TOWARDS A PREAMBLE-BASED THEORY OF CONSTITUTIONAL INTERPRETATION

Eliot T. Tracz*

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* Judicial Clerk to Hon. Kathy M. Wallace, MN Third Judicial District and Adjunct Professor, Mitchell Hamline School of Law. J.D., DePaul University College of Law; B.A. Coe College. The author wishes to thank Rev. Kellie Tracz for her support, and the editors and staff of the *Gonzaga Law Review* for their efforts in preparing the article for publication.

INTRODUCTION

> 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.[1]

Plato once wrote, "the beginning of any process is most important . . . [.]"[2] Recently, legal scholars have heeded this advice, resulting in a sparse, but renewed, focus on the Preamble to the Constitution and its relevance to constitutional law.[3] Central to this interest is identifying the essential purposes of the Constitution stated in the Preamble: forming a more perfect union, establishing justice, domestic tranquility, providing for the common defense, promoting the general welfare, and securing the blessings of liberty.[4]

In his recent book, *We The People*, Professor Erwin Chemerinsky extrapolates four core values from the Preamble: commitment to a democratic form of government, a desire to create an effective form of government, establishment of justice, and freedom.[5] Chemerinsky also finds the presence of another value—equality—which he believes exists implicitly in the Preamble.[6] Building on these values, Chemerinsky suggests a progressive agenda for approaching the Constitution from a perspective based on the Preamble.[7] Unfortunately, Chemerinsky's agenda does not contain a formula for judicial application.

Other scholars and writers have taken more narrow approaches to addressing the role of the Preamble in constitutional law. Some have discussed the role of

1. U.S. CONST. pmbl.

2. PLATO, REPUBLIC 52 (C.D.C. Reeve ed., G.M.A. Grube trans., 2d ed. 1992).

3. *See e.g.*, ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 23–24 (2018); Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 435–42 (2000); John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1022–23 (2018).

4. U.S. CONST. pmbl.

5. CHEMERINSKY, *supra* note 3, at 57–58.

6. *Id.* at 58–59.

7. *Id*. at 59–60.

the Preamble in determining unenumerated rights under the Ninth Amendment.[8] John Welch and James Heilpern have focused on drawing attention back to the Preamble.[9] Missing from the academic literature on the Preamble, however, is a comprehensive theory of Preamble-based constitutional interpretation.

One likely reason for this lack of interest in a Preamble-based theory of constitutional interpretation is underdeveloped dicta found in *Jacobson v. Massachusetts*.[10] In that case, Justice John Marshall Harlan wrote:

> Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom.[11]

Justice Harlan is, of course, right that no power is derived from the Preamble, but that does not mean the Preamble is not of great importance.

This article's purpose is to suggest a formula for a Preamble-based theory of constitutional interpretation as well as to discuss how such a theory might be practically applied. In Part I, this article discusses the history and purpose of the Preamble, as well as some early views on the meaning and use of the Preamble in constitutional law.[12] Part II develops a Preamble-based method of constitutional interpretation and offers a comparative discussion of Preamble-based interpretation and other forms of constitutional interpretation.[13] Finally, Part III applies this theory of Preamble-based constitutional interpretation to several well-known cases as an example of how it could be practically applied by judges.[14]

8. *See* Axler, *supra* note 3, at 442–455; *see also* Gilbert Paul Carrasco & Peter W. Rondino, Jr., *"Unalienable Rights," the Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL. L. REV. 498, 503–523 (1990).

9. Welch & Heilpern, *supra* note 3.

10. *See* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (finding that the Preamble "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.").

11. *Id.*

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

I. THE PREAMBLE

A. *A Brief History of Preambles*

Constitutional preambles are somewhat of an enigma. Because preambles are not usually included in the operative part of constitutional texts, the scholarship concerning them is fairly light.[15] At the same time, the Preamble to the United States Constitution is widely taught in high school civics classes.[16] Given the wide knowledge of the Preamble's text, despite minimal scholarship on its origin and purpose, it is reasonable to ask how the Preamble was created.

