither clear nor consistent in their efforts (such as they were) to explain the precise meaning of the various phrases of the preamble (each of which is at least as abstract and open-ended as the due process[10] and equal protection[11] clauses), it appears that many of the Supreme Court Justices who have used the preamble have not felt constrained to use its phrases as they were used by the Framers and ratifiers. Stated differently, these two themes involve first, the *permissibility* of using the preamble in constitutional interpretation, and second, the *meaning* of the preamble's phrases.[12] The third theme emerging from this project is that the preamble can usually be invoked with plausibility by *either* side in virtually every case involving an issue of constitutional law. This is so not only because the preamble's language is so vague but also because the objects of government enumerated in the preamble frequently conflict with one another. This theme is elaborated upon in the conclusion of the article.

Part II of this article describes how the preamble was understood by the Framers and ratifiers of the Constitution. Part III describes how the preamble has been used by the Supreme Court.

---

[10] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[11] *Id.* amend XIV, § 1.

[12] It is interesting, and perhaps revealing, that the first constitutional law case decided by the Supreme Court contains an extended discussion of the preamble. Indeed, the preamble receives a more thorough treatment in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), than in any other Supreme Court decision. What is more, the provision is discussed at length both in the opinion of Justice James Wilson, who not only played a leading role in the Constitutional Convention and in the Pennsylvania Ratifying Convention but is also considered to be a Framer of nearly Madisonian stature, *see* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197 (1913) ("Second to Madison and almost on a par with him was James Wilson."), and in the opinion of Chief Justice John Jay, himself an author of *The Federalist*. Thus, with respect to the question of what the phrases of the preamble mean, the views of two men who were instrumental in framing and ratifying the Constitution are undoubtedly entitled to be given some weight. And with respect to the question of whether the preamble was intended to play any role at all in constitutional interpretation, the fact that both Wilson and Jay devoted a considerable amount of space to the preamble provides at least a partial answer. For a discussion of what Wilson and Jay actually had to say about the preamble, see *infra* text accompanying notes 61-63, 96-98, 113-14, 136-40, 141-43, 157-59 & 208-09; *infra* notes 140 & 173.

II. HOW THE PREAMBLE WAS UNDERSTOOD BY THE FRAMERS AND RATIFIERS OF THE CONSTITUTION

The preamble consists of seven phrases. The first phrase—"We the People"—describes who is consenting to the newly formed government and the source of its legitimacy. The latter six phrases—"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"—describe the objects of the government to which "the People" have consented.[13]

A. THE ORIGINS OF THE PREAMBLE

The origin of three of the preamble's phrases—"provide for the common defence," "promote the General Welfare," and "secure the Blessings of Liberty"—seems clear: they are borrowed from the Articles of Confederation.[14] Indeed, the very first substantive resolution of the Constitutional Convention was that "the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty and general welfare.'"[15]

As for the other phrases of the preamble, their origins are somewhat obscure. There was little discussion of the preamble during the Convention—or at least little that was recorded.[16] The draft of the

---

[13] The preamble is thus consistent with the Declaration of Independence, according to which there are two conditions that render governments legitimate: they must "deriv[e] their . . . powers from the consent of the governed," and they must secure "certain unalienable Rights, . . . among [which] are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). *See generally* W. BERNS, TAKING THE CONSTITUTION SERIOUSLY (1987) (arguing that Constitution must be understood in light of principles of Declaration); H. JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING (1984) (same).

[14] *See* Articles of Confederation, Mar. 1, 1781, art. III ("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 . . . .").

[15] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (M. Farrand rev. ed. 1966) [hereinafter RECORDS] (remarks of Edmund Randolph); *see also id.* at 30, 33, 39, 40, 41.

[16] The only extended discussion of the preamble—or, more precisely, of the *concept* of a preamble—in the records of the Convention appears in a document relating to the work of the Committee of Detail. In that document Edmund Randolph wrote that

> [a] preamble seems proper not for the purpose of designating the ends of

preamble that was reported out of the Committee of Detail (on August 6th) was agreed to unanimously, and without discussion.[17] But that draft included *none* of the six objects included in the final version; and

---

> 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 . . . .

2 *id.* at 137 (emphasis in original). Political theory, in short, was not thought to be a proper concern of a preamble.

Randolph explicitly contrasted an appropriate preamble to the United States Constitution with the preambles of state constitutions, which are essentially statements of political theory. These preambles provide a catalogue of the first principles of government: the natural freedom and equality of men, the purpose of government, the necessity of government by consent, and the right of revolution. Among the first words of the constitution of Randolph's home state of Virginia, for example, are that "all men are by nature equally free and independent, and have certain inherent rights"; that "government is, or ought to be, instituted for the common benefit, protection, and security of the people"; that "all power is vested in, and consequently derived from, the people"; and that "when any government shall be found inadequate or contrary to [its] purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it." VA. CONST. of 1776, Bill of Rights, §§ 1-3, in 7 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS: 1492-1908, at 3812, 3813 (F. Thorpe ed. 1909).

So much for what the preamble to the United States Constitution should *not* be. What is it that the preamble *should* be? "[T]he object of our preamble," according to Randolph, "ought to be briefly to . . . declare, that the present foederal government is insufficient to the general happiness, [and] that the conviction of this fact gave birth to this convention . . . ." 2 RECORDS, *supra* note 15, at 138. It seems fair to infer from this rather modest description of the proper function of the preamble that the only Framer on record to discuss the provision at any length did not foresee a major role for the preamble in matters of constitutional interpretation.

Like the records of the Constitutional Convention, the leading defense of the Constitution is all but silent with respect to the preamble. The single exception is Hamilton's citation of its opening words in support of the proposition that a bill of rights is unnecessary. THE FEDERALIST No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter all references to *The Federalist* are to this edition] (arguing that because federal government will have only those powers that people give it, there is no need to reserve rights).

[17] *See* 2 RECORDS, *supra* note 15, at 193 ("On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention—it was passed unan: in the affirmative"); *see also id.* at 196, 209.

it began with the words "We the people of the States."[18] The final version was reported out of the Committee of Style on September 12th, five days before the Constitution was signed.[19] There is no explanation for the changes.[20]

---

[18] In full, the draft read:

> 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.

Id. at 177. "We the people of the States of . . ." was presumably changed to "We the People of the United States" because the Framers were unable to anticipate which states would ultimately ratify the Constitution. *See* Mahoney, *Preamble*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1435, 1435 (L. Levy, K. Karst & D. Mahoney eds. 1986).

[19] *See* 2 RECORDS, *supra* note 15, at 590.

[20] It is possible that the decision to add the phrase "establish Justice" was based on a comment made by Madison early in the Convention. Responding to Roger Sherman's suggestion that the only "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," 1 *id.* at 133, Madison stated that

> [h]e 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. at 134 (emphasis added).

As for the preamble's "insure domestic Tranquility" language, it is possible that Sherman's "defence . . . agst. internal disputes & a resort to force," *id.* at 133, served as the basis for that phrase. Edmund Randolph made similar comments. *See id.* at 18 (federal government must protect against "dissentions between members of the Union, or seditions in particular states"); *id.* at 19 (under Articles of Confederation, federal government "could not check the quarrals [sic] between states, nor a rebellion in any not having constitutional power Nor means to interpose according to the exigency"); *see also id.* at 24-25.

B. THE INTENDED ROLE OF THE PREAMBLE IN CONSTITUTIONAL INTERPRETATION

That the Framers of the Constitution and the proponents of ratification apparently gave little thought to the preamble, and said little about it, suggests that they did not anticipate that courts would make creative use of its words. But the opponents of ratification were convinced otherwise. A recurring theme of the speeches and essays of the Anti-Federalists is that the broad language of the preamble will be used by federal courts to aggrandize the power of the federal government and restrict—if not obliterate—the powers of state governments. Thus "Brutus":

> The judicial power will operate to effect . . . what is evidently the tendency of the constitution: . . . an entire subversion of the legislative, executive and judicial powers of the individual states. . . .
>
> . . . .
>
> 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 the 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 . . . .[21]

And elsewhere:

> To discover the spirit of the constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the preamble . . . . If the end of the government is to be learned from these words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government. . . . The courts, therefore, will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal

---

[21] *Essays of Brutus* No. 11 (Jan. 31, 1788), in 2 THE COMPLETE ANTI-FEDERALIST 417, 420-21 (H. Storing ed. 1981).

and local affairs of the different parts.

. . . .

The first object . . . is "To form a perfect union [sic]." . . . Now to make a union of this kind perfect, it is necessary to abolish all inferior governments, and to give the general one compleat legislative, executive and judicial powers to every purpose. The courts therefore will establish it as a rule in explaining the constitution to give it such a construction as will best tend to perfect the union or take from the state governments every power of either making or executing laws. The second object is "to establish justice." . . . [U]nder this the courts will in their decisions extend the power of the government to all cases they possibly can . . . .[22]

Other Anti-Federalists voiced similar concerns:

The objects of th[e] government . . . expressed in the pre[amble] . . . include every object for which government was established amongst man, and in every dispute about the powers granted, it is fair to infer that the means are commensurate with the end—and I believe we may venture to assert, that a good judge would not hesitate to draw this inference . . . .[23]

It is possible that the Anti-Federalists' fears were intentionally exaggerated, and expressed largely for rhetorical reasons, since there is some evidence that the proponents of ratification neither expected nor desired that the preamble would be a license for federal judges to give broad constructions to constitutional provisions. Indeed, the "father of the Constitution" himself expressed concern late in his life over the mischievous uses to which the preamble was being put:

---

[22] *Essays of Brutus* No. 12 (Feb. 7, 1788), in *id.* at 422, 424-25.

[23] Clinton, *Notes of Speeches Given by George Clinton before the New York State Ratifying Convention*, in 6 *id.* at 177, 184; *see also Essays of Brutus* No. 5 (Dec. 13, 1787), in 2 *id.* at 388, 389 ("It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution. The great objects . . . are declared in this preamble in general and indefinite terms . . . ."); *cf. Letters from A Countryman* No. 5 (Jan. 17, 1788), in 6 *id.* at 86, 86 (Congress' article I, section 8 power to provide for "common Defence" and "general Welfare" "gives [Congress] power to do any thing at all"); *A Review of the Constitution Proposed by the Late Convention by A Federal Republican* (Oct. 28, 1787), in 3 *id.* at 65, 75 (Congress' article I, section 8 power to provide for "general Welfare" "should have been accurately defined"; it is "too indefinite").

> 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 specifications . . . .[24]

And, arguing against the proposition that the terms "common Defence" and "general Welfare" in article I, section 8 of the Constitution[25] "convey[] to Congress a substantive & indefinite power,"[26] Madison said the following:

> That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by

---

[24] J. MADISON, *Letter to Robert S. Garnett* (Feb. 11, 1824), in 9 THE WRITINGS OF JAMES MADISON 176, 176-77 (G. Hunt ed. 1910). The letter is less than entirely clear as to what misuse or misuses of the preamble Madison had in mind, though it appears that Madison was responding to a suggestion of John Taylor, a United States Senator from Virginia, that the preamble's "We the People" language supports the proposition that the United States government is federal rather than national. The book in which Senator Taylor advanced that argument, *see* J. TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 171-77 (Washington 1823), is the topic of Madison's letter. Madison's general response to Taylor was that the United States government is neither wholly national nor wholly federal but a combination of the two. J. MADISON, *supra*, at 177; *accord* THE FEDERALIST No. 39, at 246 (J. Madison). For a discussion of Supreme Court Justices' views of the relationship between the preamble's "We the People" language, on the one hand, and the question of whether the United States government is federal or national (or both), on the other, see *infra* text accompanying notes 75-86.

[25] "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 . . . ." U.S. CONST. art. I, § 8, cl. 1.

[26] J. MADISON, *Letter to Andrew Stevenson* (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 24, at 411, 411.

them.[27]

This argument was largely a recapitulation of one that Madison had advanced more than thirty years earlier:

> This similarity in the use of these phrases [i.e., "common defence" and "general welfare"], in the two great Federal charters [i.e., the Articles of Confederation and the Constitution], might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said that in the former they were ever understood to be . . . a general grant of power . . . .
>
> . . . .
>
> Whether the exposition of the general phrases . . . would not by degrees consolidate the States into one sovereignty, is a question concerning which . . . [there is] little room for difference of opinion. To consolidate the States into one sovereignty, nothing more can be wanted than to supersede their respective sovereignties in the cases reserved to them, by extending the sovereignty of the United States to all cases of the "general welfare"—that is to say, *to all cases whatever.*[28]

In fact, Madison had already argued for a narrow construction of those terms in *The Federalist*:

> 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

---

[27] *Id.* at 420; *see also id.* at 418-19 ("[T]hese terms copied from the Articles of Confederation, were regarded in the new as in the old instrument, merely as general terms, explained & limited by the subjoined specifications; and therefore requiring no critical attention or studied precaution."); *id.* at 422 ("it was taken for granted that the terms were harmless"); *id.* at 428 (they were "general terms, limited and explained by the particular clauses subjoined to the clause containing them").

[28] J. MADISON, *Report on the Resolutions* (Feb. 7, 1799), in 6 THE WRITINGS OF JAMES MADISON 341, 354-57 (G. Hunt ed. 1906) (emphasis in original); *see also id.* at 356 (broad construction of phrases would "destroy[] the import and force of the particular enumeration of powers which follow these general phrases in the Constitution").

> 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 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.[29]

And if the terms "common Defence" and "general Welfare" were intended to have a narrow meaning as they are used in article I, section 8, and to be qualified by the enumeration of powers in that section, then it seems likely that these two phrases (as well as the others) were intended, *a fortiori*, to have a narrow meaning as they are used in the preamble, and to be qualified by the enumeration of powers that follows the preamble—namely, the seven articles of the Constitution.[30]

---

[29] THE FEDERALIST No. 41, at 262-63 (J. Madison).

[30] There is some evidence that the preamble was not even considered to be a *part* of the Constitution. When Madison proposed that the preamble be amended so as to include a statement of the first principles of government—principles having to do with the purpose of government, the necessity of government by consent, and the right of revolution, *see* 1 ANNALS OF CONG. 451 (J. Gales ed. 1789); *cf. supra* note 16 (discussing analogous provision in Virginia Constitution)—some members of the First Congress objected. South Carolina Representative Thomas Tudor Tucker, for example, responded to Madison's first proposed amendment as follows:

> I presume these propositions are brought forward under the idea of being amendments to the constitution; but can this be esteemed an amendment of the constitution? If I understand what is meant by the introductory paragraph, it is the preamble to the constitution; but *a preamble is no part of the constitution*. It is, to say the best, a useless amendment. For my part, I should as soon think of amending the concluding part, consisting of General Washington's letter to the President of Congress, as the preamble . . . .

1 ANNALS OF CONG., *supra* at 745 (referring to 2 RECORDS, *supra* note 15, at 666) (emphasis added); *accord id.* at 746 (remarks of Virginia Representative John Page) ("the preamble [is] no part of the constitution"). The proposition that the preamble is no more a part of the Constitution than is Washington's letter to Congress has obvious implications for the question of the preamble's appropriate role in constitutional interpretation.

On the other hand, there are suggestions that the phrases of the preamble were intended to be construed broadly, and to provide a basis for the liberal exercise of federal power. Thus Hamilton (without explicitly invoking the preamble) argued that the powers essential to provide for the "common defense," itself one of the "principal purposes to be answered by the union," should "exist *without limitation*," and that "no constitutional shackles can wisely be imposed on the power to which the care of [the safety of nations] is committed."[31] And while it might be argued that Hamilton was merely defending and justifying the broad grants of power to the federal government that are actually enumerated in the Constitution, and not suggesting that the federal government should have powers beyond those specifically mentioned in the text (or even that those powers should be given a broad construction), it does not seem unreasonable for Hamilton's Anti-Federalist readers to have been alarmed—as they must have been—by his rationale for an expansive understanding of "common defense": "the *means* ought to be proportioned to the *end*."[32]

As with "common defense," so with "general welfare": Hamilton argued for a broad construction of the term—and did so in two of his most famous writings. In a draft of his opinion on the constitutionality of a national bank, Hamilton said that the term "general welfare" in article I, section 8 is "of very comprehensive import" and "must necessarily embrace every object of general concern."[33] And in his *Report on Manufactures*, Hamilton argued that the phrase "general welfare" is "as comprehensive as any that could have been used"; if the term were construed narrowly, "numerous exigencies incident to the affairs of a Nation would have been left without a provision."[34]

---

[31] THE FEDERALIST No. 23, at 153 (A. Hamilton) (emphasis added).

[32] *Id.* (emphasis in original); *cf. id.* No. 31, at 194-95 (A. Hamilton) ("As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.").

[33] A. HAMILTON, *Draft of an Opinion of the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 64, 90 (H. Syrett ed. 1965). Hamilton omitted this passage from the final version. *See* A. HAMILTON, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in *id.* at 97, 128.

[34] A. HAMILTON, *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures*, in 10 *id.* at 230, 303. Madison minced no words in expressing his disagreement with Hamilton's understanding of the term "general welfare." In a letter to Henry Lee, Madison asked:

> What think you of the commentary [in Hamilton's *Report on Manufactures*] on

C. THE MEANING OF THE PREAMBLE'S PHRASES

Whether the preamble should be used by courts is one question; *how* it should be used is another. Thus, regardless of how significant a role the preamble was expected to play in constitutional interpretation (assuming it was expected to play any role at all), it would be useful to understand the precise meaning of its words (assuming they have anything approximating a precise meaning). How did the Framers and ratifiers of the Constitution understand the phrases of the preamble?

