A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation

Brian Leiter
Carole E. Handler
Milton Handler

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A RECONSIDERATION OF THE RELEVANCE AND MATERIALITY OF THE PREAMBLE IN CONSTITUTIONAL INTERPRETATION

*Milton Handler,* **Brian Leiter** and Carole E. Handler**

At a time when the bicentennial of the Constitution is being widely celebrated, it is appropriate to reconsider the role of the preamble in constitutional adjudication. For two centuries the preamble has been the most neglected feature of our organic charter. While almost every other provision has been subjected to exhaustive analysis and a rich and often long history of judicial construction, the preamble has been surprisingly ignored by the overwhelming majority of commentators1 and relegated to sheer irrelevance by the courts.2

Though it is understandable that the courts, on the few occasions on which the question has arisen, have accorded no substantive effect

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2 See infra note 9.
to the preamble,\(^3\) it is difficult to comprehend why they (as well as the commentators) have failed to turn to the preamble as an aid to the proper construction of the constitutional text. As an authoritative recital of the Constitution's purposes and the intent of its framers, the preamble would seem well-suited to playing a useful role in constitutional interpretation; a role, moreover, that is not at all unusual or unfamiliar. In fact, as we endeavor to demonstrate below, the fate of the preamble in constitutional jurisprudence is inexplicably anomalous when compared to the well-established interpretive significance accorded preambles and preamble-like provisions in the construction of other legal instruments.

That the preamble has been improperly excluded from the process of constitutional interpretation would hardly seem worth noting, however, unless the recognition of its relevance might have influenced, albeit modestly, the course of judicial decision in the past and could be of assistance to the Court in the future in the resolution of increasingly difficult questions of constitutional interpretation. That it should have had and can have such an effect is our belief and the theme of this paper. Indeed, one would expect that this too would be the view of each of the major schools of constitutional construction. For the interpretivist, the preamble would seem to possess significance as explicit language of the document; for the noninterpretivist, as relevant evidence of the document's broad purposes and values; and for the originalist, as a statement of the framers' "intent."\(^4\) But in fact, each of these schools has ignored the preamble.

In developing our thesis, we examine in Part I of this article the fate of the preamble in the courts. While the courts have declared that no substantive right or power derives from the preamble, this defensible conclusion\(^5\) has effectively chilled almost all reliance on the preamble in interpreting the Constitution.\(^6\) In Part II, we demonstrate just how anomalous a phenomenon this is by examining the well-established rules of construction involving preambles and analogous provisions in contracts, statutes, and treaties. Interestingly, even early commentators on the Constitution, we show, envisioned an office for the preamble in constitutional jurisprudence similar to that of preambles under the common law—a role unhappily never thereafter realized.

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\(^3\) See infra notes 17-19 and accompanying text.

\(^4\) For further discussion of these points, and our understanding of these schools of interpretation, see infra notes 53-65 and accompanying text.

\(^5\) But see infra notes 120-21 and accompanying text.

\(^6\) But see infra note 14 for cases that do employ the preamble.
In Part III, we turn to the broader question of how the Constitution should be read. Drawing on the writings of the Constitution's framers as well as of legal and jurisprudential writers of the same or proximate eras, we show that they conceived of the Constitution as a legal document subject to familiar common-law principles of interpretation and adjudication: inclusion and exclusion, expansion and contraction, case-by-case determination, and other forms of necessary and historically warranted interpretive dynamism. Constrained thus dynamically and in the common-law tradition, the Constitution has the elasticity which its preamble contemplates and which, like the development of common-law principles, enables it to cope with new problems, arising at different times under ever-changing conditions and circumstances. This is what we argue in Part IV, where we suggest how some important constitutional issues might be determined using the preamble not for any substantive principles but for the direction and guidance its eloquent statement of the charter's goals and purposes can provide.

I. THE PREAMBLE AND THE COURTS

The preamble of the Federal Constitution reads:

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.8

Although the Constitution begins with this unequivocal invocation of noble ideals and goals, the courts, throughout our history, have been reluctant to accord any force to this initial declaration of purpose.9

In truth, however, the courts' disdain for the preamble is selective. Courts, for example, will frequently note that ultimately sovereignty resided in the people of the United States as attested to by the

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7 See infra notes 97-102 and accompanying text.

By referring to the Constitution's elasticity, we are not in any way endorsing the rewriting of its text in the untrammelled discretion of the Justices; rather by invoking the analogy of the development of common law principles, we focus on the interpretations of the charter's provisions whose words and phrases are frequently couched in generalities and whose application to the facts of specific cases requires judicial construction.

8 U.S. Const. preamble.

preamble's beginning, "We the people." But this reference has always been more of a rhetorical flourish than an effort to ascertain concrete entitlements or protections under the Constitution.

By contrast, courts considering an issue bearing in some way on the preservation or promotion of national security will hold that such an objective clearly falls within constitutional bounds by reference to the preamble's language that the Constitution was established in part to "provide for the common defence." Unlike the words "We the people," the courts' invocation of the "common defence" language does figure in the determination of substantive constitutional questions. But if courts are willing to invoke the "common defence" provision of the preamble in the context of adjudicating the constitutionality of acts and legislation bearing on national security, they have demonstrated no such willingness with respect to the language seemingly applicable to the most contentious issues in recent constitutional adjudication: those pertaining to questions of liberty, welfare, and, to a lesser extent, justice. There have been exceptions. For example, in Goldberg v. Kelly, the due process rights of welfare

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13 It should be noted that the language concerning the establishment of "justice" has generally been construed as referring to the establishment of a judiciary and the provision thereby of procedural justice. See, e.g., 1 J. Story, Commentaries on the Constitution of the United States § 482 (1833); Chayes, How Does the Constitution Establish Justice?, 101 Harv. L. Rev. 1026 (1988).

14 397 U.S. 254 (1970); see McGautha v. California, 402 U.S. 183, 246 (1971) (Douglas, J., dissenting) ("[j]ustice—in the sense of procedural due process—is denied where a State makes inadmissible evidence designed to educate the jury on the character and propensities of the accused. Ohio does just that;" in a footnote to the word "[i]ustice," Justice Douglas noted that, "[u]t is commonly overlooked that justice is one of the goals of our people as expressed in the preamble of the Constitution . . ." and he went on to quote the preamble. Id. at n.17. Note, however, that Justice Douglas, like some other commentators, see supra note 13, construes the "justice" mentioned in the preamble to refer to procedural justice); see also Doe v. Bolton, 410 U.S. 179, 210 (1973) (Douglas, J., concurring) (ninth amendment "includes customary, traditional, and time-honored rights . . . that come within the sweep of 'the Blessings of Liberty' mentioned [as an interpretive aid] in the preamble to the Constitution").

Since 1825 (the handful of pre-1825 cases are discussed infra note 45), the preamble's language concerning liberty, justice or welfare has only been employed substantively in approximately two dozen Supreme Court cases. In almost two-thirds of these cases, the preamble is mentioned only by the dissent. In only one-sixth of the cases does the majority opinion refer to the preamble. Moreover, only four justices (Black, Douglas, Burton and Field) are
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The court observing that "[p]ublic assistance . . . is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" 15

The classic expression, however, of the significance attached to the preamble is Justice Harlan's opinion in Jacobson v. Massachusetts. 16 In a case involving the constitutionality of a state vaccination law, the Justice rejected the suggestion that "the particular section of the statute of Massachusetts now in question . . . is in derogation of rights secured by the [p]reamble of the Constitution of the United States." He observed that:

Although that [p]reamble indicates the general purposes for which

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15 Goldberg, 397 U.S. at 265.

16 197 U.S. 11 (1905); see also discussion infra note 19 and accompanying text.
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 [p]reamble, it be found in some express delegation of power or in some power to be properly implied therefrom.\footnote{Jacobson, 197 U.S. at 22.}

This view has been reiterated by other courts.\footnote{See, e.g., United States v. Kinnebrew Motor Co., 8 F. Supp. 535, 539 (W.D. Okla. 1934), cert. dismissed, 296 U.S. 669 (1935) (discussing Jacobson and remarking that "there is no such thing as the 'Welfare Clause' of the Constitution"); Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W.D. Ky.), rev'd, 74 F.2d 697 (6th Cir. 1934), which discusses Jacobson and observes that: [i]t would hardly seem necessary to demonstrate the fallacy of the claim that there is any inherent or general power unmentioned in the Constitution to accomplish the purposes set forth in the preamble to that instrument. It would seem perfectly apparent that the objects set forth in the preamble were intended by the fathers to be attained through the exercise of the powers granted to the national government in the Constitution . . . .}

It is important to note that what these courts hold is actually uncontroversial and perfectly consistent with its rules of construction for analogous legal documents. The narrow holding of the Supreme Court in Jacobson and of the various federal district courts is that no substantive rights are conferred by the preamble by itself. In fact, these courts neither reject nor even consider what role the preamble might play as an interpretive aid or guide; they are likewise silent on the possibility that substantive rights might be derived from the preamble, not by itself, but as read, for example, in conjunction with the fourteenth amendment.\footnote{See infra notes 131-222 and accompanying text.}

Nonetheless, the narrow holding, as expressed in Jacobson, has, in effect, "chilled" almost all judicial reliance on the preamble.\footnote{But see supra note 14 for exceptions to this general tendency.} The Jacobson court's unequivocal rejection of the preamble as a source of rights has effectively discouraged most courts from considering the
preamble in any context in which any contentious issues arise concerning liberty, justice or welfare.21

Perhaps the current attitude is best summed up by Professor Edward L. Rubin who, after quoting the preamble’s language that the Constitution was established to “secure the Blessings of Liberty to ourselves and our Posterity,” remarked that, “It would require great daring to derive any specific meaning from this phrase.”22

But while it may require “great daring” to derive “specific meaning” from any phrase in the preamble alone,23 the question remains whether familiar rules of construction and interpretation do not compel the rescue of the preamble from its current desuetude in our constitutional jurisprudence.

II. “PREAMBLES” IN COMMON-LAW INTERPRETATION

In this section we seek to demonstrate that the disregard of the preamble as an authoritative statement of the purposes and goals of the Constitution represents a dramatic departure from the interpretive significance accorded preambles and preamble-like provisions in other legal documents. We consider, in this regard, the recital clauses of contracts, legislative declarations of purpose in statutes, and the preambles of treaties—each of which serves to articulate the purpose of the document and the intent of its makers. We can discern no reason why their rules of construction should not obtain in the constitutional context and are fortified in our conclusion by noting that this was precisely the view of earlier and knowledgeable commentators and jurists.

A. Contracts

Private contracts typically begin with clauses often called “recital clauses,” sometimes called preambles, and frequently beginning with the word “whereas.” These clauses may describe the goals and purposes of the contract or explain its major conditions or obligations.

