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DO CONSTITUTIONS HAVE A POINT? REFLECTIONS ON "PARCHMENT BARRIERS" AND PREAMBLES

By Sanford Levinson

I. Introduction: Why Write Down Constitutional Understanding?

A basic question facing any student of constitutions is what accounts for the modern prevalence of *written* constitutions. Political scientists since Aristotle, after all, have understood that societies invariably have collective political understandings that can be called "constitutions," whether or not they are written down. What is the point of putting such understandings in writing? As we are often reminded, the United Kingdom—one of the world's great democracies, at least by conventional criteria—sustained itself over many centuries without such a constitution, even if one might well regard British membership in the European Union and its commitment to the European Convention on Human Rights as fatally weakening the conventional description of the country as lacking a written constitution. Moreover, that description is still accurate with regard to one of Britain's former colonies, New Zealand, which may have "superstatutes," such as the New Zealand Bill of Rights Act, but still functions without a canonical constitution. The same is true of Israel. Still, it is obvious that at least since the loss in 1783 of one of the major parts of the British colonial empire—in terms of subsequent history, it is perhaps not unduly chauvinistic to say *the* major part of that empire—the trend has been very much in favor of written constitutions. For this, one may presume, the United States bears some significant responsibility; it had, by 1787, become the home of a plethora of written constitutions.

As noted by the late Willi Paul Adams, one of the most distinguished European students of American constitutional practices, the United States Constitution of 1787–88 was preceded not only by the ineffective Articles of Confederation, but also, and far more importantly, by a host of state constitutions drafted in the immediate aftermath of the Declaration of Independence.[1] Many of the great issues that would be hashed out in Philadelphia in 1787 were first broached in state capitals—and, of course, James Madison, an assiduous student of comparative constitutionalism, was also well aware of constitutional debates ranging from ancient Rome to the Dutch Republic. What was written down was of obvious import.

[1] Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Lanham, MD: Rowman and Littlefield, 2001).

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After all, the people of Massachusetts had engaged in genuine collective discussion and then rejection in 1778 of the first draft of the proposed Massachusetts constitution; after modification, it was ratified in 1780, so that Massachusetts can legitimately claim to be governed by the oldest continuing constitution in the world.[2] And, of course, the Constitutional Convention in Philadelphia was triggered by widespread discontent over the revealed limitations of the first constitution of the United States, the Articles of Confederation, which had become operative in 1781. The moral of the Articles' failure was, obviously, not to reject the turn toward written constitutionalism, but rather to draft a new and better foundational agreement.

What might account for the undoubted triumph of written constitutions, at least if one puts to one side the important possibility of a "contagion effect," that is, the influence of both the American and the French revolutions on subsequent developments, culminating in the belief that truly respectable countries ought to have written constitutions? From a functionalist perspective, I have come to believe that the most important attribute of a written constitution is its setting down of clear rules, most of which are *not* open to serious interpretive dispute, about the most basic structures of government. These rules encompass such factors as establishing the institutional contexts for the making and enforcement of laws, including setting out the basic ground rules for the election (or appointment) of officials and the length of the terms of their offices. If, as is the case in all more-or-less democratic regimes, one can anticipate that those currently in power might be replaced in the future by people who are now in the opposition, then it is especially important to have clearly delineated rules setting out the mechanisms of election and replacement. One can easily believe that it is best to inscribe such rules in indelible ink rather than to rely on tacit understandings.

It is true, of course, as I have argued recently in my book *Our Undemocratic Constitution*,[3] that some of the specific rules of the U.S. Constitution, however much sense they might arguably have made at the time of initial adoption, may be significantly counterproductive today. My model example with regard to the U.S. Constitution is the Inauguration Day clause, set out in the Twentieth Amendment, which establishes January 20 of the year following elections as the date for inaugurating the winner.[4]

[2] See Oscar and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge, MA: Harvard University Press, 1966). See generally John Dinan, *The American State Constitutional Tradition* (Lawrence: University of Kansas Press, 2006), for a convincing argument that constitutional theorists have much to learn from the study of the many remarkably different American state constitutions.

[3] Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2008).

[4] U.S. Constitution, Amend. XX, section I: "The terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin." The reason a constitutional amendment was necessary, incidentally, was not because

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Given that elections (by statute) take place in early November, my own view is that this creates far too long a hiatus between the election and the inauguration of a new president and generates a problematic split between political and legal authority. This was vividly illustrated in December 2008, when participants at an international economic "summit" in the United States were far more eager to talk with President-Elect Barack Obama and his incoming team of economic advisers than with President George W. Bush (though Obama scrupulously avoided any encounters that might have called President Bush's authority into question). One might debate exactly when a new president should take office—only in a parliamentary system with "shadow governments" is it really possible to emulate the British practice of a new prime minister's taking office literally the day following election—but it is hard to believe that ten weeks is optimal, especially in a world where time is ever more compressed with regard to such issues as national security, economic crisis, or natural disasters. Still, at least there is no dispute about when the opposition is entitled to take over and, even more importantly, the political legitimacy of that takeover, even if it requires prevailing in an equally arcane and normatively indefensible electoral college.[5]

In focusing on the dominant importance of quite formal political structures, I am, to some extent at least, rejecting the pervasive contemporary view that the most important function of constitutions is to guarantee and then assure the implementation of important rights. Too often, I believe, people tend to yawn at discussions of such issues as unicameralism versus bicameralism or the precise number of votes it should take, in a presidential system, to override a presidential veto (assuming the president has a veto power at all, which is hardly a self-evident proposition). People become animated only when discussion turns to freedom of speech or religion, the rights of racial, ethnic, or gender groups, or, indeed, the protection accorded to private property. This is a profound error. I hasten to say that I do not believe that the latter debates are unimportant or the rights not worth cherishing, whether one is referring to the classic bundle

the original Constitution indicated a different date. No date at all was specified; March 4 became Inauguration Day because of an early act of Congress. But because the Constitution did specify that the president would have a four-year term, once the statute was passed and became operative, it became the equivalent of a hard-wired constitutional text, inasmuch as any change, by definition, would either reduce or lengthen the fixed four-year term. Thus, as a result of the Twentieth Amendment, ratified in 1933, Franklin D. Roosevelt's first term of office was in fact only three years and ten-and-a-half months, given that he was initially inaugurated on March 4, 1933, under the old regime, and then inaugurated for the second time on January 20, 1937.

[5] Americans do not vote "directly" for presidential candidates, but, rather, vote on a state-by-state basis for "electors" committed to the given candidates, who will then, as a result of arcane procedures set out in the Twelfth Amendment and subsequent legislation, meet to cast their votes for their particular choices. It is this feature of the Constitution that explains, for example, why the person who comes in second in the national popular vote can nonetheless win the electoral vote, as happened notably in 2000.