One way of answering this question is to note that four of the preamble's phrases (at least arguably) correspond to some provision in the text of the Constitution. These are the phrases that have to do with establishing justice,[35] insuring domestic tranquility,[36] providing for the

---

> the terms [sic] "general welfare"?—The federal Govt. has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers—If not only the *means*, but also the *objects* are unlimited, the parchment had better be thrown into the fire at once . . . .

J. MADISON, *Letter to Henry Lee* (Jan. 1, 1792), in 6 THE WRITINGS OF JAMES MADISON, *supra* note 28, at 80, 81 (emphasis in original).

Hamilton was not alone in suggesting that the phrases of the preamble should play a role in constitutional interpretation. One of his contemporaries, in fact, during the course of a defense of the proposed constitution, expressed this view more explicitly. *See Observations upon the proposed plan of Federal Government, with an attempt to answer some of the principal objections that have been made to it. By a Native of Virginia*, in 1 THE WRITINGS OF JAMES MONROE 349, 356 (S.M. Hamilton ed. 1898) ("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 . . . .").

[35] *Compare* U.S. CONST. preamble ("We the People of the United States, in Order to . . . establish Justice, . . . do ordain and establish this Constitution . . . .") *with id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") *and id.* art. III, § 2, cl. 1 ("The judicial Power shall extend . . .").

[36] *Compare id.* preamble ("We the People of the United States, in Order to . . . insure domestic Tranquility, . . . do ordain and establish this Constitution . . . .") *with id.* art. IV, § 4 ("The United States shall . . . protect each of [the States] . . . against domestic Violence.").

common defense,[37] and promoting the general welfare.[38] This fact, in combination with the fact that the delegates to the Constitutional Convention did not devote much time or energy to the preamble, lends plausibility to the idea that the preamble's phrases are merely declarative of powers granted to the government in the text of the Constitution, and that the phrases have a meaning identical to that of their textual counterparts. Thus, establishing justice has to do with the establishment of a federal court system; insuring domestic tranquility has to do with the use of federal power to suppress intrastate rebellion;[39] and providing for the common defense and promoting the general welfare have to do with Congress' taxing power. That these phrases appear in the preamble may merely be an indication that the textual provisions to which they correspond were considered by the Framers to be of fundamental importance, and thus worthy of being rephrased in an introductory section of the Constitution.

But such an answer is incomplete. First, it leaves unresolved the question of the precise meaning of the phrases "form a more perfect

---

[37] *Compare id.* preamble ("We the People of the United States, in Order to . . . provide for the common defence, . . . do ordain and establish this Constitution . . . .") *with id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . of the United States . . . ."). There are, of course, other provisions dealing with national defense. *See id.* art. I, § 8, cls. 11-16 ("war powers"); *id.* art. II, § 2, cl. 1 (President is commander in chief of armed forces); *id.* art. III, § 3 (treason).

[38] *Compare id.* preamble ("We the People of the United States, in Order to . . . promote the general Welfare, . . . do ordain and establish this Constitution . . . .") *with id.* art. I, § 8, cl. 1 ("The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare of the United States . . . .").

[39] There is reason to believe that the preamble's reference to "insur[ing] domestic Tranquility" is connected to the historical experience of Shays' Rebellion. *See* 1 RECORDS, *supra* note 15, at 18 (remarks of Edmund Randolph) (federal government must be able to protect against "seditions in particular states," since one defect of Confederation was difficulty in dealing with "rebellion . . . in Massts."); THE FEDERALIST No. 21, at 139-40 (A. Hamilton) (referring to "tempestuous situation from which Massachusetts has scarcely emerged" in context of discussion of need for "repelling . . . *domestic dangers*" (emphasis added)); *id.* No. 25, at 166 (A. Hamilton) (Massachusetts "was compelled to raise troops to quell a *domestic insurrection*" (emphasis added)).

Union"[40] and "secure the Blessings of Liberty."[41] Second, the meaning of "general Welfare" in article I, section 8 (to which the preamble's "general Welfare" language apparently corresponds) is itself somewhat vague; to say that the federal government has the power to tax for the purposes of providing for the general welfare begs the question

---

[40] One author has suggested that this phrase, too, is "specifically encompassed by or enumerated in the Constitution and its clauses," insofar as "the more perfect Union resulted from the adoption of the Constitution itself, with a national and united effective government emerging from the separate, if not disparate, states." Forkosch, *Does "Secure the Blessings of Liberty" Mandate Governmental Action?*, 1 L. & SOC. ORD. 17, 20 (1970). The claim is unexceptionable. But it remains the case that there is no provision in the body of the Constitution to which the phrase "form a more perfect Union" obviously corresponds—a provision that might provide evidence of the precise meaning of the phrase. (One possible candidate is the supremacy clause. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").)

[41] It cannot be the case, of course, that the phrase corresponds to the first ten amendments to the Constitution, since it was not known at the time of the Framing whether there would be a Bill of Rights. Insofar as it is true that "the Constitution is itself . . . A BILL OF RIGHTS," THE FEDERALIST No. 84, at 515 (A. Hamilton), the phrase "to secure the Blessings of Liberty" might correspond to a specific constitutional provision—namely, the entire text of the Constitution. But this does not help in ascertaining with any precision the meaning of the phrase.

It might be the case, of course, that the phrase was not meant to be defined with any degree of precision. For example, the phrase (and the phrase in the Articles of Confederation on which it is apparently based) might merely be one version of the commonly accepted proposition—a proposition that is perhaps the central principle of liberal political philosophy—that the end of legitimate government is the safeguarding of rights. *See* L. STRAUSS, NATURAL RIGHT AND HISTORY 181-82 (1953) (liberalism is "that political doctrine which regards as the fundamental political fact the rights . . . of man and which identifies the function of the state with the protection . . . of those rights"). *Compare* U.S. CONST. preamble ("We the People of the United States, in Order to . . . secure the Blessings of Liberty . . . , do ordain and establish this Constitution . . . .") *and* Articles of Confederation, Mar. 1, 1781, art. III ("The said States hereby severally enter into a firm league of friendship with each other, for . . . the security of their liberties . . . .") *with* The Declaration of Independence para. 2 (U.S. 1776) ("to secure these [unalienable] rights [to Life, Liberty, and the pursuit of Happiness], Governments are instituted among Men"). This is the view of Walter Berns. *See* Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 51 (R. Goldwin & W. Schambra eds. 1985) (Framers "expected the Constitution . . . to 'secure the blessings of liberty' or, they could just as well have said, to secure the rights with which all men are by nature equally endowed").

of what constitutes the general welfare.[42] Third, it is possible that "establish[ing] Justice" may have meant something other than merely establishing a federal court system.[43]

---

[42] According to Story, the preamble's "general Welfare" language has to do with, among other things, the establishment of a Post Office, *see* 1 J. STORY, *supra* note 5, § 503, at 354-55; *cf.* U.S. CONST. art I, § 8, cl. 7, and the provision of "light-houses, monuments, buoys, and other guards against shipwreck," 1 J. STORY, *supra* note 5, § 504, at 355.

[43] For example, establishing justice may have meant something more precise than establishing a court system: it may have meant establishing a *uniform* system of justice, *see* THE FEDERALIST No. 22, at 150 (A. Hamilton) ("If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."), or it may have meant establishing a *nondiscriminatory* system of justice, *see* 1 J. STORY, *supra* note 5, § 483, at 342 (discussing preamble's "establish Justice" language) ("The natural tendency of every [state] government is to favor its own citizens; and unjust preferences . . . in the administration of justice . . . may reasonably be expected to arise. Popular prejudices, or passions, supposed or real injuries, the predominance of home pursuits and feelings over the comprehensive views of a liberal jurisprudence, will readily achieve the most mischievous projects for this purpose."). Thus, assuming it is appropriate (at a minimum) to use the preamble to resolve close questions of constitutional law, and assuming the phrase "establish Justice" refers to the goal of uniformity or to the goal of nondiscrimination, it would presumably be proper for a court to use this phrase of the preamble to support a decision that fosters uniformity or nondiscrimination.

On the other hand, establishing justice may have meant something *less* precise than establishing a court system. Probably the most famous use of the word "justice" in the debates and writings surrounding the Framing and ratification of the Constitution occurs in *Federalist* 51, where Madison wrote: "Justice is the end of government. It is the end of civil society." THE FEDERALIST No. 51, at 324 (J. Madison). It is clear from the context of the passage that "justice" here means the security of rights. (Indeed, the word appears to have this meaning throughout *The Federalist*. *See* D. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* 62, 66, 83-85, 92, 98-99, 144-45, 162-63 (1984).) Thus, if the word is used in the preamble as it is used in *Federalist* 51, the preamble's claim that the object of the Constitution is to establish justice may be merely another way of saying that the end of government is the safeguarding of rights. *Compare* THE FEDERALIST No. 51, at 324 (J. Madison) ("Justice is the end of government.") *and* U.S. CONST. preamble ("We the People of the United States, in Order to . . . establish Justice, . . . do ordain and establish this Constitution . . . .") *with* The Declaration of Independence para. 2 (U.S. 1776) ("to secure these rights, Governments are instituted among Men"). Justice Story appears to have had a similar understanding of how the word "Justice" is used in the preamble. *See* 1 J. STORY, *supra* note 5, § 482, at 341 ("[I]n a free government [the establishment of justice] lies at the very basis of all its institutions. Without justice being freely, fully, and impartially administered, neither our

It is, in short, far from clear how the various phrases of the preamble were being used by the Framers of the Constitution. Indeed, it is likely that Madison did not want or expect the preamble to play a significant role in constitutional interpretation precisely because of the vagueness of its language. Whether the Supreme Court has been faithful to Madison's expectations is the subject of the next part of this article.

III. HOW THE PREAMBLE HAS BEEN USED BY THE SUPREME COURT

During the last two hundred years Supreme Court Justices have invoked the preamble in dozens of cases. In some of those cases, the preamble's phrases have been used merely for rhetorical (as opposed to interpretive) purposes. More often they have been used to resolve close questions of constitutional interpretation. And occasionally they have effectively been used to create a right or power that does not appear in the body of the Constitution. In any event, the preamble has always been taken sufficiently seriously by Supreme Court Justices to have been used as one of the "tools" of constitutional interpretation. And insofar as this is the case, the suggestion that the preamble is "universally regarded as an empty verbal flourish"[44] seems plainly wrong.

What follows is a description of how Supreme Court Justices have used each of the preamble's seven phrases.

A. "WE THE PEOPLE"

Supreme Court Justices have used the preamble's opening words—"We the People of the United States"—for a variety of purposes. And they have invoked these words in some of the Court's most famous

---

persons, nor our rights, nor our property, can be protected."). Indeed, both Madison and Story suggested that the establishment of justice is the characteristic feature of the movement—central to liberal political philosophy—from the state of nature to civil society. *Compare* THE FEDERALIST No. 51, at 324 (J. Madison) ("Justice . . . is the end of civil society.") *with* 1 J. STORY, *supra* note 5, § 482, at 341 (without establishment of justice, "men may as well return to a state of savage and barbarous independence"). Assuming this interpretation is correct, the preamble appears to contain a redundancy: to "establish Justice" and to "secure the Blessings of Liberty" are identical objects. Moreover, because this understanding of "Justice" is rather abstract, it would be difficult to say when a court is using the phrase in its "intended" sense.

[44] 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 374 (1953).

cases: *Chisholm v. Georgia*,[45] *Martin v. Hunter's Lessee*,[46] *McCulloch v. Maryland*,[47] *Barron v. Baltimore*,[48] and *Dred Scott v. Sandford*.[49]

1. Interpreting the Word "People" in the Bill of Rights

The Supreme Court has used the preamble's "We the People" language as an aid in interpreting those provisions of the Bill of Rights containing the word "people."[50] The word "People" in the preamble, according to the Court, refers to the *national* people—nothing more, nothing less. Thus, when the word "people" appears elsewhere in the Constitution, it refers to a group larger than the people of one or more states but smaller than the people of North America or the world.

In *United States v. Verdugo-Urquidez*,[51] for example, the Court, through Chief Justice Rehnquist, held that the fourth amendment[52] does not apply to a search by American agents of the Mexican residence of a Mexican citizen lacking any voluntary attachment to the United States. The text of the fourth amendment, the Chief Justice wrote,

> by contrast with the Fifth and Sixth Amendments [which use the words "person" and "accused"], extends its reach only to "the people." . . . "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." . . . "[T]he people" protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[53]

---

[45] 2 U.S. (2 Dall.) 419 (1793).

[46] 14 U.S. (1 Wheat.) 304 (1816).

[47] 17 U.S. (4 Wheat.) 316 (1819).

[48] 32 U.S. (7 Pet.) 243 (1833).

[49] 60 U.S. (19 How.) 393 (1857).

[50] *Cf. infra* note 276 (discussing Justice's use of preamble's "secure the Blessings of Liberty" language to interpret word "secured" in what is now 42 U.S.C. § 1983).

[51] 494 U.S. 259 (1990).

[52] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[53] 494 U.S. at 265.

Because the word "People," as it is used in the preamble, clearly refers to a national community, those provisions of the Bill of Rights employing that word—the first,[54] second,[55] ninth,[56] and tenth[57] amendments, as well as the fourth—do not protect individuals who are not members of that community.

The Court used the preamble's "We the People" language for a similar purpose in *Kansas v. Colorado*,[58] where the proper interpretation of the tenth amendment was at issue. One of the questions in that case was whether the government of the United States had authority over the Arkansas River. To support its position that it did, the United States argued as follows:

> All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States.[59]

The problem with this argument, according to Justice Brewer, who wrote for the Court, is that it ignores—or at least misinterprets—the tenth amendment. That amendment does not deal with the distribution of power between the government of the United States and the governments of the states; it deals with the distribution of power among the federal government, the state governments, and the *people*. The "people" to whom the tenth amendment refers, moreover, are, as the preamble makes clear, not the people of a state or states, but the people of the United States. And because the tenth amendment's "people" are the preamble's "People of the United States," it is not the case that all

---

[54] "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[55] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.* amend. II.

[56] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX.

[57] "The 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." *Id.* amend. X.

[58] 206 U.S. 46 (1907).

[59] *Id.* at 89. This is the Court's summary of the government's argument.

powers "national in their scope" must have been delegated to the federal government. Some of these powers may have been reserved to the people of the United States. The federal government, in short, is not the only place in which federal authority may be located. The principal purpose of the tenth amendment, according to Justice Brewer,

> was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States.[60]

Power over matters of national concern, in other words, may be vested in the people of the United States rather than in the government of the United States. Because, as the tenth amendment makes clear, there are not two but three significant entities in the American constitutional system, and because, as the preamble makes clear, the "people" of the tenth amendment are the *national* people, the government's argument fails.

2. The Powers of the Federal Government

The preamble's "We the People" language has also been invoked by Supreme Court Justices to support a broad interpretation of federal authority. When there has been a question as to whether a particular power may be exercised by the federal government, Justices have used the opening words of the preamble to justify its exercise. Thus, in *Chisholm v. Georgia*,[61] where the Court held that a state may be sued in federal court,[62] Chief Justice Jay cited the preamble to demonstrate the supremacy of the federal government:

---

[60] *Id.* at 90.

[61] 2 U.S. (2 Dall.) 419 (1793).

[62] The holding of the case was of course overruled by the eleventh amendment.

> [I]n establishing [the Constitution], the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the *people* of the *United States*, do ordain and establish this Constitution." Here we see the people 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.[63]

And as with (original) jurisdiction over state defendants, so with (appellate) jurisdiction over the judgments of state courts: the opening words of the preamble support a broad construction of article III's grant of jurisdiction to the federal courts. In *Martin v. Hunter's Lessee*,[64] the Court rejected a constitutional challenge to section 25 of the Judiciary Act of 1789,[65] which gave the Supreme Court appellate jurisdiction over the final judgments of states' highest courts in certain cases involving a question of federal law. The opinion of Justice Story, who wrote for the Court, echoed Chief Justice Jay's opinion in *Chisholm*:

> 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; . . . and to give [these powers] a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; [or] to make the powers of the state governments, in given cases, subordinate to those of the nation . . . .[66]

Because, in other words, it was not the states, but rather "the People of the United States," who ordained and established the Constitution, the delegation of power to federal courts, at the expense of state

---

[63] 2 U.S. at 471 (opinion of Jay, C.J.) (emphasis in original).

[64] 14 U.S. (1 Wheat.) 304 (1816).

[65] Ch. 20, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257 (1988)).