21 Note, again, that the invocation of the preamble’s provision for “common defence” has not been similarly chilled. See supra note 11 and accompanying text.


23 Since liberty rights recognized by the Court are derived from the due process clause of the fifth amendment and, so far as the states are concerned, from the fourteenth amendment, it is far from clear to us why “great daring” was not equally necessary when specific meaning was found in the similar language of these amendments.
The question that concerns us is what significance courts generally assign to these introductory recitals.

The basic rule of construction is straightforward: a court may look to a recital clause for aid in interpreting the substantive provisions of the contract when those provisions are ambiguous. The opinion of the Indiana court in *Stech v. Panel Mart* is typical. There, the court relied on a 1924 Indiana Supreme Court opinion holding that:

The preliminary recitals in a contract may be persuasive in determining the intention of the parties thereto when the language expressing their contractual relations is ambiguous, uncertain and indefinite, but they should never be allowed to control, as here, the clearly expressed stipulations of the parties.

The *Stech* court went on to qualify this principle with the observation of the Indiana Supreme Court in a 1949 opinion that,

The preliminary recitals of the contract may be of some value, but they are not contractual, and can not be permitted to control the express provisions of the contract which are contractual in nature.

Concurring with these principles of construction, the *Stech* court further observed that "a court must construe the instrument as a whole, giving effect to every portion, if possible," and that, as a consequence, "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction."

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24 See, e.g., *Stech v. Panel Mart*, Inc., 434 N.E.2d 97, 100 (Ind. Ct. App. 1982); Nassif v. Boston & Me. R.R., 340 Mass. 557, 563, 165 N.E.2d 397, 401 (1960) ("Doubtless, the recitals of the preamble [to the contract] may be used to assist in interpreting other parts of the contract, but, as such, they impose no obligations..."); *Berg v. Berg*, 201 Minn. 179, 189, 275 N.W. 836, 842 (1937). See also *United States v. Howland*, 17 U.S. (4 Wheat.) 108, 111-12 (1819) (counsel) (giving preamble of recital clauses interpretive significance even in absence of ambiguity); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103-04 (2d Cir. 1985); *Schaffran v. Mount Vernon-woodberry Mills, Inc.*, 70 F.2d 963, 965 (3d Cir. 1934); *Wilson v. Towers*, 55 F.2d 199, 200 (4th Cir. 1932); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 164 F. Supp. 293, 301 (D. Minn. 1957); *Kingwood Oil Co. v. Bell*, 136 F. Supp. 229, 240 n.15 (E.D. Ill. 1955) ("Re-sort will be had to the recitals of the contract if necessary to determine the intention of the parties and operating provisions thereof."); *Shipman v. General Transistor Corp.*, 22 Misc. 2d 632, 634-5, 198 N.Y.S.2d 852, 854 (Sup. Ct.) ("recitals to the agreement... 'may be resorted to as indicating the intention of the parties and the meaning and scope of the agreement'"); aff'd mem., 12 A.D.2d 529, 207 N.Y.S.2d 734 (2d Dep't 1960). See generally E. Farnsworth, *Contracts* § 710.10 (1990).

25 *Stech*, 434 N.E.2d at 97.

26 Id. at 100 (quoting Irwin's Bank v. Fletcher Sav. & Trust Co., 195 Ind. 669, 694, 145 N.E. 869, 877 (1924)).

27 Id. (quoting *Kerfoot v. Kessener*, 227 Ind. 58, 79, 84 N.E.2d 190, 199 (1949)).

Similarly, in Berg v. Berg, the Minnesota Supreme Court quoted approvingly the opinion of a West Virginia court:

It seems to be quite clear that paragraphs in a contract containing recitals of the purposes and intentions of the parties thereto are not strictly speaking parts of the contract, unless adopted as such by reference thereto. The obligation[s] of the parties to each other are not fixed by the terms of these recitals, and the only purpose thereof is to define or limit the obligations which the parties have taken upon themselves where the extent thereof is uncertain, or to aid in interpreting any ambiguous language used in expressing such obligation. Such preambles or recitals in a contract are analogous to the preamble in a statute. It is no part of the statute, but frequently it is looked to in determining the proper construction of the act. It ordinarily declares the mischief which it is the intention of the Legislature to correct by the passage of the act, and thus offers valuable aid in construing a statute ambiguous on its face. And so in contracts where a preamble of this character is added declaratory of the purposes and intentions of the parties, it will be looked to in construing the contract, and to supply any omissions therefrom which are capable of being supplied by reference to such recitals, but in no sense will it be the basis of a legal and binding obligation of the parties.

In sum, two basic rules of construction apply when courts are construing the recital clauses of contracts:

1. Contracts are to be construed as a whole; and
2. Where substantive provisions are ambiguous, recital clauses may be used to fill in terms or clarify meanings or purposes.

The recital clause, then, is an interpretive aid, one that is subsidiary to the main text of a contract, but that may be properly invoked to construe ambiguous provisions, and thereby impose obligations upon and create entitlements for the parties.

B. Legislative Declarations of Purpose

Many statutes begin with a legislative declaration of purpose, and a large number of courts have addressed the question of what role such declarations play in the interpretation of the statute. The answer to this question, however, can only be understood in the context of a general rule of interpretation: that courts should effectuate the legislature's intent in construing statutory provisions. A legislative decla-

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30 Id. at 189 (quoting Martin v. Rothwell, 81 W. Va. 681, 683-84, 95 S.E. 189, 190 (1918)).
32 See, e.g., Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation
ration of purpose is, then, a way of ascertaining the legislature's intent. Consequently, courts uniformly take the view that a legislative declaration of purpose is an important interpretive aid.33


[j]If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress... If a court... ascertains that Congress had an intention... that intention is the law and must be given effect.

Id. at 842-43 & n.9; see also, Director, Office of Workers' Compensation Programs, United States Dep't of Labor v. Forsyth Energy, Inc., 666 F.2d 1104, 1107 (7th Cir. 1981) ("In interpreting a statute, this court's function '... is to give effect to the intent of Congress.'"); Environmental Defense Fund v. Colorado Dep't of Health, 731 P.2d 773, 776 (Colo. Ct. App. 1986) ("The fundamental rule of statutory construction is to determine the General Assembly's intent and, if possible, to give effect to every word of the statute by reading the act as a whole. A reviewing court must liberally construe general provisions of the statute to give full effect to the General Assembly's intent.") (citation omitted); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535 (1947) ("The Court no doubt must listen to the voice of Congress."). But see infra notes 106-07 and accompanying text for framers' view of intent and how it is to be ascertained.

33 A North Carolina court stated that

It is elementary that the controlling principle in the interpretation of a statute is that it must be given the meaning which the Legislature intended it to have. Thus, when the Legislature has erected within the statute, itself, a guide to its interpretation [in the form of a "declaration by the Legislature of the policy to be accomplished by the act"], that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit.

In re Watson, 273 N.C. 629, 632, 161 S.E.2d 1, 5 (1968) (citations omitted); see also, EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (interpreting the word "employee" in a way to make it consistent with declared purpose of Age Discrimination in Employment Act), cert. denied, 464 U.S. 819 (1983); Consolidated Rail Corp. v. Smith, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987) (holding that Federal Railway Safety Act preempted municipal ordinances by reading relevant section of Act in conjunction with the "Congressional statement of statutory purpose" as establishing Congressional intent to effect such preemption); Globe Fur Dyeing Corp. v. United States, 467 F. Supp. 177, 180 (D.D.C. 1978) ("Congressional purpose or declaration of policy set out in the preamble of a statute provides a sound and thoroughly acceptable basis for ascertaining the goals of the statute, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-34 (1973)"); aff'd mem., 612 F.2d 586 (D.C. Cir. 1980); Uline v. Motor Vehicle Accident Indem. Corp., 28 Misc. 2d 1002, 1004, 213 N.Y.S.2d 871, 873 (Sup. Ct. 1961) ("Although legislative declaration of the purpose and intent of a statute cannot control the judgment of the court, it is entitled to great weight as an aid to interpretation of such statute."); Hamrick v. State Farm Mut. Auto. Ins. Co., 270 S.C. 176, 180, 241 S.E.2d 548, 550 (1978) ("The purpose of... no fault coverage has been declared in the statute itself and must be considered in interpreting the statute."). An exception of sorts to the general rule is found in Smith v. Michigan Employment Sec. Comm'n, 410 Mich. 231, 234, 301 N.W.2d 285, 289 (1981), which held that "[w]here a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand" (following language of N.W.2d). While this does not
Thus, purpose generally, and a legislative declaration of purpose in particular, are important and proper aids in interpreting statutes. The main difference from the rule for contracts is that courts place less emphasis on the need for the statutory language to be ambiguous before appeal to a legislative declaration of purpose is warranted. Resort to the legislative purpose as declared in the statutory preamble is generally permissible without a threshold determination that the language of the statute itself is ambiguous.

C. Treaties

The rule of construction governing the preambles of treaties is analogous to the comparable rule for contracts (although the issue here has come up much more infrequently than in the case of contracts or statutes). In *Citizens Band of Potawatomi Indians v. United States*, for example, the court observed that “where the words of a treaty are not clear or unambiguous, we should review both the history and the purpose of the Article in question in an effort to determine its true meaning.” The court went on to note that one aid in this search would be “the treaty preamble.” Thus, for treaties, as for contracts, ambiguities in the text of the document may be resolved by reference to preamble clauses.


For contracts, statutes and treaties we may adduce the following five general rules of construction:

First, preambles are not independent sources of obligations or rights;
Second, these instruments are to be construed as a whole;

Third, the purpose of legislative or private documents is relevant to their interpretation, particularly when portions of the documents are ambiguous;

Fourth, preambles can be guides to purpose and hence helpful in interpretation;

Fifth, preambles can also be useful when particular provisions in the body of a document are ambiguous (independent of whether the preamble illuminates purpose).

Constitutional jurisprudence agrees with common-law rules of construction on the first and third points; that is, it is accepted that:

i) a preamble is not an independent source of obligations or rights;\(^{38}\) and

iii) purpose is significant in construing the document.

Constitutional jurisprudence is anomalous, however, with respect to the second, fourth, and fifth points: \(^{39}\)

ii) in not construing the Constitution as a whole but, instead, largely ignoring the preamble;

iv) in ignoring the preamble as a relevant source of purpose; and

v) in not referring to the preamble in order to construe ambiguous provisions in the constitutional text.

For convenience of reference, let us call these, respectively, the Wholeness Rule, the Purpose Rule and the Ambiguity Rule; and let us say what each of these would require of constitutional jurisprudence:

a) *The Wholeness Rule* requires that no part of the Constitution be overlooked in interpreting the Constitution, including, of course, its preamble;

b) *The Purpose Rule* requires that the preamble be consulted as evidence of the Constitution's purpose (and the intent of its framers) when the purpose of the Constitution is relevant to the construal of a particular provision;

c) *The Ambiguity Rule* requires that the preamble be consulted when construing ambiguous provisions of the Constitution in an effort to fix their meaning in particular cases.