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of liberal "negative rights" (perhaps best summarized by Justice Brandeis's famous reference to "the right to be left alone—the most comprehensive of rights, and the right most valued by a free people")[6]—or to more contemporary "affirmative rights," where one looks to the government for active succor against certain vicissitudes of life.[7]

Nonetheless, whatever the genuine ideological importance of written guarantees of rights, whether "negative" or "affirmative," I have become steadily more skeptical with regard to their practical importance. There is, of course, a rich tradition in American constitutional thinking of skepticism about mere "parchment barriers" against governmental overreaching. James Madison famously concluded *Federalist No. 48* by observing "that a mere demarkation [*sic*] on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[8] Interestingly, the particular "parchment barriers" about which he was expressing his skepticism involved "separation of powers" concerns at the national level, and one might say the same about vertical separation of powers between the national and state governments. Surely the record of United States constitutional law in particular inspires no great confidence on either point, whether one applauds or is dismayed by the changes revealed by any survey of the record of "American constitutional development." (At the very least, this offers cautionary lessons about the genuine "stickiness" of all apparent settlements.) But skepticism about the ability of "parchment barriers" genuinely to protect the rights of vulnerable minorities is also amply justified. Anyone who believes that the simple language of the Constitution explains contemporary protections, say, of seditious speech has to explain why no such interpretation of the language was given earlier in our history. Perhaps the constitutional language has *some* explanatory force, but it seems foolhardy to

[6] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[7] Whether ironically or not, given the failure of the United States Constitution to include any clear protections of such rights, at least some credit for the movement toward such guarantees in the rest of the world goes to President Franklin D. Roosevelt. His 1944 State of the Union message to Congress called for a "new Bill of Rights," on the basis of his belief that "individual freedom cannot exist without economic security and independence" and that it is a vital role of government to guarantee such security by recognizing rights "to a useful and remunerative job in the industries or shops or farms or mines of the nation; . . . to earn enough to provide adequate food and clothing and recreation; . . . to a decent home; . . . to adequate medical care and the opportunity to achieve and enjoy good health; . . . [and] to adequate protection from the economic fears of old age, sickness, accident, and unemployment." Although one might believe that a free-market system would often prove adequate to provide such "rights," it is clear that for Roosevelt and his followers, government would have both the authority and the duty to step in and fund such necessarily redistributive programs, should market solutions be perceived as inadequate.

[8] James Madison, *Federalist No. 48,* in Philip Kurland and Ralph Lerner, eds., *The Founder's Constitution* (Chicago: University of Chicago Press, 1987), vol. 1, chap. 10, doc. 15, available online at http://press-pubs.uchicago.edu/founders/documents/v1ch10s15.html.

privilege its importance over other developments in the general political culture. It is always foolhardy to confuse the "law on the books" (even if the "book" is an ostensibly revered constitution) with the "law in action" within a given society. (A side issue, which is not a central concern of this essay, is whether it is realistic to expect "independent" judiciaries to be effective guarantors of constitutional rights if such rights do not, in fact, have significant popular support. Like many political scientists—and even some lawyers—I am skeptical.)[9]

Even if we share some of Madison's skepticism about "parchment barriers," it is wise to recognize that many constitutions, including the U.S. Constitution, *do* include significant patches of text that are widely accepted as controlling and, therefore, impervious to change outside the authorized process of amendment (which, in the U.S. Constitution, establishes hurdles sufficient to make most amendment impossible). It is a mistake to overemphasize what I have elsewhere called the "narrative of change" with regard to understanding the realities of American constitutionalism; that narrative, however accurate and important, is nearly irrelevant with regard to "hardwired" institutional structures like Inauguration Day or bicameralism. It must be complemented with a "narrative of stasis."[10] One need not adopt a controversial theory of language with regard to texts establishing these structures. The point is pragmatic: For whatever reason, there is simply no public debate—or even debate among the most "creative" constitutional lawyers—about the constitutional legitimacy of Wyoming's having the same voting power in the U.S. Senate as does California, even if one believes, as I do, that this allocation is normatively indefensible. The absence of any such debate is surely as important as the pervasive controversy about, say, the legitimacy of affirmative action.

My discussion of the "point" of constitutions has thus far been cast in entirely functionalist terms: Any political system will presumably function better, at least most of the time, if it has reasonably ascertainable rules as to who is authorized to exercise (and to succeed to) political power. Such rules will not preserve a system if its rulers are perceived, whether by key elites (including the military) or the public at large, as exercising power tyrannically. At that point, as in America in 1776, it is possible that the voice of revolution will be heard throughout the land. Still, even if such rules are not sufficient to guarantee stability, one might well believe they are a necessary condition. (This is why customary conventions are of special importance, even in systems that lack canonical written constitutions.)

Thus, one way of analyzing constitutions is to identify two separate aspects of constitutional texts. On the one hand, there are provisions that

[9] The standard citation is surely Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, 2d ed. (Chicago: University of Chicago Press, 2008).

[10] See Sanford Levinson, "Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis," *Indiana Law Review* 84 (2009): 1337.

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genuinely *settle* certain important issues, such as the day on which a new president takes over legal authority, even if we happen to think that the particular rule established is open to serious criticism. On the other hand, there are those provisions that may be best viewed as *invitations to conversation*, where equally well-trained lawyers will offer sometimes dramatically different "interpretations" of constitutional texts. For examples of the latter sort within the American Constitution, one need look no further than the First Amendment's protection of "the freedom of speech" or the Fourteenth Amendment's guarantee of "equal protection of the laws"; and, indeed, similar interpretive controversies are easily attached to the assignment of power to Congress in Article I, section 8. Only the most ambitious, or delusional, constitutional designer could truly imagine that any given document would operate exclusively as a "constitution of settlement," but it should be just as obvious that a constitution that served *only* to generate conversations would itself be of limited utility. All constitutions feature both attributes and, therefore, have two distinctive (and sometimes contradictory) points: (1) to settle and make almost literally undebatable, at least in legal terms, certain fundamental features of the polity; and, at the same time, (2) to generate almost endless, and often acrimonious, debate about other fundamental features.

What I want to focus on in the rest of this essay is the particular problem posed by constitutional preambles, an extremely interesting, but relatively underanalyzed, feature of most constitutions. Relatively few of the drafters of the now hundreds of written constitutions that exist at both national and subnational levels were willing to stop simply with setting out the basic institutional structures or even including guarantees of rights to be protected in the new constitutional order. Instead, most constitutions have preambles.[11] Some of them are short and (relatively) easily memorizable, as is the case with the preamble to the U.S. Constitution: "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."[12] Others may be consid-

[11] In a forthcoming essay, Liav Orgad notes that a "non-representative sample of fifty democratic countries" revealed that thirty-seven of them have preambles and only thirteen do not—and five of the latter have "introductory articles" that may be said to function as preambles. See Orgad, "The Preamble in Constitutional Interpretation," forthcoming in *I-CON* (2011), ms. p. 3 n. 4. Similarly, a more comprehensive survey of 578 of the 801 total constitutions written from 1789 to 2006 indicated that 79 percent of them included preambles. Indeed, not only are more-recent constitutions (those written since 1950) more likely to include preambles, but they are also likely to be considerably longer than were earlier preambles. See Zachary Elkins and Tom Ginsburg, "The Comparative Constitutions Project" (2010), available online at http://comparativeconstitutionsproject.org.

[12] Indeed, the preamble can even be put to music. See (or listen to) http://www.youtube.com/watch?v=aNb9AoY5XXE.

erably longer, as illustrated by the preamble to the aforementioned Massachusetts Constitution of 1780:

> The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.
>
> The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.
>
> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following declaration of rights and frame of government as the constitution of the commonwealth of Massachusetts.