[66] 14 U.S. at 324-25.

governments and state courts, is fully consistent with the Constitution. The first three words of the preamble, according to Jay and Story, prove that this is so. Thus, the grant of jurisdiction to federal courts over "Controversies . . . between a State and Citizens of another State"[67] may permissibly be read to include jurisdiction over suits in which a state is the defendant (*Chisholm*), and the grant of jurisdiction to federal courts over "all Cases . . . arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their Authority"[68] may permissibly be read to include jurisdiction over the judgments of state courts (*Martin*).[69]

Elsewhere, however, the preamble's "We the People" language has been used not to demonstrate the supremacy of the federal government vis-à-vis the governments of the states, but rather to demonstrate the *coequality* of the federal and state governments. In *Barron v. Baltimore*,[70] the Court held that the takings clause of the fifth amendment[71] is not a limitation on the power of state governments. Writing for the Court, Chief Justice Marshall invoked the preamble in support of the proposition that the people of the United States can place limits only upon their own government—i.e., the government of the United States:

> 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 of the United States] conferred on th[eir] 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

---

[67] U.S. CONST. art. III, § 2, cl. 1.

[68] *Id.*

[69] Justices have used other phrases from the preamble to justify a broad conception of federal jurisdiction. *See infra* text accompanying notes 113-23 ("form a more perfect Union"); *infra* text accompanying notes 141-47 ("establish Justice"); *infra* text accompanying notes 208-12 ("insure domestic Tranquility").

[70] 32 U.S. (7 Pet.) 243 (1833).

[71] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

by the instrument.[72]

The Chief Justice went on to say that the federal and state governments are "distinct governments, framed by different persons and for different purposes."[73] Thus, while the preamble's opening words were used to vindicate the exercise of federal power in *Chisholm v. Georgia* and *Martin v. Hunter's Lessee*, those words were used to *defeat* the exercise of federal power in *Barron v. Baltimore*.[74]

3. A National (as Opposed to Federal) Government, Operating upon Individuals (as Opposed to States)

The Constitution, unlike the Articles of Confederation, is not a compact among states. It is the people, not the states, who ratified the Constitution.[75] And while the United States government under the Articles was a confederation—which is to say, it operated only upon the states—the United States government under the Constitution is both federal and national—which is to say, it operates both upon the states and upon individuals.[76] That the Constitution created a government drawing its authority from, and operating upon, individuals is a recurring theme in Supreme Court opinions. And to support this proposition, various Justices have cited the preamble's "We the People" language.[77]

---

[72] 32 U.S. at 247.

[73] *Id.*

[74] This passage from *Barron v. Baltimore*, whose holding is of course no longer good law, was quoted in Withers v. Buckley, 61 U.S. (20 How.) 84, 90-91 (1858) (Daniel, J.), which reaffirmed *Barron*, and in Brown v. Walker, 161 U.S. 591, 624-25 (1896) (Shiras, J., dissenting), where the majority expressed the view that a federal statute protecting witnesses against self-incrimination can be invoked in a state proceeding.

[75] *Compare* Articles of Confederation, Mar. 1, 1781, art. III ("The said *States* hereby severally enter into a firm league of friendship with each other . . . ." (emphasis added)) *with* U.S. CONST. preamble ("We the *People* of the United States . . . do ordain and establish this Constitution . . . ." (emphasis added)).

[76] *See* THE FEDERALIST No. 39, at 246 (J. Madison) ("The . . . Constitution . . . is . . . neither a national nor a federal Constitution, but a composition of both.").

[77] That the words "We the People" can be used to support a national—as opposed to federal—interpretation of the Constitution was not lost on the Anti-Federalists, who objected to the very first words of the proposed constitution on precisely these grounds. *See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents* (Dec. 18, 1787), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 145, 157 ("The preamble begins with the words, 'We the people of the United States,' which is the style of a compact between individuals entering into a state of society, and not that of a confederation of states."); Henry,

Thus, in *White v. Hart*,[78] Justice Swayne, writing for the Court, invoked the preamble's opening words in rejecting the claim that because the state of Georgia was not a part of the Union after its secession, it was not bound by the Constitution's prohibition against impairing the obligation of contracts[79] at that time. Justice Swayne reasoned as follows: the government established by the Constitution is a government of individuals, not states; it is therefore impermissible for a state to secede from the Union; the Constitution, consequently, was fully applicable to the state of Georgia at all times. In the Court's words:

> The National Constitution was, as its preamble recites, ordained and established by the people of the United States. It created not a confederacy of States, but a government of individuals. It assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual . . . . For all the purposes of the National government, the people of the United States are an integral, and not a composite mass, and their unity and identity . . . are not affected by their segregation by State lines for the purposes of State government . . . . The doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence. The late rebellion was without any element of right or sanction of law.[80]

And in *Downes v. Bidwell*,[81] where the Court addressed the question of whether Puerto Rico was part of the United States for purposes of

---

Speeches of Patrick Henry in the Virginia State Ratifying Convention (June 4, 1788), in 5 *id.* at 209, 211 ("[W]ho authorised [sic] them to speak the language of, *We, the People*, instead of *We, the States*?" (emphasis in original)); *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 24 (J. Elliot 2d ed. 1836) (remarks of Joseph Taylor at North Carolina Ratifying Convention) ("Had [the preamble] said, *We, the states*, there would have been a federal intention in it. But . . . it is clear that a consolidation is intended." (emphasis in original)).

[78] 80 U.S. (13 Wall.) 646 (1872).

[79] *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

[80] 80 U.S. at 650; *cf. infra* note 123 (discussing use of preamble's "more perfect Union" language to support illegality of secession).

[81] 182 U.S. 244 (1901).

the uniformity clause,[82] Justice Harlan, writing in dissent, invoked the preamble's "We the People" language to support the proposition that the Constitution is fully applicable to territories (no less than to states). For Justice Harlan, there is no distinction between states and territories for purposes of the uniformity clause, since the relevant unit in the constitutional scheme is the individual rather than the state. Responding to the suggestion that the Constitution operates only upon states, Justice Harlan wrote as follows:

> In reference to the doctrine that the Constitution was established by and for the States as distinct political organizations, Mr. Webster said: "The Constitution itself in its very front refutes that. It declares that it is ordained and established by the People of the United States. . . . [I]t pronounces that it was established by the people of the United States in the aggregate. Doubtless, the people of the several States, taken collectively, constitute the people of the United States. But it is in their collective capacity, it is as all the people of the United States, that they established the Constitution."
>
> . . . I cannot assent to the proposition . . . that the National Government is a government of or by the States in union, and that the prohibitions and limitations of the Constitution are addressed only to the States. . . . [Ours] is a government created by the People of the United States, . . . and supreme over States and individuals . . . . The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States.[83]

Justice Harlan also quoted from *McCulloch v. Maryland*,[84] where the Court upheld the constitutionality of the National Bank, and Chief Justice Marshall wrote the following words in response to the suggestion that the powers of the federal government are delegated to it by the states:

> "The Government proceeds directly from the people; [it] is 'ordained and established' in the name of the people . . . . The

---

[82] "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

[83] 182 U.S. at 377-78 (Harlan, J., dissenting).

[84] 17 U.S. (4 Wheat.) 316 (1819).

> Government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them . . . ."[85]

The first three words of the preamble thus serve to distinguish the Union from the Confederation.[86]

4. Judicial Review

The Court has invoked the preamble's "We the People" language to legitimize the exercise of judicial review. Since the Constitution was framed and ratified by the people themselves, while an act of Congress is enacted by the representatives of the people, the law of the agents must give way to the law of the principals when there is a conflict between the two. This is of course the argument of *Federalist* 78.[87]

In *Carter v. Carter Coal Co.*,[88] the Court held that the Bituminous Coal Conservation Act of 1935,[89] which sought to regulate the coal industry, was beyond Congress' enumerated powers, and thus unconstitutional. Justice Sutherland, writing for the Court, quoted the opening words of the Constitution to justify the Court's invalidation of

---

[85] 182 U.S. at 376-77 (quoting 17 U.S. at 403-05).

[86] *See* 1 J. STORY, *supra* note 5, § 463, at 328 ("[T]his 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 . . . .").

[87]

> [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> . . . [T]he power of the people is superior to [the power of the legislature] . . . . [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

THE FEDERALIST No. 78, at 467-68 (A. Hamilton); *accord* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803) (Marshall, C.J.). *But see* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986) (criticizing *Marbury* and *Federalist* 78). Neither Hamilton, in *Federalist* 78, nor Marshall, in *Marbury*, referred to the opening words of the preamble.

[88] 298 U.S. 238 (1936).

[89] Ch. 824, 49 Stat. 991 (repealed 1937).

the statute:

> [T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. "We the people of the United States," it says, "do ordain and establish this Constitution . . ." . . . . [T]he supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal . . . must apply the supreme law and reject the inferior statute whenever the two conflict.[90]

But the preamble has also been used to *call into question* the exercise of judicial review. Dissenting in *Thornburgh v. American College of Obstetricians & Gynecologists*,[91] where the Court invalidated portions of a Pennsylvania abortion law, Justice White complained that the rationale for judicial invalidation of statutes is inapplicable when the "higher law" in light of which a given statute is judged has not in fact gained the assent of the people, but instead is merely the creation of judges. "Because the Constitution itself," wrote Justice White,

> is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But [judicial] decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made . . . .[92]

Thus, for those who read the Constitution broadly, the opening

---

[90] 298 U.S. at 296-97.

[91] 476 U.S. 747 (1986).

[92] *Id.* at 787 (White, J., dissenting).

words of the preamble can justify an active judiciary, while for those who read the document narrowly, the same words mandate judicial restraint.

5. Sovereign Immunity

The first three words of the Constitution reflect the fact that in the American constitutional system the people themselves are sovereign. Conflicts between the people and their government, therefore, should (at least in theory) be resolved in favor of the people. The legitimacy of judicial review is one corollary of the idea of popular sovereignty; the possible *il*legitimacy of sovereign immunity is another. For if governments are not sovereign, the notion that they are immune from suit is problematic. This difficulty has not gone unnoticed by Supreme Court Justices.

Thus, in a dissenting opinion in *Employees v. Missouri Public Health Department*,[93] where the majority held that the eleventh amendment[94] bars suits for overtime pay by certain state employees, Justice Brennan challenged the doctrine of sovereign immunity by invoking the preamble. "'We the People,'" wrote Justice Brennan, "formed the governments of the several States. Under our constitutional system, therefore, a State is not the sovereign of its people. Rather, its people are sovereign. Our discomfort with sovereign immunity . . . is thus entirely natural."[95]

Invoking the preamble to challenge the doctrine of sovereign immunity has a distinguished history. The first Supreme Court Justice to make such use of the preamble was Justice Wilson, in *Chisholm v. Georgia*,[96] where the Court held that a state is amenable to suit in federal court. Since it is the people of the United States who are sovereign, and not the government of the United States or the governments of the respective states, it is perfectly legitimate, according to Justice Wilson, for the people to ordain and establish a constitution under which a state may be sued in federal court. Wilson first discussed

---

[93] 411 U.S. 279 (1973).

[94] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[95] 411 U.S. at 322-23 (Brennan, J., dissenting). Justice Brennan also used the preamble's "establish Justice" language to challenge the doctrine of sovereign immunity in general and a broad interpretation of the eleventh amendment in particular. *See infra* text accompanying notes 180-83.

[96] 2 U.S. (2 Dall.) 419 (1793).

the confusion surrounding the question of sovereignty in general:

> Is a toast asked? "The *United States*," instead of the "People of the *United States*," is the toast given. This is not *politically* correct. The toast . . . presents only the *artificial* person, instead of the *natural* person, who spoke it into excellence. A *State* I cheerfully admit, is the noblest work of *Man*: But, *Man himself*, free and honest, is, I speak as to this world, the noblest work of GOD.[97]

The Justice then moved on to the question of sovereign immunity in particular, invoking the preamble along the way:

> [O]ur national scene opens with the most magnificent object, which the nation could present. "The PEOPLE of the *United States*" are the first personages introduced. Who were those people? They were the citizens of thirteen States . . . . *[T]hose people* . . . ordained and established the present Constitution. By that Constitution . . . *Judicial* power is vested.
>
> . . . *[C]ould* the *people* of those States . . . bind those *States* . . . by the . . . Judicial power so vested? If the principles, on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer.[98]

The political theory of the American Constitution in general, and the preamble in particular, call into question the doctrine of sovereign immunity.

6. Who is a Citizen?

Justices have also invoked the preamble's "We the People" language in cases involving the question of who qualifies as a citizen. Thus, in both the majority and a dissenting opinion in *Dred Scott v. Sandford*,[99] Justices used the preamble's opening words as an aid in deciding whether blacks were citizens for purposes of federal diversity jurisdiction.[100]

---

[97] *Id.* at 462-63 (opinion of Wilson, J.) (emphasis in original).

[98] *Id.* at 463 (emphasis in original).

[99] 60 U.S. (19 How.) 393 (1857).

[100] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."); Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version at 28 U.S.C. § 1332(a)(1) (1988)) ("[T]he circuit

For Chief Justice Taney, writing for the majority, they were not, since the citizens to whom the diversity provisions of the Constitution and the Judiciary Act refer are "the People of the United States" mentioned in the preamble, and blacks were not a part of that group. In the words of the Chief Justice:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who . . . form the sovereignty . . . . They are what we familiarly call the "sovereign people," and every citizen is one of this people . . . . The question before us is, whether the class of persons described in the plea in abatement [i.e., blacks] compose a portion of this people, and are constituent members of this sovereignty? We think they are not . . . .[101]

Elsewhere the Chief Justice wrote as follows:

> The brief preamble sets forth by whom [the Constitution] was formed, for what purposes, and for whose benefit and protection. It declares that it was formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States . . . . It does not define . . . who shall be regarded as . . . one of the people. It uses them in terms so well understood, that no further description or definition was necessary.
>
> . . . [T]he negro race [w]as a separate class of persons . . . . [T]hey were not regarded as a portion of the people or citizens of the Government then formed.[102]

In his dissenting opinion, Justice Curtis started from the same premise, but reached the opposite conclusion. For him, blacks *were* citizens, precisely because they were included among the people who ordained and established the Constitution. Justice Curtis argued as

---

courts shall have original cognizance . . . of all suits . . . between a citizen of the State where the suit is brought, and a citizen of another State.").

[101] 60 U.S. at 404.

[102] *Id.* at 410-11 (emphasis in original). The Court's holding with respect to the issue of citizenship was of course overruled by the fourteenth amendment. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

follows:

> Th[e] Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, . . . colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States" by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.[103]

And elsewhere:

> It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.[104]

The preamble thus demonstrates that blacks are citizens.[105]

---

[103] 60 U.S. at 576 (Curtis, J., dissenting).

[104] *Id.* at 582.

[105] That membership among the preamble's "People of the United States" is a sufficient condition for citizenship is also the view of Chief Justice Waite, who wrote for a unanimous Court in Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875). The Chief

B. "[F]ORM A MORE PERFECT UNION"

Those Supreme Court Justices who have invoked the phrase "form a more perfect Union" have not used the words with any degree of consistency.

1. The Commerce Clause

In view of the controversy surrounding the commerce clause[106]—or more specifically, the controversy surrounding the question of what precisely the commerce clause does and does not permit Congress to do—it is not surprising that those interpreting the clause have looked beyond the specific words of the provision. One such interpretive aid has been the preamble's "form a more perfect Union" language. That phrase, however, has led Supreme Court Justices in more than one direction—indeed, it has led them in opposite directions.

In the *Lottery Case*,[107] for example, the Court upheld the constitutionality of a federal law prohibiting the interstate transportation of lottery tickets, holding that Congress' power to make such a law derived from the commerce clause. Dissenting for himself and three other Justices, Chief Justice Fuller argued that Congress' power to *regulate* commerce does not embody the power to *prohibit* it. The purpose of the commerce clause, according to the Chief Justice, was to prevent interstate discrimination:

> [U]nder the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power

---

Justice used the following words:

> Looking at the Constitution itself we find that it was ordained and established by "the people of the United States," and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain . . . .
>
> Whoever, then, was one of the people of . . . these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption.

Id. at 166-67 (footnote omitted). The Court went on to hold that while women are citizens, the privileges and immunities clause of the fourteenth amendment does not guarantee them the right to vote, since the right to vote is not an incident of citizenship.

[106] "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

[107] 188 U.S. 321 (1903).

> to deal with commerce as between themselves to the General Government it was undoubtedly in order *to form a more perfect union* by freeing such commerce from state discrimination, and not to transfer the power of restriction.[108]

The Chief Justice's use of the phrase "more perfect Union" in this passage may appear to be rather casual; but its implications are potentially far-reaching. For the meaning that Chief Justice Fuller appears to have given the phrase suggests that, for him, the difference between the Confederation and the Union is one of degree and not of kind: the purpose of the commerce clause—and perhaps of the Constitution itself—was merely to make the Confederation function better, not to change the fundamental character of that government. The commerce clause, in short, should be interpreted narrowly.

Yet thirteen years earlier, the identical Justice (Fuller) had used the identical phrase ("more perfect Union") to give the identical constitutional provision (the commerce clause) a *broad* interpretation. Writing for the majority in *Leisy v. Hardin*,[109] the Chief Justice invalidated an Iowa statute prohibiting the import of liquor:

> To concede to a State the power to exclude, directly or indirectly, articles [of commerce], without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that *more perfect Union* which the Constitution was adopted to create.[110]

Thus, conceding that "there is difficulty in drawing the line between the municipal powers of the [state] government and the commercial powers of the [federal government],"[111] Chief Justice Fuller used the preamble to help him draw that line. Because the Constitution was established in order to "form a more perfect Union," interpreters of the commerce

---

[108] *Id.* at 371-72 (Fuller, C.J., dissenting) (emphasis added).