The Wholeness Rule, by itself, is plainly the least significant; it is the other two rules that tell us what the interpreter should try to do with the preamble once he agrees to consider the document as a

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\(^{38}\) See supra notes 17-19 and accompanying text.

\(^{39}\) See supra notes 1-23 and accompanying text.
whole, including its preamble. 40

It might be objected, of course, that common-law rules of interpretation have no place when it comes to the Constitution. We reject, however, the notion that constitutional interpretation is different from the common-law principles discussed above. We can find no reason for exempting constitutional interpretation from a methodology whose wisdom had been repeatedly demonstrated in countless common-law adjudications. 41

In fact, early commentators on the Constitution, steeped as they were in common-law methods of interpretation, 42 conceived of a role for the preamble similar to that described for contracts, statutes, and treaties and encapsulated in the Wholeness, Purpose and Ambiguity Rules.

Thus, Justice Story in his Commentaries 43 writes that:

The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law . . . .

There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions. 44

Story’s basic thesis—that the preamble had a familiar and proper role to play in the construal of the Constitution—accords perfectly with the familiar common-law principles discussed above. 45 In keeping

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40 Note, of course, that the Purpose Rule naturally takes precedence over the Ambiguity Rule: for as long as purpose is relevant, and the preamble is evidence of purpose, then the preamble may be properly consulted, whether or not a particular provision is ambiguous.

41 There is even less reason for this difference given what we argue in Part III—that the Constitution was a document written by lawyers and intended to be construed in the manner familiar to common-law lawyers.

42 See especially infra notes 93-96 and accompanying text.

43 See J. Story, supra note 13.

44 Id. at §§ 459-60.

45 Story only cited Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Id. at § 460 & n.1. But in fact, there were a couple of decisions (but only a couple) in the first generation after the adoption of the Constitution that did employ the Preamble as an interpretive tool. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 381 (1822) (Marshall, C.J.); M’Culloch v. Mary-
with these, Story went on to observe that, "[t]he 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."\(^4\)

Similarly, Fortunatus Dwarris, in his seminal work on statutory interpretation,\(^4\) observed that "[t]he preamble [of a statute], is entitled to great consideration. It is, indeed, that introductory statement . . . to which both reason and authority point, for ascertaining the intention of the enactment."\(^4\) And Platt Potter (a justice of the Supreme Court of New York), in his edition of Dwarris's treatise, goes on to write in perhaps hyperbolic but telling terms:

Perhaps, in the history of American jurisprudence and of American fundamental law, there is no single paragraph that possesses more profound significance, in the expression of the object and intent of the instrument, and of its framers, than that of the preamble to the federal constitution. The highest judicial authority ever accords to it\(^4\) a significance becoming an instrument which was laying the deep foundations of a national government for American empire which should rest on the solid basis of the will of an intelligent and a free people; the highest original source of all legitimate earthly authority.

This preamble expresses the whole spirit of the instrument; and while it is never resorted to to enlarge the powers confided to the general government, or to any of its departments; and though it confers no power, *per se*, it has ever been referred to, and has been used for the purpose, as its true office would seem to be, to ex-

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\(^4\) J. Story, *supra* note 13, at § 462. See also § 422:

But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words in which those powers are granted can be a sound one which narrows down their ordinary import so as to defeat those objects.

Id.


\(^4\) Id. at 107. See also, T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 43 (2d ed. 1874) ("as Lord Coke and Lord Bacon say, the preamble is a key to open the understanding of a statute").

\(^4\) Potter neglected to cite any evidence for this proposition.
pound and express the nature, extent, and application of the powers conferred in the constitution itself.

... Here is found condensed, the reasons which have ever had their influence upon reflecting judicial minds in giving construction to this great fundamental law, the sheet anchor of our political hopes. 50

What for Story and Potter was natural—common-law wisdom applied to constitutional interpretation resulting in the rule that the preamble should be consulted to "expound and express the nature, extent, and application of the powers conferred in the constitution itself"—has unfortunately not been the way in which the Court itself through the years has regarded the opening words of the document. 51 Yet as Chief Justice Marshall noted, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." 52 Perhaps it is time, then, that this anomalous treatment of the Constitution's preamble come to an end. We consider now what difference this might make in our constitutional jurisprudence.

III. CONSTITUTIONAL INTERPRETATION AND CONSTITUTIONAL COMMON LAW

In asserting the relevance of the preamble, we do not align ourselves with any particular school of constitutional interpretation. In fact, the preamble, in our view, can be invoked to buttress all three of the currently dominant constitutional theories (interpretivism, noninterpretivism, and originalism). For interpretivists, constitutional interpretation must be firmly grounded in the language of the document, the structure of government it creates, or the document's his-

50 F. Dwarris, supra note 47, at 266-67. See also T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 11 (4th ed. 1878) (using the preamble to show "[t]he general purpose of the Constitution").

51 See supra notes 16-21, 43-50 and accompanying text.

Again, there have been a handful of exceptions. See Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 88 (Temp. Emerg. Ct. App. 1981) ("In the construction of the Constitution of the United States, statutes and regulations, the federal rule permits and requires consideration of preambles in appropriate cases."); cert. denied, 456 U.S. 905 (1982); United States v. Boyer, 85 F. 425, 430 (W.D. Mo. 1898) ("the preamble to the constitution . . . may be properly referred to for the purpose of correctly construing that instrument"). These are the decisions which in our view should be controlling. We agree with Judge Gewin's well worded dissent in Leflore v. Robinson, 434 F.2d 933, 955 (5th Cir. 1970) (Gewin, J., dissenting), withdrawn on other grounds, 446 F.2d 715 (1971):

The preamble to the Constitution does not purport to guarantee individual rights, but it does set forth what this union of states is all about. It does not limit the Bill of Rights but it does serve as a key to an interpretation of the responsibilities involved as well as the rights therein conferred and secured.

52 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
As Professor John Hart Ely writes: “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.” In short, the judge should look to “the general themes of the entire constitutional document and not...[any] source entirely beyond its four corners.” Interpretivism, in fact, encompasses both strict constructionism and originalism, though without according a priority to intent in the manner of the latter. Since the essence of interpretivism, however, is always a concern for the document itself, plainly the charter’s prefatory words ought not to be ignored.

Noninterpretivists, by contrast, hold that constitutional interpretation may often transcend the explicit language of the text to give effect to the underlying values and purposes that animate the Constitution and that ensure its continued vitality two hundred years after its framing. Professor Ely succinctly characterizes this view as follows: “courts should...enforce norms that cannot be discovered within the four corners of the document.” Similarly, Professor Thomas Grey has described noninterpretivism as the “acceptance of the courts’ additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.” Despite his differences with the interpretivist, it would seem that the noninterpretivist, too, in his pursuit of larger background values and purposes should be able to find important aid in the preamble’s expression of the broad aims of the Constitution.

Moreover, the noninterpretivist has more immediate need of the preamble than either the interpretivist or originalist. For the familiar complaint against noninterpretivism is that it represents an usurpation of legislative authority by the judicial injection of purely “personal” values into the Constitution. The preamble, as we argue

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53 See, e.g., J. Ely, Democracy and Distrust (1980); Monaghan, supra note 22.
54 J. Ely, supra note 53, at 1.
55 Id. at 12.
56 See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 17 (1971).
58 J. Ely, supra note 53, at 1.
59 Grey, supra note 57, at 706.
60 See, e.g., Bork, supra note 56, at 3-6; Rehnquist, The Notion of a Living Constitution, 54
below,\textsuperscript{61} enables the noninterpretivists to respond to such a charge by identifying themselves with the values set out in the preamble.

Finally, originalists contend that constitutional interpretation is to be guided by the intent of the framers.\textsuperscript{62} As former Attorney General Ed Meese put it:

Our belief is that only the sense in which the Constitution was accepted and ratified by the nation, and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.\textsuperscript{63}

Elsewhere, Meese has characterized his "jurisprudence of original intention" as seeking "to discern the meaning of the text of the Constitution by understanding the intentions of those who framed, proposed, and ratified it. The intentions of the Framers supply us with our original principles."\textsuperscript{64} Similarly, Robert Bork has advocated "deriving [as] rights from the Constitution . . . [only those] specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules."\textsuperscript{65} Yet it is precisely the purpose of a document's preamble—in a constitution or otherwise—to disclose the values intended by its makers.\textsuperscript{66} Certainly one interested in original intent cannot ignore that the framers wanted to promote the general welfare and to secure the blessings of liberty for themselves, their children and their children's children.

What would be the consequence if all three schools of constitutional interpretation were to accept the relevance of the preamble? It surely would not lead to agreement on all (or perhaps even many) matters of substantive constitutional doctrine and theory—and we do not contend otherwise. Rather, acceptance of the interpretive import

\textsuperscript{61}See infra notes 92-123 and accompanying text.
\textsuperscript{62}See, e.g., R. Berger, Government By Judiciary (1977); Bork, supra note 56; Monaghan, supra note 22.
\textsuperscript{64}Lecture by Attorney General of the United States Edwin Meese, III, at the University of Dallas (February 27, 1986) (quoted in Bulwark, supra note 63, at 466 n.60).
\textsuperscript{65}Bork, supra note 56, at 17; see also Bork, Original Intent and the Constitution, 7 Humanities 22 (1986); R. Bork, The Tempting of America: The Political Seduction of the Law (1990).
\textsuperscript{66}See infra notes 106-08 and accompanying text.
of the preamble should at least lead everyone to concur with the oft-quoted words of Justice McKenna in *Weems v. United States*:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

It is to this important conclusion that we believe the preamble most directly speaks: for a document that begins with the affirmation that it is ordained and established in order to achieve a range of basic and very general goals—"Justice," "domestic Tranquility," "general Welfare," "the Blessings of Liberty"—is simply not plausibly construed as if its specifics are frozen in the realities of a world as it existed two centuries ago.

Justice McKenna's view has, of course, been endorsed by many other jurists. Among those who have quoted approvingly from Justice McKenna's opinion in *Weems* are Justice Brennan, Justice Harlan, Chief Justice Warren, Justice Goldberg, Justice Brandeis and Justice Blackmun. Other judges have also expressed the same basic view in slightly different terms. Perhaps the most famous

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67 217 U.S. 349, 373 (1910). Justice McKenna, it should be noted, was appointed by President McKinley, and served on the Court during the first quarter of this century, one of its most conservative eras. See 266 U.S. v-viii (1925). No one has ever accused him of being a liberal activist.