Like many facets of our democracy and our laws, parts of our Constitution were adopted from pre-existing sources.[17] Precursors of the modern preamble can be found in *The Laws* by Plato, wherein the unnamed Athenian suggests that legislators should not just issue commands in the form of law, but should also add a persuasive element to make their laws more effective and acceptable.[18] Tom Ginsburg, writing with Nick Foti and Daniel Rockmore, has found a more modern influence stemming from the British practice of including statements of purpose at the beginning of royal decrees.[19]

The role of preambles in state constitutions is even more relevant. By the time of the Constitutional Convention in Philadelphia, all of the thirteen states except Connecticut and Rhode Island had adopted constitutions.[20] Of these, all but Maryland included a preamble in their constitutions.[21] Ginsburg *et al*. identify various states as engaging in "horizontal and vertical borrowing" from the preambles of other states.[22] Lawrence Friedman wrote that some of these early constitutions, even those from non-starters like the lost State of Franklin

15. Tom Ginsburg et al., *"We the Peoples": The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 305, 308 (2014).

16. *See id.*

17. *See, e.g.*, Eliot T. Tracz, *Doctrinal Evolution and the Living Constitution*, 42 U. DAYTON L. REV. 257, 275–76 (2018) (discussing history of the Second Amendment in English traditions and laws in the Colonies); Frederick Mark Gediks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L. J. 585, 596–621 (2009) (discussing roots of Due Process Clause in the Magna Carta).

18. PLATO, THE LAWS 133 (Trevor J. Saunders trans., reprt. rev. 2004).

19. Ginsburg et al., *supra* note 15, at 311–12.

20. *Id.* at 312; *see also* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L. J. 911, 913–14 (1993).

21. Ginsburg et al., *supra* note 15, at 312.

22. *Id.*

and the Indian Stream Republic, were copycats, borrowing phrases and clauses as needed.[23]

B. *The Preamble and the Founding Fathers*

The Founders seemed to envision a role for the Preamble in interpreting the Constitution. In *Chisholm v. Georgia*, Chief Justice John Jay used terms taken directly from the Preamble— "establish justice" and "domestic tranquillity"—in his legal analysis.[24] Later, in *Cohens v. Virginia*, Chief Justice John Marshall went so far as to declare that:

> To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity.'[25]

Chisholm and *Cohens* show that early in its existence, the Supreme Court seemed to recognize the Preamble's role in interpreting the Constitution.

Constitutional commentators such as Associate Justice Joseph Story also viewed the Preamble as having a role in constitutional interpretation. In his monumental *Commentaries on the Constitution of the United States*, Story wrote:

> 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

23. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 116–17 (2d ed. 1985).

24. Chisholm v. Georgia, 2 U.S. 419, 475 (1793).

25. Cohens v. Virginia, 19 U.S. 264, 381 (1822).

> find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.[26]

Story also observed that "[the Preamble's] true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively create them."[27]

II. THEORIES OF CONSTITUTIONAL INTERPRETATION

A. *Two Theories of Constitutional Interpretation*

1. Originalism

a. Founders' Intent

Writing about the Supreme Court arguments in *Brown v. Entertainment Merchants Ass'n*,[28] Professor Chemerinsky perfectly captures the folly of relying on the Founders' intent, saying:

> As was his practice, Justice Scalia was very active in the oral argument and was pressing the attorney defending the California law about whether the state's law could be reconciled with the original understanding of the First Amendment. Finally, Justice Alito interjected and said, "Well, I think what Justice Scalia wants to know is what James Madison thought about video games." Putting it that way shows the absurdity of trying to answer today's constitutional questions by looking at the world of 1787 when the Constitution was drafted or 1791 when the First Amendment was ratified or 1868 when the Fourteenth Amendment was approved.[29]

Absurdity aside, there are other reasons to be critical of originalism as a means of constitutional (and statutory) interpretation.

Arch-textualist Judge Frank Easterbrook, a Reagan appointee to the Seventh Circuit Court of Appeals, has identified a fundamental flaw in originalism.[30] Easterbrook argues that "if intent matters. . . then the written text of the law

26. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 443, § 460, at 444 (1833).

27. *Id.* § 462, at 444.

28. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

29. CHEMERINSKY, *supra* note 3, at 27.

30. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 60–61 (1988).

imperfectly reflects what the law is."[31] Meaning, if legislative intent matters, then the law as it exists in the mind of legislators—rather than the law as it was written, approved by two houses of Congress (many of whose members likely did not read the bill), and signed by the President—replaces the law itself.[32]

If original intent is the formula for interpreting the Constitution, then determining the intent of the Founding Fathers is paramount. But relying on the Founders' thoughts is a flawed approach. As Professor Chemerinsky notes, James Madison and Alexander Hamilton often disagreed on important provisions of the Constitution, including the president's inherent powers and Congress's powers to tax and spend.[33] Hamilton objected to the Bill of Rights, which he thought was superfluous.[34] President Thomas Jefferson and Chief Justice John Marshall disagreed on the limits of power bestowed by the Constitution.[35] Because these titans of America's founding generation could not agree on what the Constitution should say, ascribing an intent to the Founders as a group is unreasonable.

b. Value-Neutral Judging

A common argument in support of originalism is that it results in "value-neutral judging"—a situation in which a judge's personal values do not influence the outcome of a case.[36] Value-neutral judging is closely aligned with the idea of judicial restraint. Justice Scalia, who is most associated with the idea of originalism, once defended his approach, writing: "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when

31. Tracz, *supra* note 16, at 265 (noting Judge Easterbrook's argument on faults with originalist interpretation).

32. *Id.*

33. CHEMERINSKY, *supra* note 3, at 37.

34. *See* THE FEDERALIST No. 84 (Alexander Hamilton).

35. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803). *See generally* Jack Knight and Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996) (analyzing the interinstitutional decision-making processes between President Jefferson and Chief Justice Marshall).

36. *See* Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 3–4 (2001) (summarizing and critiquing historical praise of formalism as value-neutral method for constitutional interpretation); *see also* CHEMERINSKY, *supra* note 3, at 31 ("The centerpiece of the conservative approach to the Constitution for the last several decades has been the premise that judges should decide cases without making value choices and that they have an approach to constitutional interpretation —originalism—that achieves that.").

the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no law at all."[37]

Chief Justice John Roberts echoed this idea during his confirmation hearings, famously saying that "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[38] This is, of course, a flawed idea of the role of judges. Judge Richard Posner took issue with Roberts' statement, writing:

> In offering the umperieal analogy, Roberts was trying to navigate the treacherous shoals of a Senate confirmation hearing. And having had a very successful career as an advocate—the batter, not the umpire—it was natural for him to exalt the former's role. (When he became Chief Justice, his perspective quickly changed.) Neither he nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. We must imagine that umpires, in addition to calling balls and strikes, made the rules of baseball and changed them at will. Suppose some umpires thought that pitchers were too powerful and so they decided that instead of three strikes and the batter is out it is six strikes and he's out, but other umpires were very protective of pitchers and thought that there were too many hits and therefore decreed that a batter would be allowed only one strike.[39]

The reality is that value-neutral judging is unrealistic.

c. Originalism and a Preamble-Based Approach

Reliance on original intent is not wholly incompatible with a Preamble-based approach to constitutional interpretation. Surely, most would agree that the law is, and should be limited to, the constitutional provisions and statutes enacted through the democratic process. This means that anything extraneous, such as letters, legislative debate, period appropriate dictionaries, and even the Federalist Papers, are not part of the law and should be considered in much the same manner as parole evidence.

37. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).

38. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of J. John G. Roberts, Jr.).

39. RICHARD A. POSNER, HOW JUDGES THINK 78–79 (2010).

But even if originalism's primary tools are removed, the Preamble presents a more authentic source for ascertaining the Founders' intent. This reliance would be in keeping with the professed beliefs of key originalists such as former Attorney General Edwin Meese, who wrote:

> 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.[40]

Judge Robert Bork, a devoted originalist, wrote that judges should "discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[41]

Honest originalism—that is, according to this author, a form of constitutional interpretation based solely on the original intent of the Framers—should heavily depend on the values set forth in the Preamble. But that is not the case. Instead, originalist judges' claims of value-neutral judging, judicial restraint, and reliance on founding intent, have proven little more than "a smokescreen to make Americans think conservatives are basing their decisions on the 'true' meaning of the Constitution, when actually their rulings are a product of their own conservative views."[42]

2. Active Liberty

In 2006, Justice Stephen Breyer published *Active Liberty: Interpreting Our Democratic Constitution.* In this book, Justice Breyer identifies two different meanings of the word "liberty:" freedom from government and freedom to participate in government.[43] Justice Breyer defines this second meaning as active liberty.[44] For Justice Breyer, active liberty is the "active and constant participation in collective power."[45] While Justice Breyer acknowledges that

40. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 466 (1986).