[109] 135 U.S. 100 (1890).

[110] *Id.* at 125 (emphasis added). These words were quoted by the Court in Schollenberger v. Pennsylvania, 171 U.S. 1, 13 (1898) (Peckham, J.), to support its invalidation of a Pennsylvania statute prohibiting the import of margarine.

[111] 135 U.S. at 125.

clause should err on the side of reading it broadly—i.e., they should err on the side of the federal government.

What accounts for the difference? It may be a matter of where one places the emphasis. In his dissenting opinion in the *Lottery Case*, Chief Justice Fuller appears to have read the phrase as saying that the Constitution was established merely in order to "form a *more perfect* Union"—i.e., to improve upon the Confederation. Hence the difference between the Confederation and the Union is one of degree only. But in *Leisy*, the Chief Justice appears to have read the phrase as saying that the Constitution was established in order to "form a more perfect *Union*"—i.e., to change the fundamental character of the government. Hence the difference between the Confederation and the Union is one of kind.[112] Such interpretive manipulation is probably inevitable when one is dealing with language as imprecise as that of the preamble.

2. The Relative Strengths of the Federal and State Governments

That the phrase "form a more perfect Union" can be used to resolve close questions in favor either of the federal government or of a state government, depending upon where one places the emphasis, is reflected in a number of other Supreme Court opinions, in a number of areas of constitutional law. Thus, in *Chisholm v. Georgia*,[113] where the Court held that a state may be sued by an individual in federal court, Justice Wilson used the preamble's "more perfect Union" language to demonstrate that one purpose of the Constitution was to increase the strength of the federal government vis-à-vis state governments:

> One of [the Constitution's] declared objects is, to form an union more perfect, than, before that time, had been formed. Before that time, the *Union* possessed Legislative, but *uninforced* [sic] Legislative power over the States. Nothing could be more natural than to *intend* that this Legislative power should be

---

[112] *Cf. Essays of Brutus* No. 12, *supra* note 22, at 425 ("The first object [declared in the preamble] . . . is 'To form a perfect union [sic].' . . . Now to make a union of this kind perfect, it is necessary to abolish all inferior governments, and to give the general one compleat legislative, executive and judicial powers to every purpose. The courts therefore will establish it as a rule in explaining the constitution to give it such a construction as will best tend to perfect the union or take from the state governments every power of either making or executing laws."). This Anti-Federalist's hypothetical federal judges obviously go quite a bit further than did Chief Justice Fuller in *Leisy*.

[113] 2 U.S. (2 Dall.) 419 (1793).

enforced by powers Executive and *Judicial*.[114]

In *Cohens v. Virginia*,[115] Chief Justice Marshall used the phrase "more perfect Union" to support the Court's exercise of appellate jurisdiction over the judgment of a state's highest court in a case involving a question of federal law.[116] The Chief Justice, who wrote for the Court, appears to have read the phrase as creating a presumption in favor of the exercise of federal jurisdiction:

> The framers of the constitution . . . were convened for the purpose of strengthening the confederation by enlarging the powers of the government . . . . 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.[117]

And in *Rhode Island v. Massachusetts*,[118] Justice Baldwin invoked the preamble's "more perfect Union" language in rejecting the claim that the Court's jurisdiction over controversies between states extends only to certain types of controversies. Writing for the Court, Justice Baldwin stated that an inability to exercise jurisdiction over a border dispute between two states

> will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit, as the instrument appointed by the constitution, so to execute its agency as to make

---

[114] *Id.* at 465 (opinion of Wilson, J.) (emphasis in original).

[115] 19 U.S. (6 Wheat.) 264 (1821).

[116] *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257 (1988)). *Cohens* reaffirmed the holding of Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), where Justice Story, writing for the Court, used the preamble's "We the People" language to support the constitutionality of section 25. *See supra* text accompanying notes 64-66.

[117] 19 U.S. at 416-17.

[118] 37 U.S. (12 Pet.) 657 (1838).

this bond of union between the states more perfect . . . .[119]

When there is a question as to whether federal courts may permissibly exercise jurisdiction over a given category of cases, in short, the preamble supports the conclusion that they may. Thus, whether the issue is the Supreme Court's original jurisdiction over cases in which a state is sued by an individual (*Chisholm v. Georgia*),[120] the Supreme Court's original jurisdiction over cases involving a border dispute between states (*Rhode Island v. Massachusetts*),[121] or the Supreme Court's appellate jurisdiction over the judgments of state courts in cases involving a question of federal law (*Cohens v. Virginia*),[122] the preamble's "more perfect Union" language supports resolving the issue in favor of a strong federal government in general, and the exercise of federal jurisdiction in particular.[123]

Elsewhere, however, Justices have used the phrase to support the proposition that the powers of the federal government are *limited*: forming a more perfect union, according to this view, is a far cry from vesting the federal government with anything approaching plenary power. In *Ex parte Virginia*,[124] for example, Justice Field dissented from the Court's holding that a federal statute prohibiting the exclusion of blacks

---

[119] *Id.* at 731; *see also* Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934) (dictum) ("The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was . . . a necessary feature of the formation of a more perfect Union." (citing, *inter alia*, Rhode Island v. Massachusetts)).

[120] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . .").

[121] *See id.* ("The judicial Power shall extend . . . to Controversies between two or more States . . . .").

[122] *See id.* ("The judicial Power shall extend to all Cases . . . arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . .").

[123] For another instance of the Court's use of the preamble's "more perfect Union" language to resolve a question in favor of the federal government, see Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869), where Chief Justice Chase, writing for the Court, used the phrase to support the unconstitutionality of secession:

> [W]hen the[] Articles [of Confederation] were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

[124] 100 U.S. 339 (1880).

from grand juries was a constitutional exercise of congressional power pursuant to section two of the thirteenth amendment[125] and section five of the fourteenth amendment.[126] Dissenting for himself and Justice Clifford, Justice Field cited the tenth amendment,[127] and then wrote that

> if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor, as I shall hereafter endeavor to show, in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their governments . . . . The design of its framers was not to destroy the States, *but to form a more perfect union between them*, and, whilst creating a central government for certain great purposes, to leave to the States in all matters the jurisdiction of which was not surrendered the functions essential to separate and independent existence.[128]

Eighty-five years later, Chief Justice Warren, writing for the majority in *Reynolds v. Sims*,[129] used the phrase for a similar purpose—despite the fact that the Chief Justice was *vindicating* a fourteenth amendment claim in that case, while Justice Field would have *defeated* a fourteenth amendment claim in *Ex parte Virginia*. In *Reynolds*, the Court held an Alabama apportionment scheme unconstitutional.[130] Rejecting the so-called "federal analogy" as "inapposite and irrelevant to state legislative districting schemes," since "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted,"[131] Chief Justice Warren went on to say

---

[125] "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

[126] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

[127] 100 U.S. at 357 (Field, J., dissenting) (quoting U.S. CONST. amend. X ("The 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.")).

[128] *Id.* at 357 (emphasis added).

[129] 377 U.S. 533 (1964).

[130] The apportionment scheme, according to the Court, violated the equal protection clause of the fourteenth amendment. *See* U.S. CONST. amend. XIV, § 1.

[131] 377 U.S. at 573.

that while

> the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union[,]" . . . at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government.[132]

The Framing and ratification of the Constitution, in other words, altered the state governments—but not in a fundamental way.

The fact that the Constitution was ordained and established in order to "form a more perfect Union" thus seems to be less than helpful as an interpretive aid. Justices who read the phrase as an indication that the Framers' goal was merely to form a *more perfect* union than had existed under the Articles of Confederation can use it to defeat federal claims and vindicate the powers of state governments. Justices who read the phrase as an indication that the Framers' goal was to fundamentally transform the less perfect Confederation into a more perfect *Union* can use it to justify broad federal powers and defeat competing state claims. The former might be said to read the phrase in light of the tenth amendment,[133] the latter in light of the necessary and proper clause.[134]

C. "[E]STABLISH JUSTICE"

The language of the preamble that has been used by the Supreme Court most frequently, for the greatest variety of purposes, and with the most creativity is the "establish Justice" phrase.

---

[132] *Id.* at 574. The Chief Justice's suggestion that it was the states who "join[ed] together" is of course mistaken. The Constitution was ordained and established by "the People of the United States," not by "the original 13 States." *See supra* text accompanying notes 61-98 (discussing Justices' use of preamble's "We the People" language).

[133] "The 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." U.S. CONST. amend. X.

[134] "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18.

1. Article III

In a few instances, Supreme Court Justices have used the phrase "establish Justice" in what might be said to be its weakest or most limited sense—i.e., simply as declarative of the specific provisions of article III of the Constitution.[135] Thus, in *Chisholm v. Georgia*,[136] to support his argument that the Framers and ratifiers of the Constitution intended that states be amenable to suit in federal court, Chief Justice Jay listed the "six objects" enumerated in the preamble,[137] and then wrote as follows:

> It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the 2d section of the 3d article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases . . . .[138]

Chief Justice Jay then went on to show that the phrase "Controversies . . . between a State and Citizens of another State" in article III, section 2[139] should be interpreted so as to permit the exercise of federal jurisdiction over suits in which a state is the defendant. The important point is that one of the authors of *The Federalist* appears to have had a narrow understanding of the preamble's "establish Justice" language: the phrase simply states the end toward which article III of the Constitution is the means.[140]

---

[135] *See supra* text accompanying notes 35-39.

[136] 2 U.S. (2 Dall.) 419 (1793).

[137] *Id.* at 474 (opinion of Jay, C.J.).

[138] *Id.* at 475.

[139] U.S. CONST. art. III, § 2, cl. 1.

[140] *But see infra* text accompanying notes 157-59 (discussing Jay's more creative use of phrase in same opinion, two pages later). For other instances in which Justices have used the phrase "establish Justice" in a limited sense, see *Chisholm*, 2 U.S. at 465 (opinion of Wilson, J.) ("Another declared object is, 'to establish justice.' This points, in a particular manner, to the *Judicial* authority." (emphasis in original)), and Mahon v. Justice, 127 U.S. 700, 716 (1888) (Bradley, J., dissenting) ("The Constitution was made to 'establish justice' . . . ;[] and to attain this end as between the States themselves, the judicial power was extended 'to controversies between two or more States[.]'").

2. Federal Jurisdiction

But Justices have made less restrained use of the phrase "establish Justice." They have, for example, used the phrase to resolve doubts about the exercise of federal jurisdiction in favor of its exercise.

Chisholm v. Georgia[141] involved the question of whether the phrase "Controversies . . . between a State and Citizens of another State" in article III, section 2 of the Constitution[142] should be interpreted broadly (so as to permit federal jurisdiction over a suit in which a state is the defendant) or narrowly (so as to preclude federal jurisdiction in such a suit). Justice Wilson used the preamble to support the broad interpretation:

> [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?[143]

The establishment of justice, a fundamental object of the Constitution, would be defeated if federal jurisdiction did not extend to suits in which a state is the defendant.

Rhode Island v. Massachusetts[144] involved the question of whether the phrase "Controversies between two or more States" in article III, section 2 of the Constitution[145] should be interpreted broadly (so as to permit federal jurisdiction over border disputes between states) or narrowly (so as to preclude federal jurisdiction over border disputes). Justice Baldwin, writing for the Court, used the preamble to support the broad interpretation; he rejected the idea that the Constitution "was best

---

[141] 2 U.S. (2 Dall.) 419 (1793).

[142] U.S. CONST. art. III, § 2, cl. 1.

[143] 2 U.S. at 465 (opinion of Wilson, J.) (emphasis in original). Justice Wilson also used other phrases from the preamble to support the exercise of federal jurisdiction. *See supra* text accompanying notes 113-14 ("more perfect Union"); *infra* text accompanying notes 208-09 ("domestic Tranquility").

[144] 37 U.S. (12 Pet.) 657 (1838).

[145] U.S. CONST. art. III, § 2, cl. 1.

calculated to effect the[] objects [declared in the preamble] by making the judicial power utterly incompetent to exercise . . . jurisdiction" over border disputes between states, or that "the powers granted to this Court by the people of all the states, ought, by mere construction and implication, to be held insufficient for the objects of its creation, and not capable of 'establishing justice' between two or more states."[146] Justice Baldwin went on to say that

> [i]f we cannot "establish justice" between these litigant states, as the tribunal to which they have both submitted the adjudication of their respective controversies, it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit . . . .[147]

When there are doubts as to whether the exercise of federal jurisdiction is permissible, the preamble's "establish Justice" language appears to create a presumption in favor of its permissibility.

3. Criminal Procedure

Elsewhere, Justices have used the preamble's "establish Justice" language to support a broad interpretation of those provisions of the Bill of Rights dealing with criminal procedure. Under a Constitution ordained and established for the purpose of establishing justice, according to this view, doubts about the proper scope of the protections afforded criminal defendants should be resolved in favor of a generous construction.[148]

In *Bartkus v. Illinois*,[149] the Court held that a criminal defendant who had been acquitted in a federal court could subsequently be tried in a state court for an analogous offense, using identical evidence. Dissenting for himself and two others, Justice Black argued that the trial

---

[146] 37 U.S. at 730.

[147] *Id.* at 731. Like Justice Wilson in *Chisholm*, Justice Baldwin also used other phrases from the preamble to support the exercise of federal jurisdiction. *See supra* text accompanying notes 118-19 ("more perfect Union"); *infra* text accompanying notes 210-11 ("domestic Tranquility").

[148] *Cf. infra* text accompanying notes 282-85 (discussing use of phrase "secure the Blessings of Liberty" to support broad interpretation of Bill of Rights); *infra* note 285 (same).

[149] 359 U.S. 121 (1959).

in state court should have been barred by the double jeopardy clause of the fifth amendment,[150] as incorporated by the fourteenth. Rejecting the majority's reliance on principles of federalism, Justice Black argued that these principles must be understood in light of the purposes of the Constitution:

> The Court, without denying the almost universal abhorrence of . . . double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created "to establish Justice[,]" . . . not to destroy any of the bulwarks on which . . . justice depend[s].[151]

Because the preamble identifies the establishment of justice as a central purpose of the Constitution, the double jeopardy clause should be construed broadly. Because establishing justice is a declared object of American government, in other words, courts should err on the side of giving too much (rather than too little) protection to the accused.

In *McGautha v. California*,[152] the Court rejected a constitutional challenge to a unitary criminal trial—i.e., a trial in which the jury determined both guilt and punishment in a single proceeding. In dissent, Justice Douglas argued that such a trial violates the due process clause of the fourteenth amendment.[153] Writing for himself and two others, Justice Douglas stated that "[j]ustice—in the sense of procedural due process—is denied" when a state makes use of such a trial,[154] and added a footnote stating that "[i]t is commonly overlooked that justice is one of the goals of our people as expressed in the Preamble of the Constitution."[155] Thus "justice," for Justice Douglas, is simply a synonym for due process; and since the preamble mentions justice as an object of the Constitution, ensuring that no criminal defendant is denied due process must be regarded as fundamental to our constitutional

---

[150] U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

[151] 359 U.S. at 155 (Black, J., dissenting). Justice Black also invoked the preamble's "secure the Blessings of Liberty" language to support a broad interpretation of the double jeopardy clause. *See infra* note 285.

[152] 402 U.S. 183 (1971).

[153] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[154] 402 U.S. at 246 (Douglas, J., dissenting) (footnote omitted).

[155] *Id.* at 246 n.17.

system. A corollary is that the due process clauses of the fifth and fourteenth amendments should be given a generous construction.

4. Equality

Elsewhere, Justices have given the preamble's "establish Justice" phrase a more abstract meaning: "justice" is used as a synonym for "equality."[156] Thus, in *Chisholm v. Georgia*,[157] Chief Justice Jay invoked the preamble to support the proposition that article III, section 2's extension of federal jurisdiction to "Controversies between . . . a State and Citizens of another State"[158] permits suits in which a state is the defendant. "The exception contended for," wrote Jay,

> would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very constitution by which they professed *to establish justice*, so far deviate from the plain path of *equality* and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them.[159]

The object of the Constitution is justice. Justice means equality. It is therefore inconsistent with the object of the Constitution to permit states to sue individuals in federal court while prohibiting individuals from suing states.

The Court appears to have had a similar understanding of the preamble's "establish Justice" language in *Ward v. Maryland*,[160] where

---

[156] *Cf.* H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 141-42 (1978) ("In *The Federalist*, No. 51, Madison writes that 'Justice is the end of government. . . .' But what is justice? . . . [E]quality is the principle of justice." (footnote omitted)). *But cf.* P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 155 (1968) (discussing preamble's "establish Justice" language) ("[I]t is precisely when justice is identified and made coextensive with equality that we have the degradation of the republican form of government.").

[157] 2 U.S. (2 Dall.) 419 (1793).

[158] U.S. CONST. art. III, § 2, cl. 1.

[159] 2 U.S. at 477 (opinion of Jay, C.J.) (second emphasis added).