68 Justice McKenna concluded:

They [constitutions] are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized The meaning and vitality of the Constitution have developed against narrow and restrictive construction... .

*Weems*, 217 U.S. at 373 (emphasis added) (citations omitted).

69 See Chemerinsky, supra note 60, at 92. We take up this and related issues about the significance of the preamble in Part IV.


and familiar formulation is that of Chief Justice Marshall in *M'Culloch v. Maryland.* More recently, Justice Jackson has noted that:

[s]ome clauses [of the Constitution] could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

Similarly, Justice Cardozo admonished repeatedly against the pitfalls of mechanical judging and its companion, a static conception of law. "The good of one generation," warned Cardozo, "is not always the good of its successor." Thus, "[d]ecisions founded upon the assumption of a bygone inequality [are] unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life." As to constitutional issues, Cardozo rightly noted that "[u]nique situations can never have their answers ready made as in the complete letter-writing guides or the manuals of the art of conversation. Justice is not to be taken by storm. She is to be wooed by slow advances." In short: "[t]he great generalities of the constitution have a content and a significance that vary from age to age." As Cardozo concluded, in

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76 17 U.S. (4 Wheat.) 316 (1819). Marshall wrote: A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . In considering this question, then, we must never forget that it is a constitution we are expounding.

77 B. Cardozo, The Growth of the Law 84 (1924) [hereinafter B. Cardozo, Growth].
78 Id. at 105-06.
79 Id. at 133.
80 B. Cardozo, The Nature of the Judicial Process 17 (1921) [hereinafter B. Cardozo, Judicial Process]; see also B. Cardozo, Growth, supra note 78, at 82-83. After reviewing the evolution of the concept of "liberty" protected by the Constitution (id. at 76-81)—what he called a "fluid and dynamic conception" (id. at 81)—Cardozo concluded that: Courts know today that statutes are to be viewed, not in isolation or in vacuo, as
language particularly apposite here:

A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.\(^2\)

These in short are the views, not merely inspired and sanctioned by the preamble, but in truth compelled by it. But for all the distinguished jurists who have joined in affirming the sentiments expressed by Marshall and McKenna, there have been perhaps as great a number whose reading of the Constitution is the exact opposite. Justice Sutherland's views are typical of this opposed school of thought:

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . . The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. As nearly as possible we should place ourselves in the condition of those who framed and adopted it.\(^3\)

Only three years later, reflecting no doubt his distaste for the turn the Court was slowly taking, Justice Sutherland stated his conception of the judicial function in even stronger terms:

[T]he meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have

pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labor of economists and students of the social sciences in our own country and abroad.

\(\text{Id. at 81.}\)

\(^2\) Id. at 83-84.

\(^3\) (Emphasis added.) Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (citations omitted).
made it otherwise.\textsuperscript{84} Similar sentiments were expressed eighty years earlier by Chief Justice Taney in \textit{Dred Scott v. Sandford}.\textsuperscript{85} In our own day, this view is vigorously urged by several of the sitting justices, Edwin Meese, Robert Bork, and others.\textsuperscript{86} Of the present members of the Court, Chief Justice Rehnquist has perhaps been the most explicit on this point in his well-known attack on the “notion of a living Constitution”:\textsuperscript{87}

Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.\textsuperscript{88}

More recently, Justice White has admonished his colleagues that their substantive due process jurisprudence constitutes “judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”\textsuperscript{89} In doing so, Justice White plainly echoed the most persistent critic of such jurisprudence, Justice Black.\textsuperscript{90} Typical of Justice Black’s admonitions was his criticism of what he called “natural law due process”:

by which this Court frees itself from the limits of a written Constitution and sets itself loose to declare any law unconstitutional that “shocks its conscience,” deprives a person of “fundamental fairness,” or violates the principles “implicit in the concept of ordered liberty.” . . . [T]his concept is completely at odds with the basic principle that our Government is one of limited powers and that such an arrogation of unlimited authority by the judiciary cannot be supported by the language or the history of any provision of the Constitution.\textsuperscript{91}

\begin{itemize}
  \item \textsuperscript{84} West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402-03 (1937) (Sutherland, J., dissenting).
  \item \textsuperscript{85} 60 U.S. (19 How.) 393, 405, 426 (1856).
  \item \textsuperscript{86} See supra notes 62-65 and accompanying text.
  \item \textsuperscript{87} Rehnquist, supra note 60.
  \item \textsuperscript{88} Id. at 698. See also Lusky, Universal Kinship and the Supreme Court, 11 Cardozo L. Rev. 119 (1989).
  \item \textsuperscript{89} Bowers v. Hardwick, 478 U.S. 186, 194 (1986).
  \item \textsuperscript{90} Justice Black, of course, appeared to be guided more by an unrelenting literalism than any contemporary form of originalism.
  \item \textsuperscript{91} In re Winship, 397 U.S. 358, 381-82 (1970) (Black, J., dissenting) (citations omitted); see also Foster v. California, 394 U.S. 440, 449-50 (1969) (Black, J., dissenting):

It has become fashionable to talk of the Court’s power to hold governmental laws and practices unconstitutional whenever this Court believes them to be “unfair,”
In short, the opponents of an expansive construction of the Constitution include a cast of spokesmen perhaps as long and distinguished as those supporting the McKenna approach. Diversity of views is not uncommon in our judicial system and having regard for the complexity and difficulty of the constitutional questions which the courts are called upon to resolve, it is likely always to exist. However, the McKenna reading, in our judgment, comports more with the purposes, goals and intent of the preamble than does that of Sutherland.

In this regard, we find it especially illuminating to consider how the interpretation of the Constitution was originally conceived in the early years of its history primarily because the original common-law character of the Constitution, stressed by the early commentators, has been ignored by many modern scholars. Appreciation of the fact that the Constitution was drafted by lawyers trained in the common-law tradition will help in two respects. First, it will lend further support to the relevance and materiality of the preamble as urged by us. And second, it will support our contention—to which the preamble also speaks—that the Constitution warrants a fluid and dynamic construction—precisely the sort common-law lawyers and judges are wont to expect and provide for any legal text.

H. Jefferson Powell writes in his important article on The Original Understanding of Original Intent,92 that:

Most of the Americans influential in the framing, ratification, and early interpretation of the federal Constitution were intimately familiar with the common law, and they gleaned from it not only a general approach to constitutional interpretation . . . but also a

contrary to basic standards of decency, implicit in ordered liberty, or offensive to “those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .” All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts . . . . I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

Id. (citations omitted).

92 98 Harv. L. Rev. 885 (1985) [hereinafter Powell]; see also Powell, The Modern Misunderstanding of Original Intent, 54 U. Chi. L. Rev. 1513 (1987) [hereinafter Modern Misunderstanding]. We are aware that Professor Powell is not without his critics. See, e.g., Berger, “Original Intention” in Historical Perspective, 54 Geo. Wash. L. Rev. 296 (1986); Clinton, Original Understanding, Legal Realism, and the Interpretation of “This Constitution,” 72 Iowa L. Rev. 1177 (1987). Having independently reviewed many of Professor Powell’s sources as well as other sources from this period, we tend to align ourselves with his scholarship. For Professor Powell’s response to Professor Berger, see Modern Misunderstanding, supra, at 1533-42. For Professor Berger’s rejoinder, see Berger, The Founders’ Views—According to Jefferson Powell, 67 Texas L. Rev. 1033 (1989).
variety of specific interpretive techniques. For example, Justice Story observed that: "it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law.... [which is to be] appealed to for the construction and interpretation of its powers." In the earliest years of the republic lawyers too made explicit their reliance on common-law methods of interpretation and construction: "It is impossible to understand or explain the Constitution without applying to it a common law construction. It uses terms drawn from that science, and in many cases would be unintelligible or insensible, but for the aid of its interpretation."

Like Professor Powell and Justice Story, we believe it is important to emphasize that the Constitution was written by common-law lawyers who envisioned its being interpreted by judges trained in the common law.

In emphasizing this common-law character of constitutional law

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93 Powell, supra note 92, at 901-02 (citations omitted).
94 United States v. Coolidge, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857). Story pointed to the constitutional provision for criminal jury trial and noted that: "no person can doubt, that for the explanation of these terms, and for the mode of conducting trials by jury, recourse must be had to the common law." Id.; see also Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).
96 Other scholars have also taken note of the common-law character of constitutional law. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 228-29 (1980); Sandalow, supra note 57, at 1034, 1039, 1055-56, 1072; see also, Frankfurter, supra note 32; Llewelyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).

Professor Monaghan, it should be noted, uses the term "constitutional common law" in a different sense from the way we do. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) [hereinafter Foreword]. In Professor Monaghan's sense, constitutional common law consists only in that "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions... [and hence] subject to amendment, modification, or even reversal by Congress." Id. at 2-3. Examples of such constitutional common law include the commerce clause cases, id. at 17, the Miranda warning, id. at 20-23, and the right to damages against federal officers who violate the fourth amendment. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Foreword, supra, at 23. Professor Monaghan's conception of constitutional common law turns importantly on distinguishing the rules of the latter from "true constitutional rules" which are more clearly "related to the core policies underlying the constitutional provision[s]." Id. at 33. While we do not want to deny that such a distinction can often be properly drawn (particularly in the sorts of cases Professor Monaghan identifies), we want to emphasize a very different sense in which the Constitution is the foundation of a constitutional common law: its central provisions—and not simply related procedural or remedial rules—admit of evolution in the way legal terms do at common law. We develop these points further below in the text. For discussion and criticism of Professor Monaghan's view, see L. Tribe, supra note 1, at 36-37.
and interpretation we mean to draw attention to those broad and famil-
ilar features of the common law derived from the writings of the
great commentators on that tradition like Cardozo and Llewellyn,
which though composed in a later period give expression to a concep-
tion of the common law that would have been recognizable in the
later part of the eighteenth century. 97 These writers of a later day
emphasized the inherently dynamic character of the common law,
epitomized by what Llewellyn called the "Grand Style" which "con-
sists in a constant re-examination and reworking of a heritage, that
the heritage may yield not only solidity but comfort for the new day
and for the morrow." 98 This is what Cardozo, too, identified as "[t]he
very strength of our common law, its cautious advance and retreat a
few steps at a time." 99 The common law proceeds through a process
of trial-and-error in which "principles themselves are continually
retested; for if the rules derived from a principle do not work well, the
principle itself must ultimately be re-examined." 100 By providing us,
then, with "the laboratory of the years" the common law permits
an "endless process of testing and retesting,... a constant rejection of
the dross, and a constant retention of whatever is pure and sound and
fine." 102 As common-law lawyers—many of the first rank—the fram-
ers surely understood and were familiar with these general character-
istics of the common law. In what follows, we explore the conse-
quences of this view for the Constitution they drafted.