41. Erik Ugland, *Bork, Robert H. Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. (1971)*, 25 COMM. L. & POL'Y 370, 371 (2020).

42. CHEMERINSKY, *supra* note 3, at 31.

43. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3 (2005).

44. *Id.* at 5–6.

45. *Id.* at 3–5 (adopting political philosopher Benjamin Constant's perspective on active liberty of the ancients).

freedom from government is important, he emphasizes that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."[46]

Justice Breyer identified several tools used by all judges in interpreting a statute or constitutional provision:

> They read the text's language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand the phrase's purposes or (in respect to many constitutional phrases) the values that it embodies, and they consider the likely consequences of the interpretive alternatives, valued in terms of the phrase's purposes.[47]

Justice Breyer notes that judges may choose to place emphasis on specific tools such as history, language, purpose, or consequences.[48] For his own purposes, Justice Breyer identifies several themes on which judges should rely: judicial restraint, legislative or constitutional purposes (rather than text or history), and attention to likely consequences.[49]

Justice Breyer writes of "judicial modesty in constitutional decision-making, a form of judicial restraint."[50] Judge Michael McConnell, reviewing Justice Breyer's book, argues that the definition of "'judicial restraint' is notoriously contested[,]" yet he interprets Justice Breyer as meaning that "a decision is 'restrained' if it defers to democratic decision making."[51] If this definition is accurate, then Judge McConnell finds that the link between active liberty and judicial restraint is clear: if the basis of the constitutional system is democratic participation in decision-making, then the judgments of elected legislators and executives should take precedence over the judgments of unelected judges.[52]

Yet, judicial restraint is flawed. Justice Breyer himself refers to it as an "attitude that hesitates to rely upon any single theory or grand view of law, of

46. *Id.* at 5.

47. *Id*. at 7–8.

48. *Id.* at 8.

49. *Id*. at 17–18.

50. *Id.* at 37.

51. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2399 (2006).

52. *Id.* at 2400.

interpretation, or of the Constitution."[53] Judicial restraint, Judge McConnell writes, "is not a substantive theory of constitutional interpretation," and its application, therefore, is a question of degree.[54] To underscore this point, Judge McConnell looks to Justice Breyer's own jurisprudence, finding that while Justice Breyer often "vote[s] to sustain federal legislation," in "cases involving the constitutionality of state and local laws . . . Justice Breyer has been significantly less 'restrained' than the Court as a whole, and much less so than the conservatives."[55]

Justice Breyer's next theme emphasizes use of statutory purpose and congressional intent rather than text to interpret statutes.[56] Justice Breyer states that "interpretive problem[s] arise[] when statutory language does not clearly answer the question of what the statute means or how it applies."[57] To solve this problem, Justice Breyer states that some judges, including himself, turn "to the statute's purposes for enlightenment."[58]

Justice Breyer argues that democracy is best served when statutory interpretation seeks to discover "the legislator's will" and the "public's will."[59] However, as Judge McConnell points out:

> It is one thing to consult evidence of congressional intent as a means of interpreting ambiguous text, and quite another to invoke actual or imputed congressional intent as a reason to depart from the text, create exceptions to the text, extend the statute beyond the reach of the text, or embellish the text with unstated features.[60]

Judge McConnell, instead, argues that textualism might better suit Justice Breyer's "democracy-enhancing goals."[61]

Another issue Judge McConnell raises is the ambiguity between actual and imputed intent.[62] Judge McConnell draws a distinction between the actual purpose considered by legislators and the hypothetical intent imputed by judges.[63] Justice Breyer's stance on the appropriate definition of intent is described as follows:

53. BREYER, *supra* note 43, at 19.
54. McConnell, s*upra* note 51, at 2400.
55. *Id.* at 2402.
56. BREYER, *supra* note 43, at 85.
57. *Id.*
58. *Id.* at 85–87.
59. *Id.* at 99.
60. McConnell, *supra* note 51, at 2404.
61. *Id.*
62. *Id.* at 2405.
63. *Id.*