[160] 79 U.S. (12 Wall.) 418 (1871).

a state tax that discriminated against nonresidents was invalidated on the grounds that it was inconsistent with the privileges and immunities clause.[161] Writing for the Court, Justice Clifford stated that

> [e]xcise taxes . . . may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained *to establish justice*, and which . . . is the supreme law of the land; and that supreme law requires *equality of burden*, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. *Inequality of burden . . . was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.*[162]

The Constitution was adopted for, among other things, ensuring equality of taxation. The language of the preamble that corresponds to that object, Justice Clifford appears to suggest, is the "establish Justice" phrase. Unequal taxation, in short, is unjust, and therefore inconsistent with one of the purposes of American government.

5. The Inviolability of Contracts

Easily the most creative use of the preamble's "establish Justice" language—or, indeed, of any phrase of the preamble—occurred in the legal tender cases of the latter half of the nineteenth century, where the Court considered the constitutionality of paper money legislation. In what appears to have been rather flagrant disregard of the explicit view of Justice Story[163] (and of the implicit view of the Framers and ratifiers of the Constitution)—namely, that the preamble can create no powers or rights not granted or secured by the body of the Constitution—various Justices relied almost exclusively on the preamble's "establish Justice" language to support the invalidation of the legal tender legislation.

In the first of the legal tender cases, *Hepburn v. Griswold*,[164] the

---

[161] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[162] 79 U.S. at 431 (emphasis added). These words were quoted by the Court in Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522 (1919) (McReynolds, J.), another case involving a discriminatory tax and the privileges and immunities clause.

[163] *See supra* text accompanying notes 5-7.

[164] 75 U.S. (8 Wall.) 603 (1870).

Court declared unconstitutional the greenback legislation of 1862, which was passed to help finance the Civil War. The legislation authorized the issuance of notes redeemable not in gold or silver but in interest-bearing bonds. These notes were made legal tender, and, as such, were capable of satisfying all debts, including those contracted before the legislation was passed. The basis for the Court's holding was that the power to enact such a law was beyond the scope of Congress' enumerated powers in general, and the necessary and proper clause[165] in particular. To support the proposition that the legislation was not authorized by any explicit or implicit constitutional grant of power to Congress, the Court, through Chief Justice Chase, turned to the *locus classicus* of necessary and proper clause jurisprudence: *McCulloch v. Maryland*.[166] Chief Justice Chase then quoted the famous rule announced in that case by Chief Justice Marshall: "'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'"[167]

But whereas Chief Justice Marshall had employed this rule to uphold the constitutionality of a federal statute, Chief Justice Chase used it to *invalidate* a federal statute. The different outcomes can be explained by the fact that the Chief Justices emphasized different aspects of the rule: Chief Justice Marshall emphasized the "appropriate" and "plainly adapted" language; Chief Justice Chase emphasized the qualification. "[T]he words appropriate, plainly adapted, really calculated," wrote Chief Justice Chase, "are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution."[168] And since the greenback legislation was inconsistent with "the spirit of the Constitution,"[169] the law could not be said to have been enacted pursuant to Congress' authority under the necessary and proper clause. The law, in short, was unconstitutional. It is worth quoting the Chief Justice's reasoning at some length:

> Among the great cardinal principles of th[e]

---

[165] "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

[166] 17 U.S. (4 Wheat.) 316 (1819).

[167] 75 U.S. at 614 (quoting 17 U.S. at 421).

[168] *Id.* at 622.

[169] *Id.*

[Constitution], no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio, the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the Confederation), "their laws, and constitutions are erected." Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed."

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that "no State shall pass any law impairing the obligation of contracts."

It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is

inconsistent with the spirit of the Constitution.[170]

Or, stated differently: the preamble's "establish Justice" language is to the federal government what article I, section 10[171] is to the states. That the Constitution was ordained and established in order to establish justice means that Congress is constitutionally prohibited from passing laws impairing the obligation of contracts. Indeed, establishing justice and preventing the impairment of contractual obligations appear to be synonymous. And because the legal tender created by the challenged legislation was capable of satisfying debts contracted prior to the enactment of the law—i.e., because the new legal tender could satisfy debts that creditors expected to be satisfied with the old legal tender—the legislation impaired the obligation of contracts. That is, the legislation violated the Constitution—or, more specifically, the preamble to the Constitution. Justice Harlan was thus mistaken when he wrote, thirty-five years later, that the preamble "has never been regarded as the source of any substantive power conferred on the Government of the United States."[172] For that is precisely how Chief Justice Chase appears to have understood the preamble.[173]

---

[170] *Id.* at 622-23.

[171] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

[172] Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

[173] That Chief Justice Chase effectively used the preamble to invalidate federal legislation is remarkable in and of itself. What makes it even more remarkable is that the Framers of the Constitution considered but summarily rejected the idea of prohibiting Congress' (as well as states') impairment of contractual obligations—i.e., the idea that article I, section 9 should contain a contracts clause similar or identical to that of article I, section 10. In fact, when Elbridge Gerry suggested that the prohibition extend to Congress, his motion was not even seconded. *See* 2 RECORDS, *supra* note 15, at 619.

On the other hand, Chief Justice Chase was hardly alone in positing a close connection between the preamble's use of the word "Justice" and the inviolability of contracts. During the course of his discussion of the preamble's "establish Justice" language, for example, Justice Story argued that one of the reasons for replacing the Articles of Confederation with the Constitution was that under the former, "[l]aws were constantly made by the state legislatures violating . . . the sacredness of private contracts." 1 J. STORY, *supra* note 5, § 487, at 344. And in *Federalist* 7, Hamilton referred to "[l]aws in violation of private contracts" as "atrocious breaches of moral obligation and social *justice*." THE FEDERALIST No. 7, at 65 (A. Hamilton) (emphasis added); *cf. id.* No. 44, at 282 (J. Madison) ("laws impairing the obligation of contracts[] are contrary to the first principles of the social compact"). Indeed, the Supreme Court itself had suggested in an earlier case that there is a relationship between the preamble's "establish Justice" language and the prohibition of the impairment of contractual

Hepburn v. Griswold was overruled a year later by the *Legal Tender Cases*.[174] But four Justices dissented, and, as the majority did in *Hepburn*, relied primarily on the preamble's "establish Justice" language to support the unconstitutionality of the legislation. Dissenting for himself and three others, Chief Justice Chase, the author of the majority opinion in *Hepburn*, argued that the prohibition against impairing contractual obligations has its origins in "fundamental principles of society and government," which "apply with great force to the construction of the Constitution of the United States."[175] The Chief Justice then quoted from the Supreme Court's most explicit appeal to natural law: Justice Chase's opinion in *Calder v. Bull*.[176] "Mr. Justice Chase," wrote his namesake, "had previously declared that 'an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.' Among such acts he instances 'a law that destroys or impairs the lawful private contracts of citizens.'"[177] Chief Justice Chase then moved from "fundamental principles of society and government" to constitutional text—albeit that of the preamble: "Can we be mistaken," he asked, "in saying that such a law is contrary to the spirit of a Constitution ordained

---

obligations. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 330-31 (1827) (opinion of Trimble, J.) (prohibition of laws impairing obligation of contracts in article I, section 10 "was understood at the time of the adoption of the constitution to have been introduced into the instrument . . . for the protection of personal security and of private rights," which protection "was, itself, and alone, the grand principle intended to be established[,] . . . a principle of the utmost importance to a free people, about to establish a national government[] 'to establish justice'"); *cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (opinion of Wilson, J.) (suggesting connection between preamble's "establish Justice" language and contracts clause of article I, section 10). It is, however, something more than a short step from these sentiments to the proposition that the preamble's "establish Justice" language effectively adds a contracts clause to article I, section 9 of the Constitution.

It should also be noted that rather than using the preamble's "establish Justice" language to invalidate a federal statute, Chief Justice Chase might just as well have used the preamble's "common defence" language to *uphold* the statute. The former phrase supports a narrow interpretation of the necessary and proper clause; the latter phrase would support a broad interpretation. (The purpose of the greenback legislation, after all, was to help raise money for the war effort.) *See infra* text accompanying notes 229-41 (discussing use of preamble's "common defence" language to support broad conception of congressional power).

[174] 79 U.S. (12 Wall.) 457 (1871).

[175] *Id.* at 581-82 (Chase, C.J., dissenting).

[176] 3 U.S. (3 Dall.) 386 (1798).

[177] 79 U.S. at 582 (quoting 3 U.S. at 388 (opinion of Chase, J.)).

to establish justice?"[178]

Chief Justice Chase might be understood to have argued that natural law in general and the "fundamental principles of society and government" in particular constitute the "spirit" of the Constitution; that the body of the Constitution is its "letter"; and that the preamble represents the intersection of spirit and letter. Whether spirit, letter, or both, however, the preamble, Chief Justice Chase appears to have believed, is clearly a part of the Constitution for purposes of constitutional interpretation, and can serve as the basis for invalidating a federal statute—an act of judicial power traditionally thought to require the greatest possible restraint, and to be exercisable only in the most extraordinary circumstances.[179]

6. Other Uses

The Supreme Court has used the preamble's "establish Justice" language for still other purposes.

---

[178] *Id.* Immediately after posing this rhetorical question, the Chief Justice posed another: "Can we be mistaken in thinking that if . . . Story were here to pronounce judgment in this case [he] would declare the legal tender clause now in question to be prohibited by and inconsistent with the letter and spirit of the Constitution?" *Id.* How Justice Story would have decided this case is unclear, but it seems likely that his holding would not have rested almost exclusively on language from the preamble, since Story believed that that section of the Constitution "cannot confer any power *per se*." 1 J. STORY, *supra* note 5, § 462, at 327.

In a separate dissenting opinion, Justice Field, who also joined Chief Justice Chase's opinion, stated that he had hoped that *Hepburn* "had settled forever that under a Constitution ordained, among other things, 'to establish justice,' legislation giving to one person the right to discharge his obligations to another by nominal instead of actual fulfilment, could never be justified." 79 U.S. at 634 (Field, J., dissenting). Justice Field also invoked the preamble's "establish Justice" language to support the unconstitutionality of federal statutes in The Sinking-Fund Cases, 99 U.S. 700, 764 (1879) (Field, J., dissenting), which involved a statute requiring railroad companies to set aside a portion of their income in order to cover mortgage debts, and in Juilliard v. Greenman, 110 U.S. 421, 451, 453, 469 (1884) (Field, J., dissenting), which involved postwar legal tender legislation. In both cases Justice Field quoted from *Hepburn*'s discussion of the preamble. 110 U.S. at 469; 99 U.S. at 764.

[179] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Stevens, J., concurring in the judgment) ("When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, . . . it should only do so for the most compelling constitutional reasons."); Blodgett v. Holden, 275 U.S. 142, 147-48 (1927) (opinion of Holmes, J.) ("[T]o declare an Act of Congress unconstitutional . . . is the gravest and most delicate duty that this Court is called on to perform.").

a. Sovereign Immunity

At least one Justice has used the phrase to support a narrow interpretation of the eleventh amendment.[180] Dissenting in *Employees v. Missouri Public Health Department*,[181] where the majority held that the eleventh amendment bars suits for overtime pay by certain state employees, Justice Brennan wrote as follows: "[N]one can gainsay that a State may grievously hurt one of its citizens. Our expanding concepts of public morality are thus offended when a State may escape legal redress for wrongs."[182] In order for justice to be done, in other words, a state must be amenable to suit. And justice is a fundamental concern of the Constitution: "Our constitutional commitment, recited in the Preamble, is to 'establish Justice.' That keystone objective is furthered by the trend toward limitation of the defense of governmental immunity . . . ."[183]

b. Determining the Rights of Parties

The Court's use of the preamble's "establish Justice" language in *Montana Co. v. St. Louis Mining & Milling Co.*[184] suggests that establishing justice has to do with determining who owns a piece of real property. Justice is done when the rightful owners of property are ascertained.

In the *Montana Co.* case, a Montana statute giving parties claiming an interest in mining property the right to inspect the property after successfully petitioning a court was challenged as a violation of the due process clause of the fourteenth amendment.[185] The Court, through Justice Brewer, rejected the challenge:

> To "establish justice" is . . . one of the declared purposes of the Federal Constitution, and if, to determine the exact measure of

---

[180] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[181] 411 U.S. 279 (1973).

[182] *Id.* at 323 (Brennan, J., dissenting).

[183] *Id.*

[184] 152 U.S. 160 (1894).

[185] "No State shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

> the rights of parties it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice . . . .[186]

In response to suggestion that the statute violated the due process clause because a court could permit inspection after a summary proceeding, Justice Brewer wrote as follows: "[A]ny measures or proceedings which, having the sanction of law, provide for such temporary invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law."[187] Thus "justice," defined as the determination of the rightful ownership of property, cannot give way to overly formalistic conceptions of procedural due process—despite the fact that procedural due process, according to at least one Supreme Court Justice, is itself one of the definitions of "Justice," as that word is used in the preamble.[188]

D. "[I]NSURE DOMESTIC TRANQUILITY"

The first observation to be made about the Supreme Court's use of the phrase "insure domestic Tranquility" is that these words have never been invoked in the context of domestic insurrection in general (apparently the primary concern of the authors of the words) or article IV, section 4 of the Constitution in particular (the constitutional provision to which the phrase apparently corresponds).[189] That the Supreme Court has not heard many cases involving intrastate rebellion may account for this fact. The Court, in any event, has used the preamble's "insure domestic Tranquility" language in two types of cases: those involving criminal law and criminal procedure, and those involving disputes between states.

1. Criminal Law and Criminal Procedure

Supreme Court Justices have invoked the words "insure domestic Tranquility" in order to defeat the claims of the accused, the indicted,

---

[186] 152 U.S. at 169.

[187] *Id.*

[188] *See* McGautha v. California, 402 U.S. 183, 246 & n.17 (1971) (Douglas, J., dissenting). For a discussion of Justice Douglas' opinion in *McGautha*, see *supra* text accompanying notes 152-55.

[189] *See supra* text accompanying notes 35-39.

and the convicted. That is to say, they have used the phrase to support a narrow interpretation of the Bill of Rights. The idea, apparently, is that two of the declared objects of the Constitution—"establish[ing] Justice" and "secur[ing] the Blessings of Liberty"—must be balanced against another: "insur[ing] domestic Tranquility."[190]

In *Berger v. New York*,[191] the Court held that the use of an electronic eavesdropping device violated the fourth amendment,[192] and, therefore, that evidence obtained by use of the device was inadmissible. Dissenting from the Court's holding, Justice Black wrote that "the traditional common-law rule that relevant evidence is admissible, even though obtained contrary to ethics, morals, or law . . . is well adapted to our Government, set up, as it was, to 'insure domestic tranquility' under a system of laws."[193] Because the majority's (broad) reading of the fourth amendment is inconsistent with one of the objects of government declared in the preamble, it should be rejected. And, perhaps anticipating the objection that a narrow reading of the fourth amendment is inconsistent with other objects of the Constitution, such as "establish[ing] Justice" and "secur[ing] the Blessings of Liberty," Justice Black added that "[n]o man's privacy, property, liberty, or life is secure, if organized or even unorganized criminals can go their way unmolested, ever and ever further in their unbounded lawlessness."[194]

Three years earlier, Justice Black had suggested that another provision of the Bill of Rights—the first amendment's speech clause[195]—should be interpreted in light of the preamble. Dissenting

---

[190] Justices who have used the preamble's "insure domestic Tranquility" language to defeat the claims of criminal defendants appear to have departed from the "original understanding" of the phrase, since there is no indication in the records of the Constitutional Convention that crime prevention was even a remote concern of the Framers.

[191] 388 U.S. 41 (1967).

[192]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[193] 388 U.S. at 72 (Black, J., dissenting).

[194] *Id.* at 72-73.

[195] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

for himself and two others in *Bell v. Maryland*,[196] Justice Black argued that a state's enforcement of its criminal trespass laws does not violate the first amendment, even when the defendants were trespassing for political reasons. "A great purpose of freedom of speech," wrote Justice Black, is

> to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to "insure domestic Tranquility . . . ."[197]

Von Moltke v. Gillies[198] involved a fifth amendment[199] and a sixth amendment[200] claim. The issue in the case was whether a convicted criminal defendant had knowingly pled guilty and whether she had knowingly waived her right to counsel. The majority held that the lower courts had improperly determined that she had, and remanded for further proceedings. Dissenting for himself and two others, Justice Burton invoked the preamble to support the proposition that the rights of the accused must be balanced against the objects of government. "Our Constitution, Bill of Rights and fundamental principles of government," wrote Justice Burton, "call for careful and sympathetic observance of the due process of law that is guaranteed to all accused

---

[196] 378 U.S. 226 (1964).

[197] *Id.* at 346.

[198] 332 U.S. 708 (1948).

[199] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[200] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.* amend VI.

persons . . . . The Constitution, however, was adopted also in order to . . . insure domestic tranquility . . . ."[201] Too much protection for the accused is inconsistent with the preamble.