Just as we should ask why so many people think it is important to have written constitutions rather than relying on customary conventions, we should independently ask why so many people who engage in the enterprise of drafting constitutions believe that it is also important to include preambles. What is *their* point? With regard to written constitutions themselves, I have offered a basically functionalist explanation involving the clear social benefits of having clear-cut rules for the acquisition and maintenance (and loss) of political power. Moreover, with regard to the provisions of constitutions that invite conversations built around different interpretations of indeterminate texts, even those conversations are quintessentially "legal" inasmuch as they are instantiated in arguments directed, most obviously, to judges called upon to declare concrete winners and losers in particular controversies that turn on the meaning assigned to the text. Perhaps a functionalist account of the "constitution of conversation" would emphasize the social and political goods thought to be served by "legalizing" these controversial issues and establishing a social practice of

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looking to lawyers and judges to resolve such controversies (though, obviously, one can debate the normative desirability of such a practice).

Nonetheless, it is harder to come up with a functionalist account of preambles, not only because they most often feature glittering generalities (like "establishing justice"), but also because they generally do *not* serve as invitations to *legal* conversations. So we must explain why constitutional drafters would feel impelled to precede the identification of political officials and their powers—or even the delineation of protected rights—with the kinds of statements that are regularly found in preambles. Presumably, preambles have a point, but it really cannot be the same kind of point that would be attributed to the main body of a written constitution.

II. The (A)legal Status of Constitutional Preambles

The easiest way to demonstrate this difference, I suggest, is by reference to the very different *legal* status of a preamble from the rest of the constitution. The preamble to the U.S. Constitution is rarely cited—and even more rarely seriously discussed—by the United States Supreme Court. Ironically, perhaps, one of the earliest decisions of that Court, *Chisholm v. Georgia* (1793), in which the Court held that Georgia was liable to being sued in a federal court by a resident of South Carolina, *did* include a discussion of the preamble. The discussion appeared in the concurring opinion of Justice James Wilson, one of the primary figures involved in the Constitutional Convention of 1787, and in the Pennsylvania convention that ratified the U.S. Constitution thereafter. Wilson justified the decision in the *Chisholm* case on the basis of "the declared objects, and the general texture of the Constitution of the United States," including its commitment "to form an union more perfect, than, before that time, had been formed." Moreover, he noted, "Another declared object is, 'to establish justice.' This points, in a particular manner, to the Judicial authority. . . ."[13] It is also worth noting, though, that the Court's decision in *Chisholm* was met with a storm of protest from objecting states, and that the very first amendment to the Constitution following the Bill of Rights—the Eleventh Amendment—was explicitly designed to overrule the Court's decision. Citations to the preamble of the Constitution have been few and far between since then.[14] The most recent appears to be Chief Justice William Rehnquist's majority opinion involving claims of constitutional protection by a Mexican national whose property had been searched and seized by U.S. agents in Mexico in a manner that would have violated the

[13] *Chisholm v. Georgia,* 2 U.S. 419, 465 (1793).

[14] See Milton Handler, Brian Leiter, and Carole E. Handler, "A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation," *Cardozo Law Review* 12 (1990–1991): 117, 120–21 n. 14 (reporting a total of only twenty-four citations, over 80 percent of which occurred in dissenting opinions).

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Constitution had it been done within our own borders. Rehnquist cited the preamble (and many other parts of the Constitution) to support the argument that the Constitution applies *only* to members of the American political community and, therefore, not to foreign nationals abroad.[15] Far more important, and basically dispositive for practicing lawyers, was the Court's comment over a hundred years ago: "Although th[e] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments."[16] Justice Oliver Wendell Holmes once (in)famously described the equal protection clause of the Fourteenth Amendment as "the usual last refuge of constitutional arguments,"[17] just before, as one might predict, dismissing the relevance of such an argument. One might offer the same comment about the preamble as a source of "constitutional arguments." Things might change in the future, as was most certainly the case for equal protection arguments, which have become almost ubiquitous in the modern, post-Holmesian world. But it remains true that no law professor teaches students that citing the preamble as a principal support for one's argument would be a smart move.

One reason for such reticence was well stated by the nation's first attorney general, Edmund Randolph, in his 1791 memorandum to George Washington concerning the constitutionality of the proposed Bank of the United States. Noting that some proponents of the bank relied on the preamble, he told Washington—who, of course, had been president of the Constitutional Convention itself—that "the Preamble if it be operative is a full constitution of itself; and the body of the Constitution is useless." After all, if it became sufficient to make direct appeals to "establishing justice" or "assuring domestic tranquility," then why bother demonstrating that Congress had been assigned such powers or, even more to the point, why pay any heed to barriers against government's achieving such happy goals? Thus, Randolph pronounced "the legitimate nature of preambles" to be "declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated."[18]

III. Relationships Between a Constitution's Ends and Constitutionally Authorized Means

Preambles, more than any other parts of constitutions, make vivid the complex relationship between the presumptive ends underlying a given

[15] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).
[16] *Jacobson v. Massachusetts*, 197 U.S. 111, 22 (1905).
[17] *Buck v. Bell*, 274 U.S. 200, 208 (1927).
[18] Memorandum from Edmund Randolph to George Washington, quoted in Paul Brest et al., *Processes of Constitutional Decisionmaking*, 5th ed. (New York: Aspen Publishers, 2006), 32.

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constitution and the particular means that it authorizes to achieve those ends. Of course, in the case of the U.S. Constitution, one might argue that the views of the Constitutional Convention, which rest on empirical predictions of what means would "best fulfill" the great ends set out in the preamble, might be subject to later disconfirmation; future interpreters should thus feel free to interpret the Constitution in a way that allows achievement of the ends. Why, after all, would one confine oneself to certain means to an end if one discovers that those means are counterproductive to achieving the specified end? As I have already suggested, that might well explain the decidedly checkered history of constitutional interpretation with regard to the initial view that the national government—and, in some respects, the state governments as well—were far more governments of "limited powers" than has turned out to be the case.

Here the canonical Supreme Court opinion is probably *Home Building and Loan Association v. Blaisdell* (1934),[19] a case that arose during the Great Depression. In this case, a sharply divided Court upheld the power of the Minnesota legislature, responding to the plight of impoverished homeowners faced with the loss of their homes, to suspend the duty of debtors to adhere to their specific contracts with creditor banks. To be sure, the "mortgage moratorium" was temporary, scheduled to expire in May 1935, and the debtors were obligated under its terms to pay banks a "fair" rental for the homes they continued to live in. At the time, mortgages were structured very differently from the system that now operates in the United States, where monthly payments are of a uniform amount. Instead, mortgages at the time typically included a "balloon payment" at the end of the mortgage term, so that, for example, fifty-nine monthly payments of $100 would be followed by the obligation to make a $5,000 payment. Typically, new mortgages would then be written, which would make it unnecessary actually to come up with the final payment; of course, this assumed the creditworthiness of the borrower, precisely what was negated by the Depression. Hence the perceived need for the moratorium and the suspension of contractual obligations, in spite of the seemingly clear prohibition by the contract clause of Article I, section 10 of the U.S. Constitution, which bars states from "pass[ing any] Law impairing the Obligation of Contracts."