At the heart of a purpose-based approach stands the 'reasonable member of Congress'—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute's language, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case.[64]

But this approach is flawed because, as Judge McConnell points out, when cases proceed through the courts, it "is generally an indication that different interests in society favor different understandings of purpose. It is not often true that only one of these understandings is reasonable."[65]

The final area of emphasis in Justice Breyer's approach is to consider the consequences of an outcome. "Focus[ing] on consequences," Justice Breyer argues, "allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes which reflect [the people's] will."[66] Consequences, in Justice Breyer's view, are "an important yardstick to measure a given interpretation's faithfulness to these democratic purposes."[67]

Justice Breyer's emphasis on consequences is misplaced. As Judge McConnell notes, "an emphasis on consequences places a premium on the judge's choice of which consequences to emphasize."[68] Some statutes—those that have been enforced for some time—have a track record of discernable consequences, while newly enacted statutes may only have speculative consequences. Justice Breyer does not distinguish between actual consequences and predicted consequences, making his emphasis on consequences an exercise in guesswork.

Justice Breyer's theory of active liberty has much to recommend it, especially its emphasis on the purpose of a piece of legislation or constitutional clause. At the same time, it is bogged down by its lack of fidelity to statutory text (the law). While emphasizing fidelity to the "will of the people," Justice Breyer's approach allows a judge to ignore the text of the law that the people's representatives drafted and substitute it with the judge's own opinion on the purpose and consequences of the statute or constitutional clause.[69] Ultimately, as a progressive view of statutory and constitutional interpretation, Justice Breyer's active liberty is a victim of its own contradictions.

64. BREYER, *supra* note 43, at 88 (emphasis omitted).
65. McConnell, *supra* note 51, at 2405.
66. BREYER, *supra* note 43, at 115.
67. *Id.*
68. McConnell, *supra* note 51, at 2412.
69. *Id.* at 2417–18.

B. *A Preamble-Based Theory of Constitutional Interpretation*

While originalism is appealing because of its professed adherence to the Framers' intent and supposedly value-neutral judging, it barely adheres to its principles when applied. Similarly, Justice Breyer's active liberty considers the purpose of a statute, yet falls victim to its willingness to stray from the text of the law. What is needed is a progressive theory of constitutional interpretation that remains faithful to the text of the Constitution while also accounting for the Framers' purpose (i.e., intent).

One solution to fill this vacuum is to adopt a method of interpretation centered on the Preamble. A three-part process for interpretation based on the Preamble would include (1) identifying the clause or amendment under which the statute or action at issue is being challenged; (2) determining which of the Constitution's purposes, as listed in the Preamble, the clause or amendment furthers; and (3) determining whether the challenged action or statute is consistent with the purpose the clause or amendment seeks to further.

The first part of the analysis, identifying the clause or amendment that the activity or statute is being challenged under, is straightforward. This information should be presented to a court in the initial pleadings or in motions filed subsequently.[70] Because identifying the clause or amendment at issue is a natural starting point in any case, this part of the analysis is a formality.

The second part of the Preamble-based analysis looks to the purpose of the constitutional clause or amendment at issue. Each clause or amendment of the Constitution furthers one or more of the purposes stated in the Preamble. Justice Stanley Reed wrote that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give the expression to its wishes."[71] This is particularly so because

> In expounding the Constitution of the United States, . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.[72]

70. *See, e.g.*, FED. R. CRIM. P. 12(b)(3)(A)(iii); FED. R. CIV. P. 5.1(a).

71. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

72. Wright v. United States, 302 U.S. 583, 588 (1938) (quoting Holmes v. Jennison, 39 U.S. 540, 570–71 (1840)).

The words chosen by legislatures are often sufficient to determine the purpose of legislation.[73] It is reasonable to assume that the same logic applies to constitutional provisions.

The words the Framers used to express the Constitution's purpose are located in the Preamble. Those purposes—to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty—present a guide to interpreting the Constitution without recourse to outside materials. More importantly, interpreting the Constitution through the Preamble's text allows complete fidelity to the operative text of the clause or amendment at issue.

The third, and likely most complicated, part of the analysis is determining whether the action or statute being challenged is consistent with the purpose of the clause or amendment under which the challenge is being raised.