A. The Constitution and the Statutory Analogy

As Professor Powell has noted, "the Marshall Court followed the
path, staked out in the Constitution's first years, of applying tradi-
tional methods of statutory construction to that instrument." 103

The first and most striking feature of early common-law princi-

97 See B. Cardozo, Growth, supra note 78; B. Cardozo, Judicial Process, supra note 81; K.
98 K. Llewellyn, supra note 97, at 36; see also, id. at 6, 38.
99 B. Cardozo, Growth, supra note 78, at 5-6.
100 B. Cardozo, Judicial Process, supra note 81, at 23 (quoting M. Smith, Jurisprudence 21
(1909)).
101 Id. at 178.
102 Id. at 179. Cardozo quotes an illuminating remark by Justice Brandeis on the impor-
tance of the method of inclusion and exclusion to this process:
The process of inclusion and exclusion, so often applied in developing a rule,
cannot end with its first enunciation. The rule as announced must be deemed
tentative. For the many and varying facts to which it will be applied cannot be
foreseen. Modification implies growth. It is the life of the law.
Growth, supra note 78, at 138.
103 Powell, supra note 92, at 942.
The rules of legal interpretation are rules of common sense, adopted by the courts in the construction of the laws. . . . In relation to such a subject [a constitution of government], the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.104

This theme recurs again and again throughout the work of writers of this period.105 One of its important consequences appears most clearly, however, in a related interpretive principle: that the intent of a legal document was to be ascertained from the words of the document itself, without recourse to external evidence.106 As Hamilton put it: "whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction."107 And courts of that period took the same textualist approach. For example, Chief Justice Marshall wrote:

[A]lthough the spirit of an instrument, especially that of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the ex-

105 Justice Story declares (plainly echoing Hamilton): "In relation, then, to such a subject as a constitution, the natural and obvious sense of its provisions, apart from any technical or artificial rules, is the true criterion of construction." J. Story, supra note 13, at § 448. And Dwarris writes that "Common sense and good faith, are the leading and principal characteristics of all interpretation." F. Dwarris, supra note 47, at 48.
106 See Powell, supra note 92, at 915; see also Brest, supra note 96, at 215 ("The practice of statutory interpretation from the 18th through at least the mid-19th century suggests that the adopters assumed—if they assumed anything at all—a mode of interpretation that was more textualist than intentionalist").
107 A. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, in 8 The Papers of Alexander Hamilton 111 (H. Syrett ed. 1965). This traditional English common-law view is well-expressed by Lord Reading in 94 Parl. Deb. H.L. (5th ser.) 232 (1934): Neither the words of the Attorney General nor the words of an ex-Lord Chancellor, spoken in this House, as to the meaning intended to be given to language used in a Bill, have the slightest effect or relevance when the matter comes to be considered by a Court of Law. The one thing which stands out beyond all question is that in a Court of Law you are not allowed to introduce observations made either by the Government or by anybody else, but the Court will only give consideration to the Statute itself. That is elementary . . . .

Id., quoted in Frankfurter, supra note 32, at 540; see also 1 W. Blackstone, Commentaries on the Laws of England 59 (1765 & photo. reprint 1979):

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.

Id.
treme, to infer from the extrinsic circumstances, that a case for
which the words of an instrument expressly provide, shall be ex-
empted from its operation. . . . [I]f, in any case, the plain mean-
ing of a provision, not contradicted by any other provision in the same
instrument, is to be disregarded, because we believe the framers of
that instrument could not intend what they say, it must be one in
which the absurdity and injustice of applying the provision to the
case, would be so monstrous, that all mankind would, without hes-
itation, unite in rejecting the application.°

If “common-sense” was to be the starting point for statutory con-
struction and, in particular, for the construal of “intent predicated on
the wording of the instrument,” then a dynamic element would ap-
pear to be built into the interpretation of legal texts. For there is an
inevitable accretion in the “natural and obvious” sense of provisions
in the course of successive adjudications throughout the years. This is
the essence of the common-law approach. The lawyers who drafted
the Constitution appear to have well-understood this consequence as
appears from what follows. Words and phrases, as we shall see, take
on a life of their own, their growth being entirely consistent with the
emphasis placed by Marshall on intent derived from the wording of a
written instrument.

B. Constitutional Interpretation and Interpretive Dynamism

By “interpretive dynamism” we mean simply the view expressed
so well by Justice McKenna in Weems: that constitutional prin-
ciples must be “vital” and flexible and that, accordingly, constitutional

° Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1810), quoted in Clinton,
supra note 92, at 1215. Professor Clinton goes on to suggest that Marshall did regard “inten-
tionalism” as “one of several interpretive approaches properly employed when the language of
the document was susceptible to various interpretations.” Id. at 1215 n.150. It is not clear,
however, from the evidence Professor Clinton cites, whether Marshall means for the “inten-
tion” to be ascertained from external evidence or from the language of the document itself.
But see id. at 1216-17 (Marshall’s reliance on The Federalist in interpreting the Constitution).
Professor Clinton does, however, agree with Professor Powell that “originalism was not the
exclusive or predominant interpretive methodology [in the pre-Civil war era]. Powell, there-
fore, is clearly correct in suggesting that the principal interpretive focus of the late eighteenth
and early nineteenth century was on textual exegesis and precedent rather than on histi-
ographic interpretation.” Id. at 1220. On the general problems with reliance on original in-
tent, see, e.g., Brest, supra note 96; Sandalow, supra note 57, at 1050:
the past to which we turn is the sum of our history, not merely the choices made
by those who drafted and ratified the Constitution. The entirety of that history,
together with current aspirations that are both shaped by it and shape the meaning
derived from it, far more than the intentions of the framers, determine what each
generation finds in the Constitution.

Id.° Weems v. United States, 217 U.S. 349 (1910); see, supra notes 67-68 and accompanying
text.
provisions should be interpreted dynamically to meet the needs of a changing society. That a similar view was, in fact, shared by the common-law lawyers who framed the Constitution is suggested by three general sorts of considerations.

First, the framers and earliest interpreters of the Constitution believed in what Professor Powell has aptly called “construction by usage and precedent”: that the meaning of terms would evolve in the course of actual practice. Madison, for example, wrote that:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.

Similarly, Chief Justice Marshall, in answering the question “has Congress power to incorporate a bank?” remarked that:

[I]t is conceived that a doubtful question . . . if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Another court agreed, noting that in construing a constitutional provision “a court ought to rely for its true sense on a general practice which has been so long submitted to.” Thus, the meaning of terms was not magically locked in at the moment of drafting: the common-law lawyers who wrote the Constitution appreciated the need for terms to acquire their sense through usage over the course of time.

Second, and perhaps more importantly, the need for interpretive dynamism arose from the very nature and language of the document the framers drafted. As Chief Justice Marshall put it in Bank of the United States v. Deveaux:

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

110 Powell, supra note 92, at 940.
111 Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), reprinted in 3 Letters and Other Writings of James Madison 143, 145 (Philadelphia 1865), quoted in Powell, supra note 92, at 941.
113 Adams v. Storey, 1 F. Cas. 141, 147 (C.C.D.N.Y. 1817) (No. 66).
114 9 U.S. (5 Cranch) 61, 87 (1809).
Justice Story, writing more than a generation after the framers, gave expression to a similar sentiment:

words from the necessary imperfection of all human language acquire different shades of meaning, each of which is equally appropriate and equally legitimate .... They expand or contract, not only from the conventional modifications introduced by the changes of society, but also from the more loose or more exact uses, to which men of different talents, acquirements, and tastes from choice or necessity apply them. No person can fail to remark the gradual deflections in the meaning of words from one age to another; and so constantly is this process going on that the daily language of life in one generation sometimes requires the aid of a glossary in another.\(^{115}\)

Justice Story's diagnosis of this necessary expansion and contraction was in keeping with recognized common-law wisdom. Dwarris, for example, had written that:

No human wisdom can prepare a law in such a form, and in such simplicity of language, as that it shall meet every possible complex case that may afterward arise. . . . And as time wears on, and the wants and habits of society become changed, as they ever will change with the progressive march of intelligence, especially in a land enjoying the blessings of civil and religious freedom; the interpretations, suitable to a past age, will become more and more impracticable to the present, as to all new questions.

These are propositions so well confirmed by experience, that statesmen and lawyers now agree upon the wisdom of preparing such instruments [statutes] with general outlines, in language clear and easily understood, rather than of attempting minute details, however elaborately extended . . . .\(^{116}\)

That the framers and earliest interpreters of the Constitution shared in the general sentiments expressed so much later by McKenna is suggested, thirdly, by their views on the propriety of liberal

\(^{115}\) J. Story, supra note 13, at § 452 (emphasis added). Justice Frankfurter, writing a century later, gave pithy expression to this same sense of expansion and contraction: "like currency, words sometimes appreciate or depreciate in value." Frankfurter, supra note 32, at 538.

\(^{116}\) F. Dwarris, supra note 47, at 50-51.

It has been shown that it is impossible to word laws in such a manner as to absolutely exclude all doubt, or to allow us to dispense with construction, even if they were worded with absolute (mathematical) precision, for the time for which they were made; because things and relations change, and because different interests conflict with each other.

Id. at 51; see also Frankfurter, supra note 32, at 528 ("If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness"); Sandalow, supra note 57, at 1035 ("the questions for which subsequent generations have sought answers in the Constitution have been the questions of those generations").
construction. Hamilton, for example, in his *Opinion on the Constitutionality of an Act to Establish a Bank* asserted that “powers contained in a constitution of government . . . ought to be construed liberally, in advancement of the public good.” Dwarris gave expression to a related common-law sentiment: “Let all such judicial determinations bear the impress of good faith, with liberal views of construction in favor of civil liberty.” In this regard, Dwarris followed Lieber, who had earlier written:

> Let everything that is in favor of power be closely construed; everything in favor of the security of the citizen, and the protection of the individual, be liberally and comprehensively interpreted; for the simple reason, that power is power, and therefore able to take care of itself, as well as tending by its nature to increase, while the citizen may need protection.

Perhaps a particularly noteworthy example of this expansive view regarding civil liberties is one of Hamilton’s arguments against including a Bill of Rights in the Constitution. Hamilton wrote:

> “We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.” Here is a better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than a constitution of government.

While this was hardly the typical argument of those early opponents of a Bill of Rights, it is significant that Hamilton, one of the most important framers, would have accorded even substantive significance to the preamble. While his view as to whether the Bill of Rights should be included in the Constitution did not ultimately prevail, his point is surely worthy of note: that the preamble itself testifies to the intent of the framers to provide a constitutional guarantee of a multitude of liberties, liberties that need not be set out in enumerated form in order to be protected by the system of government the document creates.