This is the most dramatic evidence in the Constitution of a decided preference for creditors over debtors; indeed, many supporters of the new Constitution expressed hostility to debtor-relief legislation that had previously been passed by Rhode Island and other states. The contract clause was seen as a decisive barrier against such legislation in the future. Thus, both textual absolutism—what part of "no state shall pass any law" does one not understand?—and historical understandings seem to invalidate legislation such as that passed by the Minnesota legislature, however

[19] *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

understandable the pressures for such legislation might be. Nonetheless, Chief Justice Charles Evans Hughes, writing for the majority of the Supreme Court, upheld the legislation, demonstrating, for some, that the contract clause was indeed only a "parchment barrier" against legislation that was widely thought to be necessary to respond adequately to the exigencies of the day. In a key paragraph, Hughes wrote:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If, by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[20]

Why do I dwell on *Blaisdell,* given the central theme of this essay? The answer is simple: Hughes does not simply say that maintaining "domestic tranquility" or "establishing justice" is enough to validate Minnesota's actions. Instead, among other things, he goes through a painstaking doctrinal analysis to demonstrate that prior cases legitimate the legislature's actions.

To be sure, one might view John Marshall's comment as sufficiently open-ended to make any invocation of the generalities found in the preamble unnecessary. Yet we can be confident that Hughes would never have used the Marshall quotation to justify inaugurating Franklin D. Roosevelt on, say, January 20, 1933, instead of March 4 (prior to the proposal and ratification of the Twentieth Amendment, which indeed changed the established, and presumably constitutionally entrenched, date of March 4). Even though there is a broad scholarly consensus that the United States was significantly ill-served by the long hiatus between Roosevelt's trouncing of Herbert Hoover in November 1932 and his actually taking office four long months later, and even though there were those who encouraged Roosevelt in effect to declare himself a "dictator"

[20] Id. at 442–43. My colleague Scot Powe once suggested that anytime one sees a citation to these passages from *McCulloch,* readers should engage in the equivalent of holding onto their wallets, because the one certainty is that the most obvious construction of the Constitution is likely to fall by the wayside in favor of the upholding of highly controversial exertions of governmental power.

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upon his inauguration,[21] Hoover's ability to stay in office until March 4, 1933, was never in doubt. This underscores my own distinction between the genuinely "hardwired" parts of the Constitution and those that, when all is said and done, serve more as "parchment barriers" than as necessarily effective constraints against actions, and "adaptations," that are thought to be required to meet "crises."

Thus, we can arrive at the following conclusion: To rely on the statements of purposes set out in the preamble in order to justify a strongly teleological approach to the U.S. Constitution would be to remove what many regard as the greatest benefit of written constitutionalism itself, which is precisely its mixture of *specification* and *limitation* of powers. Here another Marshallian chestnut might be invoked, this time from *Marbury v. Madison* (1803): "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[22] (I will leave for another day the potential contradictions revealed when one juxtaposes the *Marbury* chestnut with the *McCulloch* one.)

Americans of all ideological persuasions are hesitant to support the proposition that those who hold political power should simply be able to do "whatever they think best for the country" or that the current oaths required of federal officials should be modified to require only fidelity to the Constitution's preamble and to let it go at that. Perhaps this is a mistake, especially given developments in the United States over the past seventy-five years that have transformed, if not eliminated, initial visions of limited government. Still, it is significant that the justifications for enhanced powers over this period have been found not in the preamble, but, with regard to Congress, in the "necessary and proper" clause that concludes the assignment of powers to the national legislature in Article I, section 8 of the Constitution, and, with regard to the president, in certain readings of Article II, dealing with presidential authority. Some analysts focus on Article II's very first sentence, which refers to "the Executive Power," unlike Article I, which specifies that Congress enjoys only those powers "herein granted." On the one hand, if powers have not been granted to Congress, one may well believe that Congress does not have them. On the other hand, if there is no such reference to the president, then one may feel free to argue that the chief executive enjoys, say, the "prerogative" powers articulated by John Locke in Chapter XIV of his *Second Treatise of Government.* Other analysts focus on the implications of assigning the president the power to serve as commander-in-chief of the armed forces. University of St. Thomas Law School professor Michael

[21] Walter Lippmann, one of the most widely respected newspaper columnists of the era, wrote in a pre-Inauguration column: "A mild species of dictatorship will help us over the road in the roughest months ahead." Quoted in Jonathan Alter, *The Defining Moment: FDR's Hundred Days and the Triumph of Hope* (New York: Simon and Schuster, 2007), 187.

[22] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803).

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Stokes Paulsen emphasizes the importance of the "oath of office" clause as a justification for extraordinary action that many would view as stretching the Constitution to the breaking point.[23] Not even Paulsen, though, offers the preamble in support of his argument.

As for countries other than the United States, I know far more about the formal content of their constitutions than I do about their argumentative practices. And it is true that most (though certainly not all) constitutions include preambles. As political science professor Beau Breslin has noted in his recent study of written constitutions, preambles are the sites within constitutional texts "where constitutional framers proclaim their principal intentions, where they communicate their deepest aspirations for the newly created polity."[24] Given Breslin's elaboration of the multiple functions of contemporary preambles, it is perhaps all the more significant that he offers no examples in which a preamble has become an important part of a given country's professional legal tradition of argument and adjudication (although, as we will see shortly, there may in fact be some such examples).

Especially telling in this regard is latter-day South Africa, not least because its new 1996 Constitution was, by all accounts, intended to serve as a radical break with the past and a harbinger of a transformed future.[25] Anyone who doubts this must merely read its preamble:

> We, the people of South Africa,
> Recognise the injustices of our past;

[23] See Michael Stokes Paulsen, "The Constitution of Necessity," *Notre Dame Law Review* 79 (2004): 1257. The most obvious "extraordinary action" involves torture and other breaches of ordinary legal norms.

[24] Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Baltimore, MD: The Johns Hopkins University Press, 2009), 50.

[25] The "transformationist" impulse behind the Constitution has been recognized by the South African Constitutional Court and plays some role in its jurisprudence. See, e.g., Justice Mahomed's opinion in *State v. Makwanyane,* which invalidated the death penalty in South Africa:

> In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.

State v. Makwanyane, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). See also *Soobramoney v. Minister of Health (SwaAulu-Natal),* 1009 (1) SA 765 (CC), 1997 (12) BCLR 1696: "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. . . . [T]hese conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order." See also Christopher Roederer, "Founding Provisions," in *Constitutional Law of South Africa,* 2d ed., ed. Stuart Woolman et al. (Cape Town: Juta, 2002), 13-4.

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Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.[26]

Interestingly enough, this preamble is immediately followed by several "founding provisions," the first of which states:

[Section] 1. Republic of South Africa
The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[27]

[26] South African Constitution, available online at http://www.info.gov.za/documents/constitution/1996/96preamble.htm. The final three lines of the preamble invoke God's blessings in several of the official languages of South Africa.
[27] Ibid., available online at http://www.info.gov.za/documents/constitution/1996/96cons1.htm.