Because the language in the Preamble is, admittedly, vague, and because a given clause or amendment may further more than one of the Constitution's purposes (for example, the Commerce Clause may, in some cases, serve the general welfare by being the basis for safety regulations, or it may protect liberty by allowing individuals to participate in markets which might otherwise be closed to them), there may be wide latitude in some cases for judges to insert their own preferences.

III. AN APPLIED PREAMBLE-BASED THEORY OF CONSTITUTIONAL INTERPRETATION

While a Preamble-based theory of constitutional interpretation may work on paper, a theory is only as good as its application. Put another way, the truth of an intellectual conception is discernable only from the practical effects of its application. To that end, this article considers how a Preamble-based method of constitutional interpretation could be applied to real cases. These cases are selected not for their controversial outcomes, but rather for their recency and significance to constitutional law.

A. *Gun Rights*

The Second Amendment presents a good first example of how a Preamble-based method of constitutional interpretation could be applied for one specific reason: the very text of the amendment states its purpose. The well-known text of the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not

73. *Am. Trucking Ass'ns*, 310 U.S. at 543.

be infringed."[74] In examining how Preamble-based interpretation interacts with the Second Amendment, there is no better case than *District of Columbia v. Heller*.[75]

1. *District of Columbia v. Heller*

Richard Heller was a special police officer who was authorized to carry a handgun during his shifts at the Thurgood Marshall Judiciary Building.[76] Heller applied for a registration certificate for a handgun because he wished to keep a gun in his home.[77] The District of Columbia denied Heller's application.[78]

The District of Columbia made it a crime to carry an unregistered firearm, yet prohibited the registration of handguns.[79] The District made it unlawful to carry a handgun without a license and granted the chief of police authority to issue licenses valid for one year.[80] Finally, the District of Columbia required residents to keep their firearms "'unloaded and dissembled or bound by a trigger lock or similar device' unless . . . located in a place of business or . . . being used for lawful recreational activities."[81]

Heller filed a lawsuit in the United States District Court for the District of Columbia, seeking to enjoin the District of Columbia from enforcing the ban on the registration of handguns, the licensing requirements to the extent that they prohibited carrying an unlicensed firearm inside the home, and the trigger lock requirement.[82] The District Court dismissed the action, and Heller appealed to the Court of Appeals for the D.C. Circuit.[83] The D.C. Circuit, interpreting the complaint as seeking the right to render a firearm operable and carry it in the home when necessary for self-defense, reversed the District Court.[84] In reaching its decision, the D.C. Circuit held that the Second Amendment protects an individual right to possess firearms and that the District of Columbia's ban on handguns, along with its mandate that firearms in the home be kept nonfunctional, violated that right.[85]

74. U.S. CONST. amend. II.
75. District of Columbia v. Heller, 554 U.S. 570 (2008).
76. *Heller*, 545 U.S. at 575.
77. *Id.*
78. *Id.*
79. *Id.* at 574–75.
80. *Id.*
81. *Id.* at 576 (citing D.C. CODE § 7-2507.02 (2001)).
82. *Id.* at 575–76.
83. *Id*. at 576.
84. *Id.*
85. *Id.*

The Supreme Court granted certiorari and affirmed the D.C. Circuit in a 5-4 decision authored by Justice Scalia.[86] In a protracted majority opinion, Justice Scalia divided the Second Amendment into two parts: the prefatory clause ("A well regulated Militia, being necessary to the security of a free State,") and the operative clause ("the right of the people to keep and bear Arms, shall not be infringed").[87] Justice Scalia then dismissed the prefatory clause because "a prefatory clause does not limit or expand the scope of the operative clause."[88]

Instead, Justice Scalia focused on the operative clause, diving deep into a discussion of the phrases "right of the people" and "keep and bear Arms."[89] Ultimately, Justice Scalia found that the operative clause of the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation."[90]

2. The Preamble and the Second Amendment

The application of a Preamble-based method of constitutional interpretation to the Second Amendment is fairly straightforward. As stated above, there are three distinct steps in interpreting and applying the constitution: (1) determine which clause or amendment is (allegedly) being violated by the contested action or statute; (2) determine which of the values set forth in the Preamble the clause or amendment is intended to further; (3) determine whether the action or statute conflicts with the purpose of the clause or amendment. *Heller* presents a factual scenario that makes this analysis simple.