In *Estelle v. Jurek*,[202] finally, Justice Rehnquist used the preamble's "domestic Tranquility" language to support the legitimacy of capital punishment. Justice Rehnquist dissented from the denial of certiorari in *Estelle*, a case involving the voluntariness of confessions and the standard of review in habeas corpus proceedings, because the court of appeals, in his view, had rendered a decision in favor of the criminal defendant simply because he would face the death penalty if convicted. In the words of Justice Rehnquist:

> What is particularly troubling about this case is that I have no doubt that the decision below was colored by the fact that this is a capital punishment case. The severity of a defendant's punishment, however, simply has no bearing on whether a particular confession is voluntary or on the extent to which federal habeas courts should defer to state-court findings. Following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972), holding invalid a state capital punishment statute, the State of Texas, like 34 other States, enacted new death penalty statutes. Those States determined that capital punishment, though an extreme form of punishment, is a suitable sanction for the most extreme of crimes. One of the principal goals of our Federal Government, set forth in the preamble to the Constitution, is "[to] insure domestic Tranquility." Whether as means of deterring future crimes or as means of retribution, these States believed that a carefully designed and limited system of capital punishment would be one way of ensuring domestic tranquility.
>
> . . . By overturning Jurek's conviction on the basis of a procedural nicety, the decision below . . . renders Texas' death penalty statute an ineffective deterrent . . . .[203]

Justice Rehnquist thus used the preamble to give a narrow interpretation to the fifth amendment's self-incrimination clause[204] and (at least by

---

[201] 332 U.S. at 741 (Burton, J., dissenting).

[202] 450 U.S. 1014 (1981).

[203] *Id.* at 1019-21 (Rehnquist, J., dissenting from denial of certiorari).

[204] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

implication) to the eighth amendment.[205]

2. Disputes between States

The object of domestic tranquility might apply either to *intra*state tranquility (with "domestic" referring to individual states) or to *inter*state tranquility (with "domestic" referring to the country as a whole). To the extent that the Framers of the Constitution had in mind the experience of Shays' Rebellion when they inserted these words into the preamble,[206] they appear to have been concerned about intrastate tranquility.[207] Except when using the phrase in the context of criminal law and criminal procedure, however, those Supreme Court Justices who have used the phrase have used it in connection with interstate tranquility.

Thus, in *Chisholm v. Georgia*,[208] Justice Wilson used the phrase to support the exercise of federal jurisdiction over a case in which the defendant was a state. A "declared object" of the Constitution, wrote Wilson, is

> "to ensure [sic] domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations; the rule between contending States; will be enforced among the several States, in the same manner as municipal law.[209]

In *Rhode Island v. Massachusetts*,[210] the Court used the preamble's "domestic Tranquility" language in rejecting a narrow interpretation of another grant of federal jurisdiction. There the Court, through Justice Baldwin, held that border disputes fall within the category of

---

[205] "[C]ruel and unusual punishments [shall not be] inflicted." *Id.* amend. VIII.

[206] *See supra* note 39.

[207] *But see* 1 RECORDS, *supra* note 15, at 18 (remarks of Edmund Randolph) (federal government must protect against "dissentions between members of the Union"); *id.* at 19 (remarks of Randolph) (under Articles of Confederation, federal government "could not check the quarrals [sic] between states"); *see also id.* at 25.

[208] 2 U.S. (2 Dall.) 419 (1793).

[209] *Id.* at 465 (opinion of Wilson, J.).

[210] 37 U.S. (12 Pet.) 657 (1838).

controversies between states—controversies over which the Court has jurisdiction. A contrary holding would "be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit, as the instrument appointed by the constitution, so to . . . enforce the domestic tranquillity of each and all."[211] When there is a question as to the scope of the Supreme Court's jurisdiction over suits to which a state is a party,[212] in short, the preamble's "domestic Tranquility" language supports a broader rather than a narrower scope.

In *Mahon v. Justice*,[213] finally, Justice Bradley dissented from the Court's holding that a lower court had improperly issued a writ of habeas corpus. That writ, which in Justice Bradley's view had been properly issued, instructed the state of Kentucky to return to West Virginia an indicted felon who had been kidnapped by officers of Kentucky after escaping into West Virginia. The majority held that "no right, secured under the Constitution or laws of the United States, was violated" by the kidnapping.[214] Dissenting for himself and Justice Harlan, Justice Bradley argued that the abduction was unconstitutional, since

> the Constitution provides a peaceable remedy for procuring the surrender of persons charged with crime and fleeing into another State. This provision of the Constitution has two objects: the procuring possession of the offender, and *the prevention of irritation between the States*, which might arise from giving asylum to each other's criminals, and from violently invading each other's territory to capture them. It clearly implies that there shall be no resort to force for this purpose. The Constitution has abrogated, and the States have surrendered, all right to obtain

---

[211] *Id.* at 731.

[212] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to . . . Controversies between two or more States . . . [and] between a State and Citizens of another State . . . ."); *id.* art. III, § 2, cl. 2 ("In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction."); *see also* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (current version at 28 U.S.C. § 1251 (1988)).

[213] 127 U.S. 700 (1888).

[214] *Id.* at 715. The alleged constitutional violations involved the privileges or immunities and due process clauses of the fourteenth amendment, U.S. CONST. amend. XIV, § 1, and the extradition clause of article IV, which provides that "[a] Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime," *id.* art. IV, § 2, cl. 2.

> redress from each other by force. The Constitution was made to . . . "*insure domestic tranquillity*;" and to attain this end as between the States themselves, . . . they were enjoined to deliver up to each other fugitives from justice when demanded . . . . This manifest care to provide peaceable means of redress between them is utterly irreconcilable with any right to redress themselves by force and violence . . . .[215]

The reasoning appears to run as follows: (1) the Constitution requires that states "deliver up to each other fugitives from justice when demanded";[216] (2) the object of this constitutional provision is to "insure domestic Tranquility" among the states; therefore, (3) it is impermissible for states to resolve disputes by means of force—or, to use the words of Justice Bradley, the extradition clause "*clearly implies* that there shall be no resort to force."[217] Standing alone, the extradition clause is addressed to the state *to which* an escapee has fled; it instructs officials of that state that they must return the fugitive if such a demand is made. But in combination with the preamble, the extradition clause is addressed to the state *from which* an escapee has fled; it instructs officials of that state that demanding the return of the fugitive is the only constitutional means of recapturing him.

Here, Justice Bradley appears to have gone beyond the position of the Framers and of Justice Story—namely, that the preamble cannot provide an independent basis for invalidating government action. For Justice Bradley, the justification for the extradition clause is to "insure domestic Tranquility"; that provision therefore "implies" that demanding the return of a fugitive is not only permitted but required. The preamble precludes a resort to force.

E. "[P]ROVIDE FOR THE COMMON DEFENCE"

The constitutional provision to which the preamble's "provide for the common defence" language apparently corresponds is section 8, clause 1 of article I, which has to do with Congress' power to tax.[218] Yet only one case in which the Court has invoked the phrase "provide for the

---

[215] 127 U.S. at 716 (Bradley, J., dissenting) (emphasis added).

[216] *Id.* (referring to U.S. CONST. art. IV, § 2, cl. 2).

[217] *Id.* (emphasis added).

[218] *See supra* text accompanying notes 35-39.

common defence" has had anything to do with taxation.[219] More often, Justices have used the phrase to give a narrow interpretation to first amendment rights; to give a broad interpretation to the permissible scope of congressional power; or to uphold the denial or revocation of citizenship.

1. The First Amendment

In *Wayte v. United States*,[220] a man who had sent letters to government officials informing them that he did not intend to register with the Selective Service, and was then indicted for failing to do so, challenged the indictment on first amendment[221] grounds. Justice Powell, writing for the Court, cited *United States v. O'Brien*[222] for the proposition that government regulation of speech is permissible when it satisfies four conditions, one of which is "'further[ing] an important or substantial governmental interest.'"[223] To support the majority's

---

[219] That case, Patton v. Brady, 184 U.S. 608 (1902), involved a challenge to a federal excise tax on tobacco, imposed by Congress to help finance the Spanish-American War. The plaintiff in *Patton* had paid the (old) tax in May of 1898, but refused to pay any additional tax subsequent to the enactment of the tax increase a month later. The basis for his refusal was that Congress had power to levy an excise tax only once. Rejecting this claim on behalf of a unanimous Court, Justice Brewer invoked the preamble to support broad congressional powers in the area of taxation:

> [W]hy should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased. . . . The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defence[.]" . . . Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be, that having made provision for times of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies[?]
>
> That which was possible in fact existed. A war had been declared.

Id. at 619-20.

[220] 470 U.S. 598 (1985).

[221] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend I.

[222] 391 U.S. 367 (1968).

[223] 470 U.S. at 611 (quoting 391 U.S. at 377).

holding that the government's "passive enforcement" policy—i.e., its policy of prosecuting only nonregistrants who informed the government that they did not intend to register—met this condition, Justice Powell cited case law, *The Federalist*, and constitutional text.[224] But his first authority was the preamble:

> Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning. Recognizing this fact, the Framers listed "provid[ing] for the common defence," U.S. Const., Preamble, as a motivating purpose for the Constitution . . . .[225]

Justice Powell thus balanced the first amendment's speech clause against the preamble's "common defence" language, and concluded that speech rights must give way, since "constitutional protections of any sort have little meaning"[226] in a society that cannot defend itself. Justice Powell's reliance on the preamble in *Wayte* has potentially far-reaching implications: every word of the constitutional text, apparently, must be interpreted in light of the fact that the document was ordained and established in order to "provide for the common defence," since providing for the common defense is a necessary condition for the survival of the Constitution.

The Court made similar use of the preamble's "common defence" language in *Greer v. Spock*,[227] where it rejected a private citizen's first amendment challenge to a military post's regulation prohibiting partisan political speeches and the distribution of campaign literature. The Court, through Justice Stewart, held that a military installation is not a public forum for first amendment purposes, and, therefore, that speech rights may legitimately be restricted. In the Court's words:

> One of the very purposes for which the Constitution was ordained and established was to "provide for the common defence," and this Court over the years has on countless occasions recognized the special constitutional function of the

---

[224] *Id.* at 612.

[225] *Id.* at 611-12.

[226] *Id.* at 612.

[227] 424 U.S. 828 (1976).

> military in our national life, a function both explicit and indispensable. . . . [I]t is . . . the business of a military installation . . . to train soldiers, not to provide a public forum.
>
> . . . The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . constitutionally false.[228]

The preamble qualifies first amendment rights.

2. Congressional Power

The Supreme Court has used the preamble not only to defeat the rights of individuals but also to vindicate the powers of government: Justices have invoked the preamble's "provide for the common defence" language when upholding an exercise of congressional power that has been challenged as beyond Congress' constitutional authority. Thus, in *Selective Service v. Minnesota Public Interest Research Group*,[229] the Court upheld, in the face of a constitutional challenge, a federal statute denying financial assistance to students who fail to register for the draft. Rejecting the claim that the statute was a bill of attainder,[230] the Court held that a nonpunitive statute cannot be a bill of attainder, and that the challenged statute could reasonably be said to further nonpunitive goals. In further support of the law's constitutionality, the Court pointed out that the law did not single out an identifiable group—i.e., nonregistrants—based on their past conduct, since regulations promulgated pursuant to the statute allowed students who had not registered for the draft to become eligible for financial assistance by registering late.[231] In a concurring opinion, Justice Powell argued that the statute would be constitutional even in the absence of regulations permitting late registration. According to Justice Powell,

> the interest of Government—indeed of the people of our country—in providing for national security is *compelling*. It has been recognized as such from the earliest days of the Republic. The Preamble of the Constitution declares that one of the Framers' purposes was to "provide for the common defence."

---

[228] *Id.* at 837-38 (footnotes omitted).

[229] 468 U.S. 841 (1984).

[230] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

[231] 468 U.S. at 848-51.

> . . . I . . . disagree with the Court's reasoning . . . to the extent it relies upon the Secretary's regulation that "interprets" the . . . Act. In view of the compelling interest of Government, the constitutionality of [the statute] does not depend upon this interpretation.[232]

The implication is that federal statutes enacted in furtherance of the goal of providing for the common defense are entitled to heightened deference, and pass constitutional muster more easily than other statutes.

In *Lichter v. United States*,[233] the Court invoked the preamble's "common defence" language in rejecting two separate challenges to the Renegotiation Act,[234] which provided for the recovery of "excessive profits" realized by military subcontractors during time of war. The statute was challenged as unconstitutional both on the grounds that its enactment was beyond Congress' enumerated powers and on the grounds that it impermissibly delegated authority to the administrative agency charged with determining the amount of "excessive profits." In rejecting the first challenge, the Court, through Justice Burton, stated that "[t]he Renegotiation Act was developed as a major wartime policy of Congress comparable to that of the Selective Service Act,"[235] and that "[t]he language of the Constitution authorizing such measures is *broad rather than restrictive*."[236] To support the latter proposition, Justice Burton cited, among other things, the preamble's "common defence" language.[237] The Court went on to hold that the necessary and proper clause[238] gave Congress the constitutional authority to enact the statute.[239] As for the impermissible-delegation claim, Justice Burton stated that when deciding whether a given delegation of legislative power is constitutional,

---

[232] *Id.* at 860-62 (Powell, J., concurring in part and concurring in the judgment) (emphasis in original) (footnotes omitted).

[233] 334 U.S. 742 (1948).

[234] *See id.* at 745 n.1 (providing citations for various components of Renegotiation Act).

[235] *Id.* at 754.

[236] *Id.* at 755 (emphasis added).

[237] *Id.* at 755 n.3.

[238] "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl 18.

[239] 334 U.S. at 757-65.

> it is of the highest importance that the fundamental purposes of the Constitution be kept in mind . . . .
>
> . . . .
>
> The war powers of Congress and the President are only those which are to be derived from the Constitution but . . . the primary implication of a war power is that it shall be an effective power to wage the war successfully. Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.[240]

Justice Burton then cited the preamble in full, italicizing "provide for the common defence."[241]

3. Citizenship

Supreme Court Justices have used the preamble's "provide for the common defence" language to support the constitutionality of federal statutes denying or revoking the citizenship of those who are unwilling to serve in the armed forces. In *Kennedy v. Mendoza-Martinez*,[242] the Court declared unconstitutional, on fifth[243] and sixth[244] amendment grounds, a federal statute providing for the revocation of the citizenship of those who leave the country during time of war for the purpose of evading military service. Dissenting for himself and Justice White, Justice Stewart argued that the enactment of the statute was a permissible exercise of congressional power:

---

[240] *Id.* at 779-82.

[241] *Id.* at 782 n.34.

[242] 372 U.S. 144 (1963).

[243] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

[244]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. amend. VI.

> I think it apparent that Congress in enacting the statute was drawing upon a[] power[] [that is] *broad and far reaching*.
>
> A basic purpose of the Constitution was to "provide for the common defence." To that end, the Framers expressly conferred upon Congress a compendium of powers which have come to be called the "war power." Responsive to the scope and magnitude of ultimate national need, the war power is "the power to wage war successfully."
>
> It seems to me evident that Congress was drawing upon this power when it enacted the legislation before us. To be sure, the underlying purpose of this legislation can hardly be refined to the point of isolating one single, precise objective. . . . But . . . the war power clearly supports the objective of removing a corrosive influence upon the morale of a nation at war.[245]

Justice Frankfurter advanced a similar argument in *Trop v. Dulles*,[246] where the Court invalidated a federal statute providing for the revocation of the citizenship of those who desert the military during time of war. Dissenting for himself and three others, Justice Frankfurter rejected the majority's holding that the enactment of the statute was an impermissible exercise of congressional power:

> One of the principal purposes in establishing the Constitution was to "provide for the common defence." To that end the States granted to Congress the several powers of Article I, Section 8, clauses 11 to 14 and 18, compendiously described as the "war power." Although these specific grants of power do not specifically enumerate every factor relevant to the power to conduct war, *there is no limitation upon it* (other than what the Due Process Clause commands).[247]

While the preamble may not *confer* any powers, in short, its "common defence" language supports the view that "there is no limitation upon"

---

[245] 372 U.S. at 212-13 (Stewart, J., dissenting) (quoting Hughes, *War Powers under the Constitution*, 42 REP. A.B.A. 232, 238 (1917)) (emphasis added) (footnote and citation omitted).

[246] 356 U.S. 86 (1958).

[247] *Id.* at 120-21 (Frankfurter, J., dissenting) (emphasis added). Justice Frankfurter was of course mistaken when he suggested that it was "the States," rather than "the People of the United States," that "granted to Congress the powers of Article I, Section 8." *See supra* text accompanying notes 61-98 (discussing Justices' use of preamble's "We the People" language).

Congress' power to legislate in the area of national defense,[248] and that this power is "broad and far reaching."[249]

And just as the preamble justifies the revocation of citizenship, so too does it justify the denial of citizenship. In *United States v. Macintosh*[250] and *United States v. Schwimmer*,[251] the Court upheld the denial of citizenship to petitioners for naturalization who had refused to take an oath declaring that they would serve in the military in time of war. Those cases involved a question of statutory construction: the issue was whether a federal statute requiring, among other things, that petitioners for naturalization be "attached to the principles of the Constitution of the United States"[252] could be interpreted so as to require willingness to serve in the military as a condition of naturalization. The Court in both cases held that it could, and cited the preamble to support such a construction.[253]

Writing for the majority in *Macintosh*, Justice Sutherland stated that "[t]he Constitution, . . . wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense,'" and went on to say that "[f]rom its very nature, the war power, when necessity calls for its exercise, tolerates *no qualifications or limitations*, unless found in the Constitution or in applicable principles of international law."[254] And, writing for the majority in *Schwimmer*, Justice Butler stated that since "[t]he common defense was one of the purposes for which the people ordained and established the Constitution," the proposition that "it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises" must be considered "a fundamental principle of the Constitution."[255]

Because it is mentioned in the preamble, in short, providing for the common defense must be considered a fundamental object of government. And because that object is fundamental, the government

---

[248] *Trop*, 356 U.S. at 120 (Frankfurter, J., dissenting).