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Even if one regards the preamble, like Article I, as "foundational,"[28] they are both apparently treated as nonjusticiable,[29] that is, unsuitable for judicial enforcement. This means, practically speaking, that professional lawyers (and most legal academics) will simply tend to ignore such passages inasmuch as they presumably provide no "added value" to one's explicitly legal arguments—arguments that focus on clauses that courts *will* enforce. Thus, in an interesting case dealing with the voting rights of imprisoned felons, the Chief Justice of the South African Constitutional Court, Arthur Chaskalson, acknowledged that "[t]he values enunciated in section 1 of the Constitution are of fundamental importance" inasmuch as "[t]hey inform and give substance to" the Constitution in its entirety, but then went on to proclaim that "they do not, however, give rise to discrete and enforceable rights in themselves."[30] Still, there *are* cases in which the South African Court has looked to the preamble for interpretive guidance.[31]

A similar decision seems to have been reached by the Indian Supreme Court with regard to the preamble of that country's complex constitutional document: "Regarding the use which can be made of the preamble in interpreting an ordinary statute, there is no doubt that it cannot be used to modify the language if the language of the enactment is plain and clear. If the language is not plain and clear, then the preamble may have effect either to extend or restrict the language used in the body of an enactment." The Indian justice who authored this statement, interestingly enough, went on immediately to quote, among others, the nineteenth-century American justice Joseph Story, who had described the preamble of U.S. Constitution as only "a key to open the mind of the makers." According to Indian Chief Justice Sikiri, a preamble may "show the general purposes for which [those framing the constitution] made the several provisions in the Constitution; but nevertheless the preamble is not a part of the Constitution."[32]

It may be worth noting that Article 116 of the 1990 Nepalese Constitution (supplanted, apparently, by a new constitution in 2008) specified that "[a] bill to amend or repeal any Article of this Constitution, *without prejudicing the spirit of the Preamble of this Constitution,* may be introduced in either House of Parliament: Provided that this Article shall not be subject

[28] See G.E. Devenish, *A Commentary on the South African Constitution* (Durban, South Africa: Butterworths, 1998), 28–29.

[29] See Roederer, "Founding Provisions," 13-5 n. 1.

[30] *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO),* Case No. CCT03/04 (2004).

[31] See, e.g., Liav Orgad, "The Preamble in Constitutional Interpretation," *I-CON* (forthcoming 2011).

[32] *Kesavananda Bharati v. The State of Kerala,* AIR 1973 SC 1461, available online at http://openarchive.in/newcases/29981.htm. See Joseph Story, *Commentaries on the Constitution of the United States,* ed. Ronald D. Rotunda and John E. Nowak (Durham, NC: Carolina Academic Press, 1987), 163.

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to amendment."[33] Almost undoubtedly the most notable use of a preamble has occurred in France, where the Constitutional Council in 1971 invalidated a law passed by the French parliament in light of the "fundamental principles recognized by the laws of the Republic."[34] As a matter of fact, these "fundamental principles" are nowhere named in the 1958 constitution, but are in the preamble to the 1946 constitution. As Liav Orgad writes,

> In later decisions, the council held that the Preamble to the 1946 Constitution enjoys legal force and constitutes an independent source of rights.[35] Interestingly, at the time it was drafted, the 1946 Preamble did not enjoy any legal status. Thus, the Constitutional Council, through a reference to the 1946 Preamble in the 1958 Preamble, effec-

[33] Nepalese Constitution of 1990, Article 116 (emphasis added), available online at http://www.servat.unibe.ch/icl/np00000_.html.

[34] See Decision of the Constitutional Council No. 44-71 (1971).

[35] The preamble to the 1958 French Constitution begins as follows: "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution." See http://www.servat.unibe.ch/icl/fr00000_.html. The 1946 preamble itself is considerably longer and more detailed:

> In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic.
>
> They further proclaim, as being especially necessary to our times, the political, economic and social principles enumerated below:
>
> - The law guarantees women equal rights to those of men in all spheres.
> - Any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum upon the territories of the Republic.
> - Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs.
> - All men may defend their rights and interests through union action and may belong to the union of their choice.
> - The right to strike shall be exercised within the framework of the laws governing it.
> - All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.
> - All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.
> - The Nation shall provide the individual and the family with the conditions necessary to their development.
> - It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society.
> - The Nation proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities.

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tively granted the 1946 Preamble a higher status than it had previously enjoyed.[36]

So perhaps it is fair to place the preamble of the United States Constitution at one end of a spectrum in being barely, if at all, "legalized," whereas the 1946 French preamble, whatever its initial status, has become strongly generative for modern French constitutional law.[37] Still, even taking into account such examples as South Africa, India, or France, I still think it safe to say that, generally speaking, the motive force behind writing a preamble is to serve some function(s) other than providing an additional patch of text for use in the standard arsenal of legal arguments. Let us turn now to what those functions might be.

IV. The "Nonlegal" Functions of Constitutional Preambles: Delineating the Nation

For better or worse, one important clue to the possible importance of preambles is provided by the German (and, one must always note, at least briefly Nazi) legal philosopher Carl Schmitt.[38] For Schmitt, the existence of a political nation (which, of course, may or may not have

- The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State.
- The French Republic, faithful to its traditions, shall conform to the rules of international public law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people.
- Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace.
- France shall form with its overseas peoples a Union founded upon equal rights and duties, without distinction of race or religion.
- The French Union shall be composed of nations and peoples who agree to pool or coordinate their resources and their efforts in order to develop their respective civilizations, increase their well-being, and ensure their security.
- Faithful to its traditional mission, France desires to guide the peoples under its responsibility towards the freedom to administer themselves and to manage their own affairs democratically; eschewing all systems of colonization founded upon arbitrary rule, it guarantees to all equal access to public office and the individual or collective exercise of the rights and freedoms proclaimed or confirmed herein.

Available online at http://www.elysee.fr/elysee/anglais/the_institutions/founding_texts/preambule_to_the_27th_of_october_1946_constitution/preambule_to_the_27th_of_october_1946_constitution.20243.html.

[36] Orgad, "The Preamble in Constitutional Interpretation," 12.

[37] See ibid., 13 n. 53, citing Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press, 1992), 40–45, 66–78 (noting that seven of the sixteen annulments issued by the Council between 1971 and 1981 were based on interpretations of the 1958 preamble.

[38] See especially Carl Schmitt, *Constitutional Theory,* ed. and trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008).

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been organized into a political state) precedes the adoption of a constitution and, indeed, gives life to it. It is the unified political will of a people (as in "We the People") that creates a constitution—at least in those political orders that purport to rest on popular sovereignty.[39] And any constitution adopted by a national *volk* instantiates the particular perspectives of that discrete national entity, including, for Schmitt, the all-important division of the world into friends and potential enemies.[40] (Does any national constitution, for example, omit clauses dealing with the possibility of war?) We can speak, perhaps less freightedly, of a division of the world into the particular community included within the ambit of the constitution and the inevitably far larger group of others (or Others) who are excluded from it, even if one does not regard them as enemies. The Swiss Constitution, for example, seems altogether typical inasmuch as it ascribes to the Swiss Confederation "the intent of strengthening the alliance of the Confederates and of maintaining and furthering the unity, strength and honor of the Swiss nation."[41] Even if the Swiss do not look askance at the "unity, strength and honor" of other nations, that is clearly not a concern of those gathered together under the auspices of the Swiss Constitution. Nor, I presume, would anyone criticize the Swiss as being "parochial" for their lack of any such concern.

The South African Constitution may be remarkably universalist and cosmopolitan in some of its language, including the emphasis in the preamble on advancing presumably universal "human rights and freedoms." Still, no one reading the preamble would doubt that the constitution is aimed at residents of South Africa, perhaps even "citizens" of South Africa. Perhaps the best evidence is the concluding phrase, in which God's blessings are invoked in a plethora of the eleven official languages of South Africa (including, of course, English and Afrikaans).[42] Note, however, that the languages used are all "local." Arabic, for example, is *not* an official language of South Africa, nor are any of the other languages identified with other parts of Africa, such as Swahili. The South African Constitution is, in this sense, distinctly *not* "Pan-African."