The first step, determining under which clause or amendment the District of Columbia laws are being challenged, is simple: it is the Second Amendment. The basis for challenging a statute or action is usually explicitly stated, either in the complaint or in the appeal.

The second step is equally as simple: determining which of the purposes stated in the Preamble the Second Amendment seeks to further. Where Justice Scalia was content to dismiss the first part of the text of the Second Amendment as a mere prefatory clause,[91] it is exactly the fact that a prefatory clause is included that makes determining which of the Preamble's values the Second Amendment supports an easy task. "A well regulated Militia, being necessary to

86. *Id.* at 576, 636.
87. *Id.* at 576–77.
88. *Id.* at 578.
89. *Id.* at 579–92.
90. *Id.* at 592.
91. *Id.* at 577–78.

the security of a free State"[92] clearly indicates that the Second Amendment furthers the purpose of providing for the common defense.

This understanding of the Second Amendment is also supported by the other references to "the Militia" in the Constitution. For example, Congress has to power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[93] Congress also retains the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[94] The President serves as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."[95] In each of these declarations, the Militia is intended to serve as an auxiliary for the purposes of providing for the common defense.

The final step in the analysis requires answering this question: do the District of Columbia laws enforcing the ban on the registration of handguns, the licensing requirements for firearms, and the trigger lock requirement conflict with the purpose of the Second Amendment? Because the Second Amendment furthers the Constitution's stated purpose of providing for the common defense, and because the District of Columbia laws restrict ownership and possession of firearms for private use, there is no conflict between the Second Amendment and the District of Columbia's laws.

B. *The Takings Clause*

1. *Kelo v. City of New London*

Some cases may be more difficult to approach using the Preamble-based method of interpretation. One such type of case might involve the Takings Clause. The Takings Clause, found in the Fifth Amendment, states "nor shall private property be taken for public use, without just compensation."[96] *Kelo v. City of New London*[97] serves as an instructive analysis for applying Preamble-based interpretation to the Takings Clause.

92. U.S. CONST. amend. II.
93. U.S. CONST. art. I, § 8, cl.15.
94. U.S. CONST. art. I, § 8, cl.16.
95. U.S. CONST. art. II, § 2, cl. 1.
96. U.S. CONST. amend. V.
97. Kelo v. City of New London, 545 U.S. 469 (2005).

New London is a city in southeastern Connecticut, located near the confluence of the Thames River and Long Island Sound.[98] Due to a period of prolonged economic decline, New London was designated a "distressed municipality" in 1990.[99] The city's economic troubles were exacerbated in 1996 when the Federal Government closed the Naval Undersea Warfare Center.[100] That facility, located in the Fort Trumbull area of the city, employed over 1,500 people.[101] Two years after the closure, the population of New London shrunk to under 24,000 residents, while the unemployment rate was double that of the state average.[102]

In January of 1998, the State of Connecticut authorized a $5.35 million bond issue to support the planning activities of the New London Development Corporation, a non-profit organization created to help plan economic development.[103] At the same time, another bond issue of $10 million was authorized to create a Fort Trumbull State Park.[104] In February, Pfizer, Inc., a well-known pharmaceutical company, announced plans to construct a $300 million research facility next to Fort Trumbull.[105]

Fort Trumbull is located on a peninsula that extends into the Thames River.[106] At the time that *Kelo* was decided, Fort Trumbull consisted of the 32 acres that previously made up the naval facility as well as 115 privately-owned properties.[107] The New London Development Corporation put forward a plan that would utilize 90 acres of the area in Fort Trumbull, divided into seven parcels.[108] Parcel 1 was designated as space for the development of a "waterfront conference hotel" in the middle of a space including shops, restaurants, and marinas.[109] Parcel 2 was designated as the site of 80 new residences.[110] Parcel 3 was designated to contain approximately 90,000 square feet of research and office space.[111] Parcel 4 was divided into two portions: 4A which was designated as space to either support the state park or to support the nearby marina, and 4B

98. Kelo, 545 U.S. at 473.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 474.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

which was intended to contain a renovated marina.[112] Parcels 5, 6, and 7 were intended to provide land for office and retail space, parking, and commercial uses.[113]