Because of the common law’s emphasis on the future (not the

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117 A. Hamilton, supra note 107, at 105.
118 F. Dwarris, supra note 47, at 49.
119 F. Lieber, Lieber’s Political Hermeneutics ch.6, § 10 (n.d.), quoted in F. Dwarris, supra note 47, at 49.
120 The Federalist, supra note 104, No. 84, at 578-79 (A. Hamilton).
past) and on dynamism (not stasis), the common law requires a method of trial-and-error, a form of experimentation in which judges attempt to bring the law into harmony with the world it governs. As Justice Holmes expressed it in language appropriate here:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.

In sum, the common law offers a model for integrating the concerns for text, history and background principles—the three concerns that animate the leading schools of constitutional interpretation—but it does so in a way which supports our thesis about the dynamic and expansive interpretative implications of the preamble.

C. Judicial Review and Constitutional Common Law

The dominant theories of constitutional interpretation are all profoundly normative: they alternately praise and castigate the work of the courts in light of their own criteria for "proper" constitutional decision-making. But in assimilating constitutional interpretation to common-law interpretation we seem to deprive ourselves of any such norm. For as Legal Realists showed many years ago, and as Karl Llewellyn emphasized in his seminal work on The Common Law Tradition, common-law methods of interpretation are more like advice than commands, admitting of varied applications and allowing for reasonable disagreement over outcomes. The result is that common-law "rules" of construction do not constitute a precise yardstick designed to vindicate or castigate constitutional decision-making. But is that not, however, more of an asset than a liability? We are thus not offering any litmus test for determining the validity or wisdom of

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122 See supra notes 97-102 and accompanying text.
123 Missouri v. Holland, 252 U.S. 416, 433 (1920), quoted in Frankfurter, supra note 32, at 537. Justice Harlan expresses the same idea in these words: "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).
125 K. Llewellyn, supra note 97.
any of the Court's decisions. We are offering what we believe is a useful methodology that can hopefully lead to a better constitutional jurisprudence.

We do not desire to involve ourselves in the controversy that has raged over the years as to whether judicial review was contemplated by the framers or more broadly, whether there should be such review. We merely note the obvious that a constitution is not self-executing. Its provisions must be applied to variable and particularized states of fact. The only organ of government that could authoritatively determine what the words and phrases meant when applied to concrete states of fact were the courts. And of course this is what happened from the time of Marshall down to the present date and we don't believe any member of the present Court would have it otherwise. Once the need for judicial review is accepted and correlatively it is recognized that constitutional adjudication will be carried out in the common-law tradition, it is only to be expected that, as at common law, reasonable men can reasonably disagree as to the scope and meaning of the broad and majestic clauses of the charter. When you apply the technique of inclusion and exclusion, contraction and expansion, inescapably the justices and the commentators will disagree as to where the lines are to be drawn. To repeat then, when we therefore argue for the interpretative significance of the preamble, we are not providing any talisman by which the vexing and contentious issues that confront the Court in each one of its terms can automatically be decided. All that we contend is that the preamble provides a sense of direction which can be of value even though by itself it will not furnish decisive answers to perplexing questions. This, we repeat, is the modest office we ascribe to the preamble—modest but nonetheless useful. What we oppose is a blind adherence to a static ideology which is not responsive to changing conditions and needs and which ignores the message the preamble is trying to transmit. Because we believe that split decisions are inevitable, the diversity of views of commentators is to be welcomed as is criticism of the Court. Of great importance is the vigorous debate among the interpretivists, the

126 See Justice Stone's eloquent articulation of this point:
   I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as our do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.


"Constructive criticism of judicial decisions...is a good thing for the judiciary and for healthy development of the law. Only a warped judicial outlook could think otherwise." Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943, 945 (1963).
non-interpretivists and the originalists, unlikely though it is that they will ever be able to persuade one another. Disagreement has been a source of strength and has nourished the common law tradition.\textsuperscript{127} Perhaps the preamble, if heeded, can serve to bridge some of these differences.

IV. THE PREAMBLE AND CONSTITUTIONAL ADJUDICATION: SOME APPLICATIONS

At the end of Part II, we argued that the preamble of the Federal Constitution could play a part in constitutional adjudication through the Purpose Rule (and the Ambiguity Rule which it subsumes).\textsuperscript{128} So construed, the preamble would be relied upon as evidence of the intent of the framers and the purpose of the document, as well as being used to shed light on the ambiguous as well as the spacious provisions of the charter. In this section, we illustrate how such an application of the preamble might work. Keeping in mind the conclusion of the previous section that we are not advancing yet another normative theory of constitutional interpretation, our limited aim is merely to show that the preamble can be a valuable interpretive tool in at least a select range of cases.

Before turning to the cases, however, we believe we should examine again the words of the preamble itself to see what it may tell us. We note first that the modest goal of this new experiment in democracy was to form a more perfect union—not to seek the perfection which is rarely vouchsafed mortal man. Is it not clear that forming a more perfect union is of necessity a continuous process? What better proof can there be than that the document being ordained was to be capable of responding to the changing needs of the people? And implicit in a more perfect union is the establishment of justice—as a minimum, a guaranty of procedural regularity. In making explicit that the goal of the Constitution was to promote the general welfare, is it not plain that the welfare of all and not of the few was to be advanced?

We come to the most important part of the preamble from our standpoint—"secure the blessings of Liberty to ourselves and our Posterity." Liberty was not an abstract ideal to those who had come to the New World to escape the tyranny of the absolute monarchies of Europe. They wanted freedom not only for themselves but for their children and their children's children. They looked to the future as

\textsuperscript{127} K. Llewellyn, supra note 97, at 39, 49 nn. 96, 119.

\textsuperscript{128} See supra notes 40-46 and accompanying text.
well as to the present and the past. And so should we. What is especially significant is that their notion of the freedoms to be secured for their posterity as well as themselves was dynamic and not static. In short, as lawyers trained in the common law, and applying common sense to its reading,\textsuperscript{129} the draftsmen knew that the generalities found in the text could only be particularized by trial and error and by the traditional methodology of inclusion and exclusion. And it would not be farfetched to surmise that these lawyers understood that there was no calibrated instrument by which the inclusions and exclusions were to be measured just as there was none at common law. They understood the creative role of judges in molding precedents and their underlying principles in resolving, wisely and justly, concrete controversies based on ever changing sets of facts.\textsuperscript{130} By the introduction to the body of the charter, they were providing guidance on how the generalities were to be particularized. Instinct in their words was that the charter was to be liberally construed.

We turn now to consider some of the controversies that have occupied the Court over the last eighty-five years.

\textbf{A. Substantive Due Process and Equal Protection: A Brief Look at the Major Cases}

The twentieth century has witnessed an unprecedented amount of litigation involving the liberty and equality interests protected by the fifth and fourteenth amendments. The result has been a long line of Supreme Court cases striking down or upholding legislation as inconsistent or consistent with the demands of due process or equal protection. Because it is in relation to certain points on this line of cases that the preamble might have had some bearing, we begin by setting out in summary form some of the Court's major decisions in these fields.\textsuperscript{131}

(A) During this period, the Court, in response to challenges under the rubrics of due process or equal protection, has upheld legislation: (i) fixing the price of milk;\textsuperscript{132} (ii) establishing a minimum wage

\textsuperscript{129} See supra notes 104-05 and accompanying text.

\textsuperscript{130} See A. Cox, Forward to R. Bernstein, Defending the Constitution (1987).

\textsuperscript{131} For ease of presentation, we have not discriminated between decisions under the Equal Protection Clause and the Due Process Clause, or between decisions under the fifth amendment or the fourteenth amendment. Since our concern is with the relevance of the "liberty" and "general welfare" language of the preamble, we simply want to set out what the Court has done in these selected areas. In our consideration of particular cases, infra notes 132-54 and accompanying text, we take account of the particular rationales and constitutional provisions relied upon by the Court.

for women;\(^{133}\) (iii) establishing maximum hours and minimum wages for workers covered under the Fair Labor Standards Act;\(^{134}\) (iv) making it an unfair labor practice for an employer to encourage or discourage union membership;\(^{135}\) (v) establishing a cap on welfare payments to large families;\(^{136}\) (vi) providing for the financing of public school education through property taxes, even though this resulted in inequalities among school districts;\(^{137}\) (vii) prohibiting the use of Medicaid funds for abortions not deemed "medically necessary";\(^{138}\) and (viii) prohibiting consensual homosexual sodomy.\(^{139}\)

(B) Similarly, during that same period, the Court, usually (but not always) under the rubrics of equal protection or due process, has struck down legislation: (i) setting maximum working hours for bakers;\(^{140}\) (ii) prohibiting transportation in interstate commerce of goods produced by child labor;\(^{141}\) (iii) establishing a minimum wage for women;\(^{142}\) (iv) regulating the price of gasoline;\(^{143}\) (v) authorizing the sterilization of certain criminals;\(^{144}\) (vi) segregating public schools by race;\(^{145}\) (vii) requiring the payment of a poll tax;\(^{146}\) (viii) establishing a residency requirement for receipt of welfare assistance;\(^{147}\) (ix) denying state funds for free public education to illegal aliens;\(^{148}\) (x) prohibiting the teaching to young children of any modern language other than English in the schools;\(^{149}\) (xi) requiring students to attend public rather than private schools;\(^{150}\) (xii) providing criminal penalties for

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133 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). This case is widely regarded, of course, as bringing an end to the so-called "Lochner era." See, e.g., R. Rotunda, J. Nowak & J. Young, supra note 1, at § 15-4; L. Tribe, supra note 1, at § 8-7.

134 United States v. Darby, 312 U.S. 100 (1941).

135 Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941).


138 Harris v. McRae, 448 U.S. 297 (1980).


140 Lochner v. New York, 198 U.S. 45 (1905); this decision was, of course, effectively overruled in Bunting v. Oregon, 243 U.S. 426 (1917).

141 Hammer v. Dagenhart, 247 U.S. 251 (1918) (decided under the Commerce Clause), overruled, United States v. Darby, 312 U.S. 100 (1941).


the use of contraception by married couples or the giving of advice and information regarding the same;\textsuperscript{151} (xiii) prohibiting the procurement of an abortion except to save the life of the mother;\textsuperscript{152} (xiv) limiting occupancy of any residence to members of the same "family," narrowly defined;\textsuperscript{153} and (xv) requiring city contractors to sub-contract a certain portion of their work to minority businesses in a way not "narrowly" tailored to remedy the effects of prior discrimination.\textsuperscript{154}

The conclusion that the course of decision has been inconsistent is hardly novel. Variations reflect the deep philosophical differences among the justices both over time and in respect of the composition of the Court at any one period. These differences are reflected in the series of quotations set forth above where the insightful passage from Justice McKenna's opinion in \textit{Weems} is contrasted with the views of Justice Sutherland.\textsuperscript{155}

In his dissenting opinion in \textit{Poe v. Ullman},\textsuperscript{156} Justice Douglas lists nine other Justices who would concur in his view that:

\begin{quote}
When the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights—in part substantive, in part procedural!—which experience indicated were indispensable to a free society.\textsuperscript{157}
\end{quote}

To his list may be added among the members of the Warren, Burger and Rehnquist courts the following: Justices Brennan, Goldberg, Fortas, Marshall, Blackmun and Chief Justice Warren. In the Sutherland group we would include, again from these courts: Justices Black, White, Scalia, Kennedy, O'Connor and Chief Justice Rehnquist.