One might notice similarly "localist" aspects in another preamble that appears to embrace universal values more than parochial ones, the pre-

[39] See, e.g., ibid., 65, 70.

[40] Carl Schmitt, *The Concept of the Political,* trans. George Schwab (Chicago: University of Chicago Press, 2007).

[41] Swiss Constitution, available online at http://servat.unibe.ch/icl/sz00000_.html.

[42] Thus, "Nkosi Sikelel' iAfrica," although isiZulu, works as well with isiXhosa because the languages are connected, and it might even evoke isiSwati and isiNdebele. "Morena boloka setjhaba sa heso" is Sesotho, but works also with Sepedi and Setswana. "Mudzimu fhatutshedza Afurika" is Tshivenda, while "Hosi katekisa Afrika" is Xitsonga. I am extremely grateful to Aifheli E. Tshivhase, a lecturer in the Faculty of Law at the University of Cape Town, for providing me with this information, and to Professor Christina Murray for putting me in touch with Mr. Tshivhase.

amble to the United States Constitution. It is ultimately "We the People of the United States," after all, who are to enjoy the full blessings of liberty or other goods protected by the Constitution, and not those who are not part of the American community. The most awful demonstration of this point, of course, is *Dred Scott v. Sandford,* an 1857 case in which the majority of the United States Supreme Court defined blacks, even if formally "free" rather than "slaves," as outside the American political community.[43] They were therefore left defenseless, as a matter of constitutional law, against being stripped of any rights that they might, as a matter of contingent fact, happen to possess as the result of the grace of their white rulers. To be sure, this aspect of *Dred Scott* was overruled after the Civil War by the first sentence of the Fourteenth Amendment, which established birthright citizenship for anyone born "within the territory" of the United States.[44] And the overruling of *Dred Scott* by the Fourteenth Amendment has not meant the elimination of the ability of the United States to distinguish between citizens and noncitizens, let alone residents and nonresidents, in structuring its actions.

But let us look at a number of other preambles from around the world and discern what they might be telling us about the visions of their authors (and the social groups they represent). One might, for example, wish to ascertain the relevance of *religion* to constitutional framers and to the communities for which they purport to speak. Although the South African Constitution would not strike most observers as religiously sectarian, it does, as already noted, acknowledge the community's presumptive belief in a God who is capable of "blessing" (or, presumably, otherwise judging) South Africa's new venture in democratic constitutionalism. The United States Constitution is widely viewed as among the most secular of national constitutions,[45] and the preamble certainly offers no succor to those who would challenge this. But one might consider the very last line of the Constitution, which, like the preamble, is presumably without litigative potential, but nonetheless of some import for those interested literally in every word of constitutions regardless of their interest to ordinary lawyers.

The U.S. Constitution concludes as follows: "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of *our* Lord one thousand seven hundred and

[43] *Dred Scott v. Sandford,* 60 U.S. (19 How) 393 (1857).

[44] It should be noted that this part of the Fourteenth Amendment was determined not to apply to American Indians, who were treated as part of separate, though distinctly subordinate, nations and, therefore, not entitled to birthright citizenship. American law with respect to the citizenship status of American Indians changed in 1924, but only because of the passage of a law by Congress. The Supreme Court has never overruled its decision in *Elk v. Wilkins,* 112 U.S. 94 (1884), which rejected birthright citizenship as a constitutional right.

[45] See, e.g., Isaac Kramnick and R. Laurence Moore, *Godless Constitution: A Moral Defense of the Secular State,* rev. ed. (New York: W. W. Norton, 2005).

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Eighty seven and of the Independence of the United States of America the Twelfth."[46] To put it mildly, not everyone even at the time of the Constitutional Convention believed in a common "Lord" who was born (more-or-less), 1,787 years prior to the great events in Philadelphia.[47] Indeed, one might even suggest that any similar conclusion to a statute passed by Congress today would properly be found to violate the establishment clause of the First Amendment.

This controversial (and demonstrably false) claim to religious unity among the American people circa 1787, buried as it is in the Constitution's concluding line, is one that arguably needs to be teased out of the document. Yet the task of finding similar claims is scarcely so difficult with regard to many other constitutions around the world. Americans, for example, need only look to their north in order to find the opening words of the the constitution-like Canadian Charter of Rights and Freedoms: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[48] Switzerland begins its preamble by speaking "In the Name of God Almighty!"[49] And Germany's post–World War II framers were "Conscious of their responsibility before God and Men."[50] One might well regard these invocations of "God" as relatively nonsectarian, unless, of course, one does not believe in any god. Alternatively, one might be a religious believer who presumes that the "God" invoked by Canada, Switzerland, or Germany is some version of a Christian (or Judeo-Christian) god that one might not in fact believe in. There are, after all, said to be over three-quarters of a million Hindus in Canada,[51] and perhaps they could be forgiven for believing that the ostensible community that is organizing itself around the Charter of Rights and Freedoms, by referring only to "God" instead of multiple "gods," excludes them or, at best, merely "tolerates" their presence.

One cannot take refuge in some vague invocation of post–World War II Judeo-Christianity when reading some other preambles—even those of countries considered well within "the West." Thus, the preamble of the Greek Constitution consists in substance of "In the name of the Holy and Consubstantial and Indivisible Trinity."[52] (Not surprisingly, Article 3 establishes the Eastern Orthodox Church of Christ as the "prevailing religion"

[46] United States Constitution, available online at http://www.earlyamerica.com/earlyamerica/freedom/constitution/text.html (emphasis added).

[47] I was reminded to think about this passage of the Constitution by Ronald R. Garet, "With Radiant Countenance: Creation, Redemption, and Revelation," a paper prepared for delivery at the annual meeting of the American Association of Law Schools, January 2008.

[48] Canadian Charter of Rights and Freedoms, available online at http://www.efc.ca/pages/law/charter/charter.text.html.

[49] Swiss Constitution, available online at http://servat.unibe.ch/icl/sz00000_.html.

[50] German Constitution, available online at http://www.helplinelaw.com/law/germany/constitution/constitution01.php.

[51] See "Hinduism: The World's Third Largest Religion," http://www.religioustolerance.org/hinduism.htm.

[52] Greek Constitution, available online at http://www.hri.org/docs/syntagma/.

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in the country.) The most remarkable of such preambles is almost certainly Ireland's:

> *In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,*
>
> We, the people of Éire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.[53]

The naïve reader may well believe that a condition of membership within the "people of Eire" is "Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ." One may wonder, of course, if this helps to explain anything interesting about Irish politics. After all, Dublin many years ago had a Jewish mayor, Robert Briscoe, who presumably acknowledged no such obligations. I have little doubt, moreover, that any attempt by contemporary Ireland to deny citizenship, say, to immigrants who do not acknowledge such obligations might well run afoul of the European Convention of Human Rights, but that is a matter for a different essay.

Perhaps the best non-Western analogue to Ireland's constitution is that of the Islamic Republic of Pakistan, whose preamble can, like Ireland's, be described as a form of political theology. It is also unusually long and, like the preambles of many contemporary constitutions, seems dedicated to telling the nation's story and placing its people in a given relationship with the universe.

> Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;
>
> And whereas it is the will of the people of Pakistan to establish an order:
>
> Wherein the State shall exercise its powers and authority through the chosen representatives of the people;
>
> Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;

[53] Irish Constitution, available online at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf (emphasis in the original).

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Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;

Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity:

Now, therefore, we, the people of Pakistan,

Cognisant of our responsibility before Almighty Allah and men;

Cognisant of the sacrifices made by the people in the cause of Pakistan;

Faithful to the declaration made by the Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, that Pakistan would be a democratic State based on Islamic principles of social justice;

Dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny;

Inspired by the resolve to protect our national and political unity and solidarity by creating an egalitarian society through a new order;

Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution.[54]

Needless to say, not all countries wish to embrace such a sectarian self-understanding as do Greece, Ireland, or Pakistan (among many other examples that might be given). Thus, the preambles of at least some constitutions written in recent years, especially in Europe, seem to wish to

[54] Constitution of Pakistan, available online at http://www.pakistanconstitution-law.com/preamble.asp.

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define the relevant political community—and its ostensible "unity"—in less religious terms. Especially interesting in this regard is Poland, not least because of its strong historical identification with Roman Catholicism, but also because its new constitutional self-understanding was developed during the reign of "the Polish Pope," John Paul II. The preamble to the Polish Constitution reads:

> Having regard for the existence and future of our Homeland,
>
> Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,
>
> *We, the Polish Nation—all citizens of the Republic,*
>
> *Both those who believe in God as the source of truth, justice, good and beauty,*
>
> *As well as those not sharing such faith but respecting those universal values as arising from other sources,*
>
> Equal in rights and obligations towards the common good—Poland,
>
> Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values,
>
> Recalling the best traditions of the First and the Second Republic,
>
> Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage,
>
> Bound in community with our compatriots dispersed throughout the world,
>
> Aware of the need for cooperation with all countries for the good of the Human Family,
>
> Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland,
>
> Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies,
>
> Recognizing our responsibility before God or our own consciences,
>
> Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of aiding in the strengthening [of] the powers of citizens and their communities.[55]

Poland, obviously, tries to recognize the coexistence of religious and nonreligious elements of its heritage. But consider in this context the

[55] Polish Constitution, available online at http://servat.unibe.ch/icl/pl00000_.html (emphasis added). Consider also in this context the preamble to the 1998 Albanian constitution, which begins as follows: "We, the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and/or other universal values, . . . establish this Constitution." See http://www.ipls.org/services/kusht/intro.html. I am grateful to Zachary Elkins for informing me of this text.

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preamble to the Spanish Constitution, which is striking in its failure to mention any aspect of Spain's equally notable religious history. The preamble calls upon the "Spanish Nation" "to establish justice, liberty, and security" and a panoply of other goods "in accordance with a just economic and social order." Moreover, "all Spaniards and peoples of Spain" will be protected "in the exercise of human rights, their cultures and traditions, languages, and institutions. . . ." But any acknowledgment that for many Spaniards, at least historically, these "cultures and traditions," not to mention "institutions," had anything to do with the Roman Catholic Church, is left between the lines, as it were. In its own way, the preamble to the Spanish Constitution seems comparable to that of the South African Constitution in distancing itself from what many would say is Spain's historical past.[56]

Almost certainly the most notable attempt of a preamble to establish a fully secular vision of its constituent people, at least when functioning as a polity, is that found in the constitution of modern Turkey:

> In line with the concept of nationalism outlined and the reforms and principles introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivaled hero, this Constitution, which affirms the eternal existence of the Turkish nation and motherland and the indivisible unity of the Turkish State, embodies;
>
> The determination to safeguard the everlasting existence, prosperity and material and spiritual well-being of the Republic of Turkey and to attain the standards of contemporary civilization as an honourable member with equal rights of the family of world nations;
>
> The understanding of the absolute supremacy of the will of the nation and of the fact that sovereignty is vested fully and unconditionally in the Turkish nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from liberal democracy and the legal system instituted according to its requirements;
>
> The principle of the separation of powers, which does not imply an order of precedence among the organs of State but refers solely to the exercising of certain State powers and discharging of duties which are limited to cooperation and division of functions, and which accepts the supremacy of the Constitution and the law;
>
> The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its State and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of

[56] See the Spanish Constitution, available online at http://servat.unibe.ch/icl/sp00000_.html.

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> secularism, there shall be no interference whatsoever by sacred religious feelings in State affairs and politics; . . .
>
> This Constitution, which is to be embraced with the ideas, beliefs, and resolutions it embodies below [and] should be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit,
>
> Is entrusted by the Turkish nation to the patriotism and nationalism of its democracy-loving sons and daughters.[57]

One could write an entire essay on the Turkish preamble itself, since it raises so many questions beyond those of religion and secularism. It is obviously suffused with Turkish nationalism. It appears to require, for example, that all who wish to be deemed "good Turks" must recognize Atatürk as their "immortal leader" and "unrivaled hero," in spite of the fact that any multicultural society will feature a multiplicity of "heroes," some of whom will have been historical adversaries and, consequently, are unlikely to be the objects of universal admiration. (Consider, in the case of the U.S., Robert E. Lee and Ulysses S. Grant, or Abraham Lincoln and Jefferson Davis.) I have written elsewhere of the importance to any society of its public monuments, which are necessarily "tutelary" inasmuch as they attempt, with varying success, to shape the consciousness of the citizenry and of future generations and inculcate in them the norms of "political correctness."[58]

From this perspective, the opening paragraph of the Turkish preamble is a model example of this tutelary function, for good or (from the perspective of those less taken by Turkish nationalism) for ill. Few other preambles are as "personalistic" as the Turkish one, but many reflect the desire of their authors to model a history of the particular nation that is being given a certain form of political life to go with its preexisting social one.

Exemplary in this regard is the constitution of Croatia, written in the aftermath of the dissolution of the multiethnic state of Yugoslavia in 1992.[59] The Croatian preamble presents an extended history lesson, presumably part of an effort to educate the surrounding community and, perhaps, pay a "decent respect to the opinions of mankind,"[60] though one assumes that it will also play a role in the future civic education of young Croatians:

[57] Constitution of the Republic of Turkey, available online at http://www.servat.unibe.ch/icl/tu00000_.html.

[58] Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Durham, NC: Duke University Press, 1998).

[59] Constitution of Croatia, available online at http://www.servat.unibe.ch/law/icl/hr00000_.html.

[60] See the American Declaration of Independence: "When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." Available online at http://www.ushistory.org/declaration/document/index.htm.

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The millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty, manifested in [a series of specified historical events occurring in the seventh, ninth, and tenth centuries, as well as other events in 1527, 1712, 1848, 1868, 1918, and 1939].

[With the establishment of] the foundations of state sovereignty during the course of the Second World War, by the decisions of the Antifascist Council of National Liberation of Croatia (1943), as opposed to the proclamation of the Independent State of Croatia (1941), and subsequently in the Constitution of the People's Republic of Croatia (1947) and all later constitutions of the Socialist Republic of Croatia (1963–1990), on the threshold of the historical changes, marked by the collapse of the communist system and changes in the European international order, the Croatian nation by its freely expressed will at the first democratic elections (1990) reaffirmed its millenary statehood. By the new Constitution of the Republic of Croatia (1990) and the victory in the Homeland War (1991–1995), the Croatian nation demonstrated its will and determination to establish and defend the Republic of Croatia as a free, independent, sovereign and democratic state.