[249] *Mendoza-Martinez*, 372 U.S. at 212 (Stewart, J., dissenting).

[250] 283 U.S. 605 (1931).

[251] 279 U.S. 644 (1929).

[252] Naturalization Act, ch. 3592, § 4, 34 Stat. 596, 598 (1906) (current version at 8 U.S.C. § 1448 (1988)).

[253] *Schwimmer* and *Macintosh* were eventually overruled. *See* Girouard v. United States, 328 U.S. 61 (1946).

[254] 283 U.S. at 622 (emphasis added).

[255] 279 U.S. at 650.

has broad powers. The preamble's "common defence" language suggests that the Naturalization Act should be construed in favor of the government, and against the petitioner. Though American citizenship is "'one of the most valuable rights in the world,'"[256] the preamble supports the proposition that its conferral and retention can be made contingent upon military service.

F. "[P]ROMOTE THE GENERAL WELFARE"

Supreme Court Justices have invoked the phrase "promote the general Welfare" less frequently than they have invoked any other phrase of the preamble. This is somewhat surprising, since one can readily envision situations in which the Court might use the phrase—for example, when upholding a federal statute that is challenged as beyond the scope of Congress' enumerated powers. In any event, the Court appears to have used the phrase in anything more than a perfunctory manner only twice.

In *EEOC v. Wyoming*,[257] Justice Powell used the preamble's "general Welfare" language as an aid in interpreting the commerce clause.[258] In that case the Court held, by a five-to-four margin, that the commerce clause permits Congress to bring state and local governments within the scope of a federal statute prohibiting age discrimination by employers, and that the tenth amendment[259] does not prevent Congress from doing so. Justice Powell joined the dissenting opinion of Chief Justice Burger, but wrote a separate opinion (joined by Justice O'Connor) "to record a personal dissent from JUSTICE STEVENS' novel view of our Nation's history."[260] (Justice Stevens, in a concurring opinion, argued for a broad reading of the commerce clause.)

Justice Powell's dissent was a response to Justice Stevens' suggestion that a broad interpretation is supported by the fact that the commerce

---

[256] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (quoting REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 235 (1953)).

[257] 460 U.S. 226 (1983).

[258] "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. Justices have also used the preamble's "more perfect Union" language as an aid in interpreting the commerce clause. *See supra* text accompanying notes 106-12.

[259] "The 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." U.S. CONST. amend. X.

[260] 460 U.S. at 265 (Powell, J., dissenting).

clause was "the Framers' response to the *central problem* that gave rise to the Constitution,"[261] that the clause was intended to "confer a power on the National Government adequate to discharge its *central mission*,"[262] and that interpreting the clause narrowly "is inconsistent with the *central purpose* of the Constitution."[263] Arguing against the proposition that the regulation of commerce was the central concern of the Constitution, Justice Powell noted that "the Founders stated their motivating purposes in the Preamble," and then listed the six objects declared there, none of which, Justice Powell pointed out, explicitly concerns the regulation of commerce.[264] Apparently believing that "promot[ing] the general Welfare" was the only declared object that could possibly incorporate the regulation of commerce, Justice Powell wrote that

> [a]lthough the "general Welfare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissentions between members of the Union" was of at least equal importance.[265]

Justice Powell went on to point out that Congress' article I power to regulate commerce is textually remote from Congress' power to "Provide for the . . . general Welfare,"[266] and that it is, in fact, "only one among nearly a score of other powers that follow[]."[267]

Justice Powell's use of the preamble may be summarized as follows: Justice Stevens' argument for an expansive construction of the commerce clause is based on a belief that the need to regulate interstate commerce was the fundamental motivation of those who convened to revise the Articles of Confederation. But the preamble nowhere explicitly mentions the regulation of commerce as a central object of the Union. It is unlikely, moreover, that the preamble's "general Welfare" language

---

[261] *Id.* at 244 (Stevens, J., concurring) (emphasis added).

[262] *Id.* at 246-47 (emphasis added).

[263] *Id.* at 249 (emphasis added).

[264] *Id.* at 267 (Powell, J., dissenting).

[265] *Id.* at 267-68 (quoting 1 RECORDS, *supra* note 15, at 18 (remarks of E. Randolph)).

[266] U.S. CONST. art. I, § 8, cl. 1.

[267] 460 U.S. at 268.

has to do with the regulation of commerce, since the identical language in the Articles of Confederation did not. And even if promoting the general welfare does embrace the regulation of commerce, there are other objects that are more or at least equally important. The commerce clause should therefore be given a narrower interpretation than the one for which Justice Stevens argues, an interpretation that is consistent with principles of federalism in general and the tenth amendment in particular. The preamble, in short, helped Justice Powell "place the Commerce Clause in proper historical perspective," and provided support for the proposition that "federalism is not . . . utterly subservient to that Clause."[268]

Justice Brennan made creative use of the preamble's "general Welfare" language in *Goldberg v. Kelly*,[269] where the Court held that the due process clause[270] requires that a welfare recipient be given a hearing prior to the termination of benefits. Writing for the majority, Justice Brennan stated that "procedural due process is . . . applicable to the termination of welfare benefits," and that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'"[271] To support the proposition that welfare benefits constitute a property interest for due process purposes, and that they constitute a property interest of sufficient magnitude that a *post*-termination hearing is constitutionally inadequate, Justice Brennan cited not only the leading theorist of the "new property"[272] but also the preamble: "Public assistance . . . is not mere charity, but a means to 'promote the general Welfare . . . .' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end."[273]

The promotion of the general welfare is the end toward which the provision of welfare is the means. That welfare is provided in order to achieve objectives announced in the preamble is strong evidence that welfare payments constitute "property" for due process purposes, and

---

[268] *Id.* at 266.

[269] 397 U.S. 254 (1970).

[270] "No State shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[271] 397 U.S. at 261-62 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

[272] *Id.* at 262 (citing Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), and Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

[273] *Id.* at 265.

thus are entitled to constitutional protection. The preamble supports the view that welfare is a "right," not merely a "privilege."

G. "[S]ECURE THE BLESSINGS OF LIBERTY"

Supreme Court Justices have typically invoked the preamble's "secure the Blessings of Liberty" language in two types of cases—those involving constitutional structure (federalism, separation of powers, bicameralism, etc.) and those involving the Bill of Rights. Justices have used the phrase to support a strict construction of the structural provisions of the Constitution and a liberal construction of the Bill of Rights. This is unsurprising, since the first three articles of the Constitution[274] and the first ten amendments to the Constitution[275] are generally thought to be the primary means toward the end of "secur[ing] the Blessings of Liberty."[276]

---

[274] *See, e.g.*, THE FEDERALIST No. 84, at 515 (A. Hamilton) ("[T]he Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."); *id.* No. 51, at 321 (J. Madison) (separation of powers is "essential to the preservation of liberty"); *id.* at 323 (federalism is "a . . . security . . . to the rights of the people"); *see also* Berns, *supra* note 41; Rossum, The Federalist's *Understanding of the Constitution as a Bill of Rights*, in SAVING THE REVOLUTION 219 (C. Kesler ed. 1987).

[275] *See, e.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents* (Dec. 18, 1787), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 145, 157 ("[A] BILL OF RIGHTS[] ascertain[s] and fundamentally establish[es] those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty . . . ."); Bryan, *Letters of Centinel* No. 2, in 2 *id.* at 143, 152 ("[T]he security of the personal rights of the people . . . [must be] provided for by a bill of rights . . . . What excuse can we . . . make for the omission of this grand palladium, this barrier between *liberty* and *oppression*[?]" (emphasis in original)); *see also* Bayh, *Preface* to 96TH CONG., 2D SESS., CITIZENS GUIDE TO INDIVIDUAL RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA at iii (1980) ("guarantees of individual rights found in our Constitution's Bill of Rights are the very foundation of America's free and democratic society").

[276] Which is not to say that these are the only situations in which the Court has used the phrase. In Hague v. C.I.O., 307 U.S. 496 (1939), for example, Justice Stone, writing for himself and Justice Reed, used the preamble as an aid in statutory construction. Interpreting what is now 42 U.S.C. § 1983, Justice Stone wrote that

> [t]he argument that the phrase in the statute "secured by the Constitution" refers to rights "created," rather than "protected" by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the Constitution in order to "secure the Blessings of Liberty," uses the word "secure" in the sense of "protect" or "make certain." . . . [T]he phrase was used in this sense in the statute now under consideration . . . .

1. Constitutional Structure

In *Young v. United States ex rel. Vuitton et Fils S.A.*,[277] the Court held that while, as a general matter, district courts have the authority to appoint private attorneys to prosecute criminal contempt proceedings, it is impermissible for a court to appoint the attorney of a party that is the beneficiary of a court order to conduct a criminal contempt prosecution for an alleged violation of that order. Concurring in the Court's judgment, Justice Scalia argued that a district court *never* has the authority to appoint a private attorney to prosecute a contempt proceeding, since the power of prosecution (and, derivatively, the power to appoint a prosecutor) does not fall within the authority granted a federal court by article III of the Constitution. "The judicial power," wrote Justice Scalia,

> is the power to decide, in accordance with law, who should prevail in a case or controversy. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. Rather, since the prosecution of law violators is part of the implementation of the laws, it is . . . executive power, vested by the Constitution in the President.
>
> These well-settled general principles are uncontested. The Court asserts, however, that there is a special exception for prosecutions of criminal contempt, which are the means of securing compliance with court orders. Unless these can be prosecuted by the courts themselves, the argument goes, efficaciousness of judicial judgments will be at the mercy of the Executive, an arrangement presumably too absurd to contemplate.
>
> Far from being absurd, however, it is a carefully designed and critical element of our system of Government. There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a

---

307 U.S. at 526-27 (opinion of Stone, J.).

[277] 481 U.S. 787 (1987).

> Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would "secure the blessings of liberty" rather than use its power tyranically [sic].[278]

The end is securing the blessings of liberty; the means is separation of powers. And because the end is fundamental (as evidenced by its inclusion in the preamble), the means must be given a strict interpretation. When there is a close question involving the separation of powers, the preamble instructs courts to resolve the question by erring on the side of strictness.

Justice Stevens has also invoked the preamble's "Blessings of Liberty" language in discussing the structure of the Constitution. Protesting against the majority's use of a cost-benefit approach in *Walters v. National Ass'n of Radiation Survivors*,[279] where the Court upheld a statutory limitation on the fee that may be paid an attorney representing a veteran seeking benefits from the Veterans' Administration,[280] Justice Stevens included the following dictum in his dissenting opinion:

> [T]he Framers of the Constitution created a federal sovereign whose powers were to be exercised by different branches—a Legislature, an Executive, and a Judiciary—and which was expected to coexist with at least 13 other sovereigns having jurisdiction over the same people and the same territory. Surely, if they were motivated by a desire to improve the efficiency of the economy, they could have developed a much more simple

---

[278] *Id.* at 816-17 (Scalia, J., concurring in the judgment) (citations omitted). Elsewhere in his opinion Justice Scalia wrote as follows:

> [T]he Court suggests that the various procedural protections that the Constitution requires us to provide contemners undercut the separation-of-powers argument against judicial prosecution. The reverse argument—that the structural provisions of the Constitution were not only sufficient but indeed were the only sure mechanism for protecting liberty—was made against adoption of a Bill of Rights. Ultimately, the people elected to have both checks. The Court is right that disregard of one of these raises less of a prospect of "tyrannical licentiousness" than disregard of both. But that is no argument for disregard of either.

Id. at 824-25 (citation omitted).

[279] 473 U.S. 305 (1985).

[280] The plaintiffs' challenge to the fee limitation was based upon the fifth amendment's due process clause and the first amendment.

> design for the new Government. The reason they did not do so is perfectly clear. The text of the Constitution is replete with provisions that are intended to secure the blessings of liberty—or conversely, to protect against the dangers of tyranny—notwithstanding their possible costs. . . . The limited delegations of power to the Federal Government, the tripartite division of authority among three branches of the Federal Government, the division of the Legislature into two Houses, the staggered terms of office, with Senators serving six years, the President four years, and Representatives only two, the provision for a Presidential veto of Acts of Congress, the guarantee of life tenure for federal judges—all of the checks and balances are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.[281]

2. The Bill of Rights

Just as Supreme Court Justices have used the preamble's "secure the Blessings of Liberty" language to support a strict interpretation of the provisions of the Constitution dealing with structure, so too have they used the phrase to support a liberal interpretation of the Bill of Rights (and fourteenth amendment). Thus, dissenting for himself and Justice Marshall in *Greer v. Spock*,[282] where the Court upheld, in the face of a first amendment[283] challenge, a military post's regulation prohibiting partisan political speeches and the distribution of campaign literature, Justice Brennan wrote as follows:

> With . . . unenlightening generality, the Court observes: "One of the very purposes for which the Constitution was ordained and established was to 'provide for the common defence,' and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable." But the Court

---

[281] 473 U.S. at 369 n.18 (Stevens, J., dissenting); *see also* United States v. Munoz-Flores, 110 S. Ct. 1964, 1977 n.5 (1990) (Stevens, J., concurring in the judgment) ("I agree with the Court that the Origination Clause [article I, section 7, clause 1] is intended to 'safeguard liberty.' Indeed, this must be true, in a general sense, of almost every constitutional provision, since the Constitution aims to 'secure the Blessings of Liberty.' U.S. Const., Preamble." (citation omitted)).

[282] 424 U.S. 828 (1976).

[283] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

> overlooks the equally, if not more, compelling generalization that—to paraphrase the Court—one of the very purposes for which the First Amendment was adopted was to "secure the Blessings of Liberty to ourselves and our Posterity," and this Court over the years has on countless occasions recognized the special constitutional function of the First Amendment in our national life, a function both explicit and indispensable. Despite the Court's oversight, if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security.[284]

Since securing the blessings of liberty is the end toward which the first amendment is the means, that constitutional provision should be interpreted broadly.[285]

The use of the preamble in *Greer v. Spock*'s majority and dissenting

---

[284] 424 U.S. at 852 (Brennan, J., dissenting) (citation and footnotes omitted). For a discussion of the *Greer* majority's use of the preamble's "common defence" language, see *supra* text accompanying notes 227-28.

[285] There are numerous other cases in which Justices have used the preamble's "Blessings of Liberty" language to support a broad interpretation of the Bill of Rights. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111, 113 (1969) (Black, J., concurring) (first amendment); Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting) (double jeopardy clause of fifth amendment); Beckwith v. Bean, 98 U.S. 266, 296 (1879) (Field, J., dissenting) (due process clause of fifth amendment); Maxwell v. Dow, 176 U.S. 581, 608 (1900) (Harlan, J., dissenting) (sixth amendment right to trial by jury); McKeiver v. Pennsylvania, 403 U.S. 528, 572 (1971) (appendix to opinion of Douglas, J., dissenting) (due process clause of fourteenth amendment); Doe v. Bolton, 410 U.S. 179, 209-10 (1973) (Douglas, J., concurring) ("zones of privacy" created by Bill of Rights).

Bartkus involved a conflict between constitutional structure and the Bill of Rights: the Court held that principles of federalism required that a state be allowed to try a criminal defendant who had been acquitted in a federal trial of an analogous crime, and that the fifth amendment's double jeopardy clause did not prohibit a second trial. Dissenting for himself and two others, Justice Black argued that the Court's holding represented "a misuse and desecration of the concept" of federalism, since "[o]ur Federal Union was conceived and created . . . to 'secure the Blessings of Liberty,' not to destroy any of the bulwarks on which . . . freedom . . . depend[s]." 359 U.S. at 155 (Black, J., dissenting). The majority did not invoke the preamble's "Blessings of Liberty" language in *its* opinion, though it might have used the phrase to support the proposition that while federalism arguably defeats the preamble's object in this instance, in the long run that object is served by strict adherence to principles of federalism, which is itself one of "the bulwarks on which . . . freedom . . . depend[s]." *Cf.* THE FEDERALIST No. 51, at 323 (J. Madison) (federalism is "a . . . security . . . to the rights of the people"). (The majority did say that "a federal system" is a "safeguard against arbitrary government." 359 U.S. at 137.)

opinions brings into relief a point that may be obvious: the objects of the federal government enunciated in the preamble, both in theory and in practice, are in many instances incompatible. Providing for the common defense often necessitates the restriction—or even deprivation—of liberty. And insuring domestic tranquility may require stopping short of fully establishing justice.[286] Thus, while Justice Brennan was obviously invoking the preamble to support a constitutional argument, his use of the preamble might be given a different, more cynical interpretation—namely, that the preamble, because of its broad, uncertain, and frequently contradictory language, is singularly unhelpful as an aid in constitutional interpretation, and perhaps obfuscates more than it clarifies.[287]

IV. CONCLUSION

The thesis of William Crosskey's *Politics and the Constitution in the History of the United States* is that the Constitution gives broad powers to the federal government, and that the document should be interpreted so as to effectuate this broad conferral of power. The preamble, according to Crosskey, supports such an interpretation:

> [T]he conclusion appears warranted that the Preamble was carefully constructed to provide a clear basis for resolving any doubts or ambiguities that the Constitution might contain, in a way that would assure an ample, general national authority; that it was drawn to preclude any narrow, hampering "equities of restraint"; and that it was meant to provide, instead, for "equities of fulfilment" of "the intent" of a national government which the Preamble sets forth, if it should turn out that such "equities" were needed.[288]

The generalities of the preamble, in other words, instruct judges to construe federal powers expansively.