It was not necessary for the first group of Justices to invoke the preamble in order to reach their decisions which establish justice, insure domestic tranquility, promote the general welfare, secure the blessings of liberty and implement the goal of moving towards a more perfect union. The gestalt of the preamble permeates their opinions despite its not being either referred to or quoted. If the preamble was given the effect for which we contend, it might have ornamented the writings of these Justices or altered their rhetoric but as we have said the results would not have been affected.\textsuperscript{158}

\begin{footnotes}
\item Griswold v. Connecticut, 381 U.S. 479 (1965) (statute violated a right to privacy).
\item Roe v. Wade, 410 U.S. 113 (1973).
\item Moore v. City of E. Cleveland, 431 U.S. 494 (1977).
\item See supra notes 67-84 and accompanying text.
\item 367 U.S. 497 (1961).
\item Id. at 516 & n.8.
\item The model opinions that are mindful of the preamble's goals, even though it is not cited,
\end{footnotes}
Our message therefore is directed to the other group of justices. And our message to this group has essentially three parts:

First, and most generally, we take the preamble to evidence the elasticity and vitality which the common-law lawyers who drafted the Constitution must have contemplated. This was the message of Part III, and it warrants special attention in light of the fact that too many constitutional scholars and judges now write as though the Constitution were not drafted by lawyers schooled in the tradition described so well by Cardozo and Llewellyn. Rather, the assumption—undefended and, we believe, insupportable—seems to be that the framers viewed constitutional language as rigid and static. But could any lawyer in the common-law tradition—familiar with the practice of inclusion and exclusion or with the way words acquire their sense through successive judicial constructions—hold such an implausible view? If we are right in Part III, then it is time to acknowledge that a rigid originalism or literalism enjoys no special place in the pantheon of constitutional theories by virtue of pedigree.

Second, the preamble’s declaration that the document seeks to secure the “Blessings of Liberty” for future generations of Americans provides the most persuasive response to a construction of the fifth and fourteenth amendments as having, in effect, a “suppressed clause” confining the “liberty” which they protect to those interests explicitly mentioned elsewhere in the Constitution or Bill of Rights. Yet the amendments contain no such explicit constraint; and surely there is no warrant for reading one in when the stated goal of the document as a whole is the protection of “Liberty,” per se, and not merely the protection of some particular and narrow class of liberties.159

Finally, we think that the preamble’s declaration of the supreme importance of the “general welfare” demands that the document’s

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159 A sizable stretch of time, of course, divides the drafters of the preamble from the drafters of the fourteenth amendment; yet there are two reasons why that later amendment should rightly be seen in light of the preamble: (i) it is an amendment to a preexisting document which begins with the preamble, and thus has come to be a part of the whole which is the Constitution, and whose values are those expressed in the preamble; and while the fourteenth amendment may, indeed, have signalled a rethinking of the constitutional structure of federalism, there is no reason to think it represented a retreat from the Founders’ commitment to “liberty”; (ii) the fourteenth amendment follows, of course, much of the language of the fifth amendment; and surely there would be no question about the propriety of construing the latter in light of the preamble; why then should language as restated and applied to citizens of the states now be exempt from such guidance?
other provisions be construed in a manner always consistent with this end. Note that we do not argue here that any independent, substantive significance be accorded the "general welfare" language; all we argue is that it be accorded interpretive significance, so that particular provisions elsewhere in the document should be interpreted in a way consonant with this general objective.

B. Privacy, Liberty and the Sodomy Statute

Defying the earlier predictions of some commentators that the Court would expand rights of autonomy and privacy in sexual matters, the Supreme Court in 1986 denied that there was a fundamental right to engage in homosexual sodomy, and upheld Georgia's prohibitory sodomy statute. The most important features of the majority opinion by Justice White were: (i) its narrowing of the issue to whether there was a right to engage in homosexual sodomy; (ii) its abrupt dismissal of the relevance of the Court's long line of "privacy" decisions; and (iii) its admonitions concerning judicial cognizance of rights not textually based on specific words of the Constitution.

Most striking about the majority opinion, as well as Chief Justice Burger's concurrence, was the obsessive focus on "homosexuality"—even though the statute forbade all sodomy. As Justice Blackmun noted in his dissent:

This case is no more about a "fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 191, than Stanley v. Georgia, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." Olmstead v. United

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160 Thus, we do not intend to dispute or run afoul of the Court's decision in United States v. Butler, 297 U.S. 1 (1936).
161 See, e.g., Grey, Eros, Civilization and the Burger Court, 43 Law & Contemp. Probs. 83, 97 (1980).
162 Hardwick, 478 U.S. at 191.
163 Id. The prohibitions of the statute were not confined to only homosexual sodomy. This, and other peculiar procedural features of the case, are not our primary concern here. For criticism of the Court on these matters, see, Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U. Chi. L. Rev. 648 (1987).
164 Id., 478 U.S. at 196.
165 See, e.g., L. Tribe, supra note 1, at § 15-21, at 1431 ("the gravamen of Hardwick's offense was the physical act he performed, not the gender of the person with whom he performed it, since the statute defines the crime of sodomy solely by reference to which parts of the anatomy may not come into contact").
By pitching the issue at the level of specificity which it did, the majority eased its burden of distinguishing the Court's prior line of privacy decisions: 'No connection between family, marriage, or procreation [the putative subject of the prior decisions] on the one hand and homosexual activity on the other has been demonstrated . . . .'  

Going on to note that to say a right to engage in homosexual sodomy "is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious," 169 Justice White admonished that, "[t]he Court itself is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." 170

This type of rigid interpretivism (which seemingly is at war with Justice White's concurrence in Griswold) 171 would freeze the liberty interests which the preamble sought to secure. 172 The Constitution says nothing about a "right to privacy," let alone about contraceptives or the teaching of foreign languages. Yet Justice McReynolds, hardly a proponent of judge-made constitutional law having no cognizable roots in the language or design of the Constitution, had no difficulty in Meyer 173 and Pierce 174 in upholding liberty interests not specifically defined by the Constitution. It is worth pausing to recall the controlling passage in his opinion:

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the fourteenth amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of

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166 Hardwick, 478 U.S. at 199 (Blackmun, J., dissenting).
168 Hardwick, 478 U.S. at 191. In dissent, Justice Blackmun replied that: "We protect those rights [e.g. marriage, procreation] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." Hardwick, 478 U.S. at 204 (Blackmun, J., dissenting).
169 Hardwick, 478 U.S. at 194.
170 Id.
172 See, e.g., Grey, supra note 57.
life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

... Plaintiff in error taught [the German] language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.\textsuperscript{175}

It is interesting to note that, years before the disputes about incorporation or Justice Black's attacks on substantive due process, the conservative McReynolds was able to see the "liberty" of the fourteenth amendment as encompassing a host of enumerated and nonenumerated freedoms—as well as to appreciate the common-law pedigree of many of these protections and the relevance of that to a proper construal of the clause.\textsuperscript{176} But if as Justice White suggests that absent explicit constitutional enumeration, the protection of any freedom by the Court represents an insupportable usurpation of legislative authority by the judiciary, a great many of the Court's precedents are in jeopardy as are our basic freedoms.

But how could such a position be seriously maintained if the preamble was accorded its proper office? In a document established in order to secure "the blessings of liberty"—not some liberties, not just enumerated liberties, but "liberty" itself—what warrant can there be for confining its protections within the rubrics which Justice White accepts? If there is a burden of proof here, surely it falls on those who would deny the dynamic and expansive implications of the preamble.

Such considerations also bear on the decision in \textit{Hardwick} \textsuperscript{177} itself. Consider, for example, how Professor Tribe frames the issue:

The proper question, as the dissent in \textit{Hardwick} recognized, is not whether oral sex as such [the "sodomy" at issue] has long enjoyed a special place in the pantheon of constitutional rights, but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy.\textsuperscript{178}

In other words, following Tribe, we may ask: are the "liberties of inti-

\textsuperscript{175} \textit{Meyer}, 262 U.S. at 399-400 (citations omitted).
\textsuperscript{176} See also, Barak, Constitutional Law Without a Constitution: The Role of the Judiciary, 40 B. of the Int'l A. of Jewish Laws. & Jurists 12 (1989). McReynold's "right of the individual to contract," \textit{Meyer}, 262 U.S. at 399, has, of course, not survived in the pantheon of liberties. But surely such evolution of the general notion of "liberty" is to be expected over the course of a constitutional common law.
\textsuperscript{177} \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986).
\textsuperscript{178} L. Tribe, supra note 1, at § 15-21, at 1428.
mate association and individual autonomy" protected by the Constitution? Given the untenability of a cramped reading of liberty—a conclusion which follows from reading the fourteenth amendment in light of the preamble as argued above—the answer should be self-evident. For once the interpretive debate is freed from the shackles of unwarranted literalism, it is surely reasonable that a society that cherishes the Blessings of Liberty ought, among other things, to shelter the right of individuals to participate in the privacy of their bedroom in consensual sexual activity of their choosing.

C. Liberty or Privacy? Rethinking Griswold

Prior to the setback in Bowers v. Hardwick, a long line of cases has recognized a multitude of liberty interests, often under a variety of rubrics, most notably (and recently) "privacy." Yet while this course of decision has often been commendable, the rhetoric of the authors of decisions in which much of this jurisprudence has developed has produced unnecessary controversy. Griswold v. Connecticut is perhaps the best example of this problem, and the Bork hearings were only the most recent evidence of the controversy it has engendered. While not many people would care to see the decision itself overturned, few are happy with Justice Douglas's reasoning. Here the preamble could have performed a useful role by suggesting a more principled foundation for the actual decision. Before considering the preamble's relevance in this regard, it is worth recounting the problems with Justice Douglas's approach.