Considering the presented historical facts and universally accepted principles of the modern world, as well as the inalienable and indivisible, non-transferable and non-exhaustible right of the Croatian nation to self-determination and state sovereignty, including its fully maintained right to secession and association, as basic provisions for peace and stability of the international order, the Republic of Croatia is established as the national state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens, and who are guaranteed equality with citizens of Croatian nationality and the realization of national rights in accordance with the democratic norms of the United Nations Organization and the countries of the free world.

Respecting the will of the Croatian nation and all citizens, resolutely expressed in the free elections, the Republic of Croatia is hereby founded and shall develop as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted.[61]

[61] Constitution of Croatia, available online at http://www.servat.unibe.ch/icl/hr00000_.html.

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Similarly tutelary, one can be confident, is the preamble to the 1992 constitution of the Socialist Republic of Vietnam, which, after referring to the "millennia-old history" of "the Vietnamese people," goes on to offer a synopsis of developments "[s]tarting in 1930, under the leadership of the Communist Party of Vietnam formed and trained by President Ho Chi Minh." Needless to say, this includes reference to the 1945 Declaration of Independence by the Democratic Republic of Vietnam and the military victories over France and the United States that "reunified the motherland, and brought to completion the people's national democratic revolution." Along the way, constitutions were adopted in 1946, 1959, and 1980.

> Starting in 1986, a comprehensive national renewal advocated by the 6th Congress of the Communist Party of Vietnam has achieved very important initial results. The National Assembly has decided to revise the 1980 Constitution in response to the requirements of the new situation and tasks.
>
> This Constitution establishes our political regime, economic system, social and cultural institutions; it deals with our national defence and security, the fundamental rights and duties of the citizen, the structure and principles regarding the organization and activity of State organs; it institutionalizes the relationship between the Party as leader, the people as master, and the State as administrator.
>
> In the light of Marxism-Leninism and Ho Chi Minh's thought, carrying into effect the Programme of national construction in the period of transition to socialism, the Vietnamese people vow to unite millions as one, uphold the spirit of self-reliance in building the country, carry out a foreign policy of independence, sovereignty, peace, friendship and cooperation with all nations, strictly abide by the Constitution, and win ever greater successes in their effort to renovate, build and defend their motherland.[62]

The Turkish, Croatian, and Vietnamese preambles test the reader not only by their length, but also by their invocation of either (or both) nineteenth-century-style organic nationalism or vanguards that claim to speak in the name of the entire social order. It is as if the Declaration of Independence—and not simply the preamble—appeared at the outset of the United States Constitution and, after specifying the "long train of abuses" that justified American secession from the British Empire, went on to single out George Washington and those who rallied to his leadership as exemplary Americans.

[62] Constitution of Vietnam, available online at http://www.servat.unibe.ch/icl/vm00000_.html.

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It is obvious that many more preambles could be analyzed in terms of the lessons their authors wished to convey to their readers, whether locals who would presumably be socialized into the understandings of the new constitution or foreign onlookers who might be reassured by references to the international community and the expressed desire to become a member in good standing of that community. Thus, as Breslin writes, a number of the constitutions drafted in Eastern Europe "have included language that not only articulates the distinctiveness of the particular regime but also includes statements acknowledging the place of the polity within the international community of sovereign states." [63] Nowhere, of course, have the ravages of organic nationalism been more virulent than in Eastern Europe, and one might see these national constitutions as way stations to a European Union that will, in time, establish its own strong identity. One should remember, however, that one of the most divisive issues in the creation of what many called a draft "constitution" for the European Union was precisely the language of the preamble and, more particularly, whether Europe's Christian heritage would be acknowledged. Largely because of France, apparently, there was no such reference.[64]

V. Conclusion: Unity, Multiplicity, and Preambles

We have seen that preambles serve far more what might be described as an "expressive" function than a "legal" one. What is being expressed is the ostensible "essence" of the people or nation in whose name the constitution has been drafted, whether defined in terms of religion, language, ethnicity, shared history of oppression, or even commitment to some scheme of universal values. This raises a final important question: Is there a perhaps fatal tension between (1) the constitutional drafters' aim of describing (or perhaps creating) national unity through the language of a preamble and (2) the reality that the societies being described are rarely so cohesive as certain preambles might suggest? Consider in this context the statement of the American Supreme Court justice Oliver Wendell Holmes in his dissenting opinion in the 1905 case of *Lochner v. New York.* There he famously proclaimed that the United States Constitution—and is there any reason to limit the force of his statement *only* to that constitution?—"is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. *It is made for people of fundamentally differing views.*" [65] Holmes even wrote that "state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical. . . ." It would make no difference

[63] Breslin, *From Words to Worlds,* 60.

[64] For an interesting overview of the controversy, see "Do 'God' and 'Christianity' Have a Place in the European Union Constitution?" http://www.religioustolerance.org/const_eu.htm.

[65] *Lochner v. New York,* 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (emphasis added).

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with regard to his own duty to uphold those laws, so long as they represented majority sentiment. To be sure, Holmes also wrote, in the next paragraph, of the dispositive role of "fundamental principles as they have been understood by the traditions of our people and our law." So perhaps he saw the American people as deeply unified around certain "traditions" even as we are "fundamentally differing" in views concerning "economic theory," among other things. Holmes was the master of the aphorism or, as he called it, the *apercu,* nowhere more than in his short and question-begging *Lochner* dissent. Nonetheless, it is still reasonable to ask if anyone who agrees with Holmes's general perspective, captured far more in his initial comments than in his cryptic caveat, would agree as well with the suggestion that the writing of preambles is more a testament to a yearning for homogeneity (whether of religion, ethnicity, or political ideology) than a reflection of reality. Sometimes this yearning may be relatively innocent and, on occasion, even inspiring—if we happen to agree with the preambular aspirations. But if one does not share the visions instantiated in a particular preamble, then it is surely permissible to view it as exemplifying simply one more power play in the struggle to establish the legitimacy of institutions of coercion that we call "law."

When I teach courses on constitutional design, I ask my students to imagine themselves as "certified constitutional designers" who will be asked to provide counsel to constitutional framers near and far on the writing of constitutions. It is easy enough to suggest that they should begin by addressing those particular issues that demand settlement, given, as I argued at the outset, that settlement is surely one of the most important functions of any constitution. But it is also obvious that one cannot understand constitutions simply from the perspective of settlement. Constitutions also function to generate (perhaps endless) legal conversations, particularly about rights, through the litigation of disputes and the accompanying legal interpretations offered by those charged with adjudicating such disputes. But then there are constitutional preambles, which make little or no contribution to the settlement function and, because they are relatively rarely the focus of litigation, almost as little contribution to the legal-conversation function. So the best way of concluding this essay is simply to ask a question of those who are brave (or foolhardy) enough to offer themselves as consultants on constitutional design: How would they respond if their clients asked them for advice on whether to write a preamble to the new constitution? To be sure, there is no one-size-fits-all answer, but that simply forces us to ask many other questions about the society in question before we decide whether to write a preamble at all, what precisely to say, and even what language(s) to say it in.

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