---

[286] On the other hand, the preamble's goals are not always in conflict: "provid[ing] for the common defence" may be a necessary condition for "secur[ing] the Blessings of Liberty," and "establish[ing] Justice" may be a necessary condition for "insur[ing] domestic Tranquility." *See* D. EPSTEIN, *supra* note 43, at 108 ("We have seen the dependence of justice on the public good (rights presuppose national defense), and the dependence of the public good on justice (peace is disturbed by insurrections by the oppressed).").

[287] For an elaboration, see *infra* text accompanying notes 288-322.

[288] 1 W. CROSSKEY, *supra* note 44, at 378-79.

There are at least two problems with Crosskey's understanding of the preamble. First, the preamble can be—and in fact has been—used not only to vindicate but also to *defeat* the powers of the federal government vis-à-vis state governments. Second, when there is a conflict between a federal (government) power and a federal (individual) right—as there frequently is—it is not possible for the preamble to vindicate both.

A. USING THE PREAMBLE AS AN AID IN INTERPRETING VAGUE CONSTITUTIONAL PROVISIONS

Consider two of the most ambiguous and controversial provisions of the Constitution: the commerce clause[289] and the necessary and proper clause.[290] Supreme Court Justices have used the preamble as an aid in interpreting both of these clauses; but while some Justices have used the preamble to give these provisions a broad interpretation, others have used it to give them a *narrow* interpretation.

Thus Justices have invoked the preamble's "more perfect Union" language to support a broad, "nationalist" interpretation of the commerce clause when invalidating state statutes that had the effect of regulating interstate commerce.[291] For these Justices, apparently, the difference between the less perfect *Confederation* and the more perfect *Union* is one of kind, and thus a broad conception of the federal government's power over commerce is warranted. On another occasion, however, a Justice invoked the preamble's "more perfect Union" language to support a narrow, "states' rights" interpretation of the commerce clause when arguing for the invalidation of a *federal* statute that had the effect of regulating *intra*state commerce.[292] For this Justice, apparently, the difference between the *less perfect* (pre-1787) Union and the *more perfect* (post-1787) Union is one of degree only, and thus a *narrow* conception of the federal government's power over commerce is warranted. Another Justice has invoked the preamble's "general Welfare" language to support a narrow, "states' rights"

---

[289] "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

[290] "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18.

[291] *See supra* text accompanying notes 109-11 (discussing Leisy v. Hardin, 135 U.S. 100, 125 (1890)).

[292] *See supra* text accompanying notes 107-08 (discussing The Lottery Case, 188 U.S. 321, 371-72 (1903) (Fuller, C.J., dissenting)).

interpretation of the commerce clause.[293] His argument was that because the "general welfare" language in the Articles of Confederation did not embrace the power to regulate commerce, it is unlikely that the identical phrase in the Constitution embraces that power; thus the argument that the regulation of commerce was the central concern of the Framers is a weak one, as is the corollary of that argument—namely, that the commerce clause should be interpreted broadly.

As with the commerce clause, so with the necessary and proper clause. In one case, the Court invoked the preamble's "common defence" language to support a broad interpretation of the necessary and proper clause when upholding a federal statute challenged as beyond Congress' enumerated powers.[294] In other cases, however, Justices have invoked the preamble's "establish Justice" language to support a *narrow* interpretation of the necessary and proper clause when arguing for the *invalidation* of federal statutes challenged as beyond Congress' enumerated powers.[295]

The preamble, in short, 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. Thus, in 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."

But a broader point remains to be made.

---

[293] *See supra* text accompanying notes 257-68 (discussing EEOC v. Wyoming, 460 U.S. 226, 265-68 (1983) (Powell, J., dissenting)).

[294] *See supra* text accompanying notes 233-41 (discussing Lichter v. United States, 334 U.S. 742, 754-65 (1948)).

[295] *See supra* text accompanying notes 163-79 (discussing, *inter alia*, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 622-23 (1870)). It seems reasonable to suggest that just as one half of the Court invoked the preamble's "establish Justice" language to support invalidating the legal tender legislation, so too could the other half of the Court have invoked the preamble's "common defence" language to support *upholding* the legislation, since it was enacted for the purpose of financing the Civil War.

B. The Preamble Implicates the Two Great Themes of the American Constitution and American Constitutionalism

Virtually every case in which the preamble has been invoked has implicated one (or both) of the two major themes of American constitutionalism: the relationship and conflict between the federal government and state governments (federalism), and the relationship and conflict between the rights of individuals and the power of majorities (liberal democracy). And the preamble has been used by both sides in these conflicts.

1. Federalism: The Powers of the Federal Government vs. the Powers of State Governments

When there has been a question as to whether the federal government may permissibly exercise its (putatively) limited powers at the expense of state governments, Justices have used the preamble to resolve the question in favor of the exercise of federal power. Thus, in addition to using the preamble's "more perfect Union" language to support a broad construction of the commerce clause,[296] Justices have used the preamble's "We the People,"[297] "more perfect Union,"[298] "establish Justice,"[299] and "domestic Tranquility"[300] language to support a broad construction of the various grants of jurisdiction to the federal courts. While article I, section 8 of the Constitution limits the power of the federal legislature, and while article III, section 2 limits the power of the federal judiciary, Supreme Court Justices have used the preamble to support an expansive rather than restrictive interpretation

---

[296] *See supra* text accompanying notes 109-11 (discussing Leisy v. Hardin, 135 U.S. 100, 125 (1890)).

[297] *See supra* text accompanying notes 60-69 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (opinion of Jay, C.J.), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324-25 (1816)).

[298] *See supra* text accompanying notes 113-23 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (opinion of Jay, C.J.), Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416-17 (1821), and Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 731 (1838)).

[299] *See supra* text accompanying notes 141-47 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (opinion of Jay, C.J.), and Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 730-31 (1838)).

[300] *See supra* text accompanying notes 208-12 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (opinion of Jay, C.J.), and Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 731 (1838)).

of those sections.

But the preamble has also been used to *defeat* the attempted exercise of federal power, and to vindicate the power of state governments. Thus one Justice has used the preamble's "We the People" language to support the proposition that the Bill of Rights is not applicable to the states;[301] another has used the preamble's "more perfect Union" language to support a narrow conception of congressional power under section two of the thirteenth amendment and section five of the fourteenth amendment;[302] and other Justices have used the preamble's "more perfect Union"[303] and "general Welfare"[304] language to support a narrow interpretation of the commerce clause.

2. Liberal Democracy: The Rights of Individuals vs. the Power of Majorities

American government is at once liberal and democratic: its end is the safeguarding of rights; and the means toward this end is majoritarian democracy. Many—perhaps most—constitutional law cases seek to resolve some conflict between these two principles. And while the preamble has been used as an interpretive aid in such cases, it has been used both to vindicate individual rights and to uphold the exercise of power by democratic majorities.[305] This is unsurprising: while "establish[ing] Justice" and "secur[ing] the Blessings of Liberty" are liberal concepts—which is to say, they have to do with individual rights—"insur[ing] domestic Tranquility," "provid[ing] for the common defence," and "promot[ing] the general Welfare" are majoritarian concepts—which is to say, they have to do with the exercise of government power.

Thus, while some Justices have invoked the preamble's "establish

---

[301] *See supra* text accompanying notes 70-73 (discussing Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833)).

[302] *See supra* text accompanying notes 124-28 (discussing *Ex parte* Virginia, 100 U.S. 339, 357 (1879) (Field, J., dissenting)).

[303] *See supra* text accompanying notes 107-08 (discussing The Lottery Case, 188 U.S. 321, 371-72 (1903) (Fuller, C.J., dissenting)).

[304] *See supra* text accompanying notes 257-68 (discussing EEOC v. Wyoming, 460 U.S. 226, 265-68 (1983) (Powell, J., dissenting)).

[305] To the extent that cases involving a conflict between the rights of individuals and the power of majorities involve a conflict between *federal* rights and the power of *state* majorities—as they often do—these cases implicate federalism concerns as well.

Justice"[306] and "secure the Blessings of Liberty"[307] language to support a broad interpretation of the Bill of Rights in general and those provisions of the Bill of Rights dealing with criminal procedure in particular, other Justices have invoked the preamble's "insure domestic Tranquility" language to support a *narrow* interpretation of those same provisions.[308] And while some Justices have interpreted the first amendment's free speech clause[309] in light of the preamble's "common defence" language[310]—which is to say, they have interpreted the clause narrowly—others have argued that the first amendment's free speech clause should be interpreted in light of the preamble's "Blessings of Liberty" language[311]—which is to say, it should be interpreted broadly. To the extent that the Constitution embodies a conflict between liberalism and democracy, in short, the preamble merely summarizes that conflict; it does not offer a solution.[312]

---

[306] *See supra* text accompanying notes 148-55 (discussing Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting), and McGautha v. California, 402 U.S. 183, 246 & n.17 (1971) (Douglas, J., dissenting)).

[307] *See supra* text accompanying notes 282-85 (discussing Greer v. Spock, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting)); *supra* note 285 (discussing, *inter alia*, Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting)).

[308] *See supra* text accompanying notes 190-205 (discussing Berger v. New York, 388 U.S. 41, 72-73 (1967) (Black, J., dissenting), Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting), Von Moltke v. Gillies, 332 U.S. 708, 741 (1948) (Burton, J., dissenting), and Estelle v. Jurek, 450 U.S. 1014, 1019-21 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

[309] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[310] *See supra* text accompanying notes 220-28 (discussing Wayte v. United States, 470 U.S. 598, 611-12 (1985), and Greer v. Spock, 424 U.S. 828, 837-38 (1976)).

[311] *See supra* text accompanying notes 282-85 (discussing Greer v. Spock, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting)).

[312] Which is not to say that the preamble is entirely without purpose. As an encapsulation of the constitutional tension between liberalism and democracy, the preamble might have been intended to serve the (concededly limited) purpose of reminding judges (and citizens) that constitutional interpretation necessarily involves balancing. In particular, the preamble might have been intended as a reminder that every question of constitutional law requires that judges balance the competing claims of individual rights and majoritarian democracy—of "Justice" and "Liberty," on the one hand, and "domestic Tranquility," the "common defence," and the "general Welfare," on the other. *Cf.* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981 (1987) ("Balancing opinions typically pit individual against governmental interests.").

C. WERE THE ANTI-FEDERALISTS' FEARS JUSTIFIED?

One of the defects of the Constitution, according to the opponents of ratification, was the preamble: the Anti-Federalists were concerned that the broad and imprecise language of that provision would serve as a justification for the liberal exercise of federal power.[313] Were the Anti-Federalists' fears justified?

The answer, in retrospect, is almost certainly no. With a couple of exceptions,[314] the preamble has never been considered an independent source of federal rights or powers. To the extent that Supreme Court Justices have made use of the preamble, they have used it either for rhetorical effect or to support resolving close constitutional questions in one direction rather than the other. That the Court has made such limited use of the preamble is understandable: three of the preamble's phrases were borrowed from the Articles of Confederation[315] (where they obviously could not have served as a justification for enhancing the powers of the central government); the preamble was apparently something of an afterthought for the Framers of the Constitution (there having been little discussion of the provision during the Constitutional Convention);[316] and the "father of the Constitution" himself repeatedly insisted, from the time of the Framing of the Constitution virtually until his death, that the preamble in general, and the phrases "common defence" and "general Welfare" in particular, were not intended to enhance the powers of the federal government.[317]

There is also the "plain language" of the preamble. When language is as vague as that of the preamble, and when a list of governmental objectives is so all-encompassing that those objectives will inevitably conflict with one another, it is not unreasonable to assume that the preamble was not expected to have significant interpretive value. And this assumption is generally consistent with subsequent Supreme Court

---

[313] *See supra* text accompanying notes 21-23; *supra* note 23.

[314] *See supra* text accompanying notes 163-79 (discussing, *inter alia*, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 622-23 (1870), where Court effectively derived federal right from preamble's "establish Justice" language); *supra* text accompanying notes 213-17 (discussing Mahon v. Justice, 127 U.S. 700, 716 (1888) (Bradley, J., dissenting), where Justice Bradley effectively derived limitation on power of state governments from preamble's "insure domestic Tranquility" language).

[315] *See supra* note 14 and accompanying text.

[316] *See supra* notes 16-20 and accompanying text.

[317] *See supra* text accompanying notes 24-30; *supra* note 34. *But see supra* text accompanying notes 31-34 (discussing Hamilton's belief that "common defence" and "general Welfare" language justifies expansive federal powers).

practice.

What, then, are we to conclude about the relevance (or irrelevance) of the preamble? One possible conclusion is that the preamble, because it can justify any outcome, is fundamentally unimportant.[318] This might be called the "legal realist" interpretation. Thus, just as Justices will invoke various justiciability doctrines—jurisdiction, standing, ripeness, mootness, political question—to avoid deciding an issue that, for one reason or another, they do not want to decide,[319] so too will Justices invoke one of the preamble's phrases to support a predetermined result. If a Justice wants to invalidate a pro-prosecution rule of criminal procedure, he will quote the preamble's "establish Justice" language; but if a Justice wants to *uphold* that same rule, she will quote the preamble's "insure domestic Tranquility" language. If a Justice wants to uphold a wartime regulation, he will cite the preamble's "provide for the common defence" language; but if a Justice wants to *invalidate* that same regulation, she will cite the preamble's "secure the Blessings of Liberty" language. The "legal realist" view, in short, is that the preamble, like the various justiciability doctrines, permits Justices to practice an unprincipled, results-oriented jurisprudence.[320]

One might just as well draw the opposite conclusion, however. Rather than being unimportant, perhaps the preamble is *all*-important. This might be called the "constitutional common law" interpretation. According to this view, the preamble is an invitation to federal judges to be creative in their constitutional interpretation; the very presence of the preamble at the head of the Constitution indicates that it is permissible—perhaps even mandatory—for federal judges to effect an evolutionary development of constitutional law in the same way that

---

[318] This is the view of Robert Bork. *See* R. BORK, THE TEMPTING OF AMERICA 35 (1990) ("Matters are not helped by . . . taking as expressing the 'spirit' [of the Constitution] a clause in the Preamble, which is entirely hortatory and not judicially enforceable . . . . Worse than that, however, there are any number of 'spirits' within the Preamble . . . .").

[319] *See* A. BICKEL, *supra* note 87, at 111-98 (discussing "passive virtues").

[320] *Cf.* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 22 (1964) ("'passive virtues' frequently inflict damage upon legitimate areas of principle"); Allen v. Wright, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting) ("More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims.").

state judges effect an evolutionary development of the common law.[321]

The best view probably lies somewhere between the "legal realist" and "constitutional common law" extremes (though closer to the former). While the preamble might in some instances serve as a legitimate (albeit limited) "tool" of constitutional interpretation (in the same way that preambles to statutes can serve as legitimate "tools" of statutory interpretation),[322] it seems rather implausible, in view of both the language of the provision and the "intent" of its authors (to the extent they had any), that the preamble, in and of itself, requires (or even allows) judges to adopt a general attitude of interpretive liberality with respect to the constitutional text. The phrases of the preamble can be given so many meanings, and can support so many different interpretations of the Constitution, that they can be used for virtually any purpose at all. This is reason enough to greet with skepticism any judicial decision in which heavy reliance is placed upon that constitutional provision.

---

[321] This is the suggestion of Handler, Leiter & Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990). There are at least two problems with this view. First, there is little evidence that this was the view of the Framers. Indeed, it seems more plausible that the Framers' silence with respect to the preamble was an indication that they foresaw a limited role for that provision than that their silence indicated approval of a significant role for the preamble. Second, even if the preamble was intended to be a signal to federal judges that they are free to engage in creative constitutional interpretation, such a signal begs an obvious question: In what direction should that creativity lead them? Should federal *powers* be interpreted broadly, or should federal *rights* be interpreted broadly? Handler, Leiter, and Handler, for example, argue that the preamble supports upholding New Deal legislation: "the extraordinary economic debacle of the Great Depression presents a case in which the 'general welfare' of the nation was surely at stake; in such a situation, to give no significance to this fundamental constitutional objective would be to ignore inexplicably and inexcusably the guidance offered by the preamble." Handler, Leiter & Handler, *supra*, at 161 n.213. But why should the objective of "promot[ing] the general Welfare" take precedence over all others? What about the possibility that the New Deal legislation, insofar as it abrogated various economic liberties (such as freedom of contract) once thought to be fundamental, was inconsistent with "establish[ing] Justice"? Or that the New Deal legislation, insofar as it involved the delegation of legislative power to executive agencies, violated the separation of powers, and thus was inconsistent with "secur[ing] the Blessings of Liberty"? Perhaps the preamble supports invalidating, rather then upholding, New Deal legislation.

[322] *See supra* text accompanying note 6; *supra* notes 7-8. The preamble might also serve as a reminder of the need for balancing in constitutional interpretation. *See supra* note 312.