After citing and discussing very briefly a range of cases that were supposed to illustrate that the Bill of Rights also protected "peripheral rights" without which "the specific rights would be less secure," Justice Douglas concluded that: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." It was this mysterious language about "penumbras," "peripheral rights,"

179 Hardwick, 478 U.S. at 186.
181 381 U.S. 479.
183 Griswold, 381 U.S. at 483.
184 Id. at 484 (citation omitted).
"zones" and "emanations"—combined with the absence of explicit textual support for this right of privacy—that brought a storm of controversy down upon Griswold. As Professor Paul Kauper noted in his well-known commentary on the decision, Justice Douglas's "unusually short opinion...combined a curious, puzzling mixture of reasoning with extraordinary freedom in the interpretation of earlier cases."185 The opinion was "ambiguous and uncertain in its use of the specifics of the Bill of Rights to invalidate the Connecticut statute"186 and, as Kauper justifiably concluded, a "labored attempt to identify the right of marital privacy with the specifics of the Bill of Rights."187

Griswold, of course, could have been decided less controversially: the paradigm, in fact, for such a decision was even available in the form of Justice Harlan's eloquent and careful dissent in Poe v. Ullman.188 It is worth recalling, then, the key parts of Justice Harlan's dissent. After observing that, "[i]t is but a truism to say that...[the due process clause of the fourteenth amendment] is not self-explanatory,"189 and after reviewing the debate surrounding that clause's proper office, Justice Harlan observed that:

Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights. . . .

. . . . .

... [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.190

With this expansive view of the fourteenth amendment established, Justice Harlan went on to make out his case that "the [Connecticut] statute marks an abridgement of important fundamental liberties protected by the Fourteenth Amendment"191 as it would require "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy."192

What then would recourse to the preamble add to this line of

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186 Id. at 244.
187 Id. at 252.
188 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). In Poe, the issue of the constitutionality of the same Connecticut statute at issue in Griswold was never reached because a majority of the Court found there was no justiciable question. (The plaintiffs had sought a declaratory judgment; they, unlike the Griswold plaintiffs, had not been prosecuted under the statute.)
189 Id. at 540.
190 Id. at 541, 543.
191 Id. at 554.
192 Id. at 553.
reasoning? In our earlier discussion of Bowers v. Hardwick, we have already suggested the answer: for the greatest obstacle to the fourteenth amendment jurisprudence typified by Harlan's Poe dissent or Douglas's conclusions in Griswold is the resistance to an expansive reading of the "liberty" of the Due Process Clause. But that resistance should melt away were the preamble given the interpretative significance for which we contend—for it is the "Blessings of Liberty" for the present and the future without qualification and without limitation that are to be secured for all of our people. If we consider further that the common-law lawyers who drafted the Constitution understood, as we argued earlier, that the meaning of terms evolve in the course of adjudication, then it seems entirely implausible that no human freedom is to be protected unless it is specifically enumerated in the Constitution or its amendments! Justice Harlan's Poe dissent suggests a framework in which Griswold and other decisions might have been recast as a decision about "liberty" instead of "privacy." Such a change would hardly silence all critics, but it would, at least, put some of the Court's Due Process jurisprudence on a surer path, one accented by the preamble itself.

D. Child Labor and the New Deal Cases

Unlike most of the cases mentioned in Section A, above, the Child Labor case and the later "New Deal" cases were decided under the Commerce Clause and not under the Due Process or Equal Protection Clauses. Nonetheless, they present in a stark way issues to which the preamble speaks: for in all of these cases the federal government was found to lack power under the Commerce Clause to pass

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193 478 U.S. 186 (1986); see supra notes 162-78 and accompanying text.
196 See supra notes 109-23 and accompanying text.
197 Poe, 367 U.S. at 544.
198 Griswold, 381 U.S. 479.
199 None of this, of course, speaks to the so-called "double standards" problem—namely, the modern court's special concern for personal and social liberties and its indifference to economic liberties (e.g. the "liberty" to contract). But we think the "liberty" of the preamble and of the fifth and fourteenth amendments is a perfect example of a general term that common-law lawyers would expect to evolve in the course of successive adjudications and judicial constructions. Calling this evolution a matter of "double standards" presupposes—wrongly—that absent a timeless yardstick, there can be no basis for adjudication. But how would any area of the common law fare under such a demand? Is it really a "double standard" when social and judicial sensibilities evolve in such a way that "liberty" contracts along one dimension and expands along another?
legislation bearing on what should rightly be classed "the general welfare." In *Hammer v. Dagenhart*, the federal government was denied the power to prohibit interstate commerce in the products of child labor and in *Carter v. Carter Coal Co.*, the power to fix coal prices and establish the right to collective bargaining for miners. In these cases two themes predominated in the majority opinions: the necessity of preserving the distinction between the realms of federal and state control (the dual sovereignty theory); and the distinction, purportedly central to the Commerce Clause, between interstate "commerce" on the one hand and the actual "productive" activities on the other (regardless of where their products ended up or their effects on interstate commerce). The former was, of course, subject to federal regulation; the latter was a matter for purely local control.

There was and is, no doubt, a certain theoretical appeal to the conceptual tidiness of the majority approach in these cases. And it is similarly tempting to view their overruling not as a matter of more enlightened constitutional interpretation, but as simply a pragmatic decision by the Court to sanction the federal legislative usurpation of power. Regardless of the Court's motive in departing from this line of decisions, however, it is still permissible to ask whether a plausible construction of the Constitution, taking account of its preamble, would not have admitted different holdings in the cases at issue.

The central issue is perhaps posed most distinctly by Justice Sutherland's majority opinion in *Carter*. According to Justice Sutherland:

> the powers which Congress undertook to exercise are not specific but of the most general character—namely, to protect the general public interest and the health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth; but are they ends, the attainment of which has been committed by the Constitution to the federal government?

That, of course, is precisely the interpretive question posed by this line of cases; but the choice is not simply between ignoring the Consti-

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202 247 U.S. 251.
203 298 U.S. 238.
204 See, e.g., L. Tribe, supra note 1, at § 5-6 at 311 n.1.
207 Id. at 290-91.
stitution and upholding the legislation or reading the Commerce Clause, as these cases did, to prohibit such legislation. Rather, the question is what the interpretation of the Constitution really shows. According to Justice Sutherland in *Carter* it shows that:

the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. . . .

. . . [S]ince every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. . . .

. . . As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. . . .

. . . That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause.208

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208 Id. at 291, 294-95, 298, 301. And similarly, Justice Day in *Hammer*:

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. . . .

. . . .

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. . . . [I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.


The insertion of the word "expressly" before "delegated" by Justice Day and Justice Sutherland's reference to "specifically enumerated" and "express terms" are to be contrasted with Chief Justice Marshall's observation in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819): "But there is no phrase in the instrument which, like the articles of confederation . . .
In Sutherland’s opinion—which is typical of many others of that period—it is clear that the guiding interpretive consideration was the maintenance of the federal system as conceived circa 1789. That background interpretive assumption explains why the Court, in *Hammer* at least, invalidated a statute that was, on its face, constitutional. Still, if the narrow construal of “interstate commerce”—to the exclusion of any regulation of commercial activity which might only have *effects* on interstate commerce (the key notion of the later decisions)—was predicated on a particular interpretive assumption (about federalism) it remains to be seen whether equally compelling and legitimate interpretive considerations might not point in the other direction. Put more simply: are the *Carter* and *Hammer* readings viable if the Commerce Clause is read together with the preamble?

The Constitution, which established the federal government, established that government, in part, to “promote the general welfare” and to “form a more perfect union,” that is, to create a nation and not merely an aggregation of states. In construing the power conferred by the Commerce Clause, the Court was presented, in fact, with a paradigm case for consulting the preamble. The real issue was whether the power conferred was to be construed broadly or narrowly: should it include the power to regulate only that which was literally “interstate commerce” or could it include the power to regulate all that which bears on or affects such commerce. The natural inference is that the power to regulate interstate commerce should be construed so as to promote the general welfare, particularly at a time when the nation was in the throes of a great depression and only the national authority could cope with the problems it presented. This does not

requires that every thing granted shall be expressly and minutely described. Even the 10th amendment . . . omits the word ‘expressly’. . . .” *Id.*

209 *Hammer*, 247 U.S. at 277 (Holmes, J., dissenting) (“the statute in question is within the power expressly given to Congress if considered only as to its immediate effects”).


211 *Carter*, 298 U.S. 238.


213 We do not want to suggest (as we have noted above) that under the rubric of “general welfare” anything goes. Yet the contrary position, which would accord no significance to this language, is untenable: the “general welfare” is one of the Constitution’s stated objectives, and as such it is entitled to interpretive weight when appropriate. We would stake out a middle position, a position for which the New Deal cases discussed in the text are paradigmatic: for 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.

214 Presumably the framers had learned from their experience under the Articles of Confed-
suggest that any and all regulations are permissible; but it can at lease warrant the conclusion of the Court in *Jones & Laughlin* 216 and *Wickard* 217 that intrastate activities which have certain sorts of "effects"—either in reality or potentially in aggregate—on interstate commerce are subject to federal control—to the extent, of course, that they affect the "general welfare" and are tailored to the promotion of such welfare. But it is not hard to imagine how the regulation of child labor218 or the regulation of particular industries during a time of national economic crisis219 could be amply justified by considerations of the "general welfare."220 Justice Sutherland conceded as much in *Carter*,221 yet he treated an outdated conception of federalism as the governing interpretive consideration—and, of course, ignored the pre-amble as a source of guidance.

It is worth concluding here with Justice Story's observation that:

> a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words in which those powers are granted can be a sound one which narrows down their ordinary import so as to defeat those objects.222

Story had better access to and knowledge of the framers' intent than Meese, Bork or alas Justice Sutherland and his followers. Is it conceivable that the framers, having experienced the impotence of the government created by the Articles of Confederation, would have contemplated that both the states and the national government would be powerless to cope with the collapse of the economy occurring during the Great Depression or that new forms of freedom could be denied their posterity because they had thought it wise to frame their purposes, goals and values in general rather than in specific terms?

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215 Some regulations might touch matters with no bearing on interstate commerce; and some matters, even if having a bearing on interstate commerce, have no relevance to the general welfare.


220 But see supra notes 213-15.

221 *Carter*, 298 U.S. 238.

222 J. Story, supra note 13, at § 422.
The preamble accorded the effect to which it is legally entitled at a minimum would be helpful in resolving these basic questions.

V. CONCLUSION

If the preamble to the Constitution were given the status we advocate, the course of our constitutional jurisprudence would not change drastically. However, we submit that the preamble merits recognition as a genuine interpretive aid in construing the Constitution’s provisions. Moreover, these provisions, as we have also argued, should be construed dynamically, as they would at common law. Viewing the Constitution as the foundation of a constitutional common law accords well with the views of the framers and the earliest interpreters of the document as well as with the actual course of our constitutional history. Against that backdrop of constitutional theory, the preamble does not demand that a single construction be put on the Constitution; rather it serves as a signpost, marking the course of constitutional common law, and demanding that, whatever the particular course, the Constitution should in the end serve to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”

223 U.S. Const. preamble.