In January 2000, the New London City Council approved the plan and authorized the New London Development Corporation to purchase property or to acquire property through eminent domain.[114] While most of the 90 acres were acquired through purchase, Petitioner Susette Kelo and several other property owners refused to reach an agreement.[115] Together, the plaintiffs owned 15 properties—four in Parcel 3 and eleven in Parcel 4A—all of which were either private residences or investment properties.[116]

After a bench trial, the Superior Court prohibited the taking of the properties in Parcel 4A but denied relief for the properties in Parcel 3.[117] Both sides appealed, and the Connecticut Supreme Court ultimately upheld the lower court ruling, finding that the takings were authorized by Connecticut's municipal development statute and that the taking of property for economic development qualified as a public use.[118] The United States Supreme Court granted certiorari and, in a controversial ruling authored by Justice John Paul Stevens, affirmed the Connecticut Supreme Court.[119]

Justice Stevens rejected the argument that New London City Development's plan would provide only economic benefits, writing that there is no way to distinguish economic development from other public purposes.[120] The Court also rejected the argument that using eminent domain for the purposes of economic development blurs the line between public and private takings, reasoning that government pursuit of a public purpose often benefits individual private parties.[121] Finally, the Court relied on *stare decisis*, writing "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[122]

112. *Id.*
113. *Id.*
114. *Id.* at 475.
115. *Id.*
116. *Id.*
117. *Id.* at 475–76.
118. *Id.* at 476.
119. *Id.* at 477, 490.
120. *Id.* at 484.
121. *Id.* at 485–86.
122. *Id.* at 488 (quoting Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)).

2. The Challenges of *Kelo*

As with the discussion of *Heller*, the purpose of this section is not to address the issues raised by the ruling in *Kelo* in depth. Instead, *Kelo* has been selected because it represents a more complicated set of facts for a Preamble-based constitutional interpretation.

The Preamble-based analysis follows the same pattern. The taking of private property, under Connecticut's municipal development statute, is being challenged under the Takings Clause of the Fifth Amendment.[123] The Takings Clause, like most sections in the Bill of Rights, applies to the individual states through the Fourteenth Amendment.[124]

The second part of the analysis is to determine which of the purposes stated by the Preamble the Takings Clause seeks to enhance. The strongest argument is that the Takings Clause is intended to further securing the blessings of liberty, particularly the rights of property owners in maintaining and disposing of their private property. No other purpose enumerated by the Framers applies to the Takings Clause based on *Kelo's* facts.

The question to be decided in the third part of the analysis is whether the taking of the Petitioners' property, under the Connecticut municipal development statute, is consistent with the Takings Clause's purpose of protecting individuals' liberty to enjoy their private property. The Connecticut municipal development statute's declaration of policy reads:

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the

123. *Id.* at 472.

124. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 n.1 (2002) (citing Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239, 241 (1897)).

> public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.[125]

From the statute's text, it is clear that Connecticut considers the acquisition of private lands to meet the needs of industry and business as public use.

The taking of private property for the purpose of handing it over to private businesses may seem unsavory, but the Takings Clause does not guard against unsavory government actions. Rather, it requires adequate compensation when the government takes private property for public use. The Connecticut legislature deems the taking of private lands to meet the needs of industry and business to be a public use. As long as the owners of the private property receive adequate compensation, a taking under a statute such as the one at issue in *Kelo* does not violate the Takings Clause and its purpose of protecting individual liberty.

IV. CONCLUSION

Because there is not a viable progressive theory of constitutional interpretation, the influence of originalism remains largely unchecked. A Preamble-based theory of constitutional interpretation, a theory based on the purposes of the Constitution as explicitly stated in the Preamble, opens the door for a progressive reading of the Constitution. This is possible because a Preamble-based approach recognizes the Framers' intent as expressed in the Constitution, an approach that originalists should applaud, while also recognizing that the language adopted by the Framers is broad enough to allow the Constitution to adapt to a changing world.

As a practical method of interpretation, reliance on the Preamble encourages fidelity to the text of the Constitution, a trait that should appeal to all jurists. Equally important, Preamble-based interpretation is a progressive theory that attacks originalism on its own ground: the original intent of the Framers. No theory of constitutional interpretation is without flaws, yet a Preamble-based theory of interpretation is surely worth further exploration.

125. CONN. GEN. STAT. § 8-186 (2020).