RECONSIDERING THE CONSTITUTION'S PREAMBLE: THE WORDS THAT MADE US U.S.

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ABSTRACT

The Preamble to the U.S. Constitution is wrongly dismissed by conventional doctrine as a mere stylistic flourish. But the drafting history of the Preamble, observable by comparing the preambles in the Articles of Confederation, the Committee of Detail draft of the Constitution, and the Committee of Style's final version, demonstrate that the Framers considered the Preamble to be substantively meaningful. Just what the Preamble means remains ambiguous: it might be viewed as a rejection of compact theory, as an interpretive guide to the powers granted in the body of the Constitution, or as a source of implied powers. But the view that reduces the Preamble to a stylistic flourish has no basis as a matter of text or history.

INTRODUCTION

Akhil Amar's wonderful new book[2] conveys several important themes including a revisionist view of the nature of the Constitution itself. In a revealing phrase, Amar writes that John Marshall "carried Washington's flag—the Constitution's flag" (p. 527). The Constitution, he suggests, was Washington's constitution, and it became Madison's constitution and Andrew Jackson's constitution, not through original meaning, but later, through constitutional politics. Especially in light of the book's largest theme, that "mere" words can be constitutive of a

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2. AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021).

constitutional order, it is worth reflecting on the Constitution's Preamble, which conventional doctrine dismisses as mere words. But the Preamble conveys substance. It tells us at the outset that the Constitution can be read as Washington's Constitution—the Constitution of the Federalists.[3]

The Constitution begins:

> 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.[4]

All the Constitution's other sentences or clauses are understood to authorize, create, empower, or limit: they all *do something*. Even the signature block at the end of the document attests to something "done"—the drafting of the Constitution—and does something: witnesses the act.[5] But the Preamble, it is said, does nothing. It is either a mere stylistic flourish, like the calligraphy of "We the People," or at most a purely symbolic package of vaporous, feel-good platitudes—a Fourth of July speech—rather than words that "make" or "do."

Jacobson v. Massachusetts (1905),[6] the supposed doctrinal source of the Preamble's nullity, dismissed it, on the authority of Story's *Commentaries*, declaring that the Preamble "has never been regarded as the source of any substantive power conferred on the government of the United States."[7] The statement has given rise to argumentative drift. Those who repeat it seem to go beyond disclaiming the Preamble as a "source of substantive power," and take *Jacobson* to mean that the Preamble is not a source of *any interpretive consequences* for the Constitution.[8]

3. For an overview of scholarship aimed at recovering the lost Federalist Constitution, *see* David S. Schwartz, Jonathan Gienapp, John Mikhail, & Richard Primus, *The Federalist Constitution: Foreward*, 89 FORD. L. REV. 1669 (2021), and the various articles in that symposium.

4. U.S. Const., Preamb.

5. U.S. Const., signature block "done in Convention . . . . In Witness whereof We have hereunto subscribed our Names . . . ." *See infra* text accompanying notes 16–17.

6. 197 U.S. 11 (1905).

7. 197 U.S. at 22 (citing 1 STORY, CONST. § 462) .

8. *Jacobson*'s assertion is ill-considered dicta. There, the Court rejected the claim of an early-nineteenth century anti-vaxxer that a state-authorized vaccination requirement violated the federal Constitution. In addition to his unsuccessful Fourteenth Amendment due process claim, the plaintiff argued absurdly that the Preamble delegated *exclusive*

The conventional view assumes that it must have no legal or interpretive effect, because the only alternative is the purportedly unacceptable one that the Preamble is an express grant of powers. But this is a tendentious, stipulative conclusion to a false dilemma. It excludes at least two other significant possibilities of what the Preamble might mean and arbitrarily chooses between the two remaining. This Essay elaborates on recent revisionist scholarship suggesting that, to the Framers, the Preamble contained a range of potential constitutional meaning.[9]

I. CONTEXTUAL CLUES: THE PREAMBLE'S DRAFTING HISTORY

The Preamble was drafted by the Committee of Style, which had been appointed by the Convention on September 8, 1787, "to revise the style of and arrange the articles agreed to" by the Convention.[10] A myth has emerged that the Committee of Style was forbidden to propose substantive changes or additions to "the articles agreed to,"[11] and this myth has fed the belief that the Preamble is a mere stylistic adornment. In fact, as I have shown elsewhere, the Committee of Style was not restricted to stylistic editing.[12] Even if a substantive Preamble would have been ultra vires, the Convention ratified it, unanimously approving it along with most of the rest of the Committee of Style draft, making only one change to the Committee of Style's wording of the Preamble: deleting "to" before "establish justice."[13]

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powers to the United States that—like the dormant Commerce Clause—precluded state legislation even in the absence of preemptive federal legislation. Given the breadth of the Preamble, this would preclude state governments from legislating at all. To reject this bizarre contention, the Court could simply have said that if the Preamble implied any federal powers, they were not exclusive.

9. The best work reconsidering the Preamble is Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. 183, 194–209 (2020) (arguing for "the Preamble's original possibilities"). *See also* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 6, 48–59 (2021); John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 TENN. L. REV. 1021 (2018).

10. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911, rec. ed. 1937) (hereinafter "FARRAND") at 547 (Journal).

11. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 538 (1969) (the Committee of Style "had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so"); Treanor, *supra* note 9 (same).

12. David S. Schwartz, *The Committee of Style and the Federalist Constitution* (manuscript on file with author).

13. 2 FARRAND, *supra* note 10, at 605.

One could argue that the Convention's ratification simply confirms its intention to have a merely stylistic preamble, but this assumes wrongly that the pre-Committee of Style preamble was itself purely stylistic. That version was written by the Committee of Detail, whose August 6 report—known to history as the first draft of the Constitution—began as follows:

> We the People of the States of New-Hampshire [etc.] . . . do ordain, declare, and establish the following Constitution for the Government of ourselves and our Posterity.
>
> Article I
>
> The stile of this Government shall be, "The United States of America."[14]

The Committee of Detail preamble indicated that the people identified as "of" the respective states established a Constitution that in turn created a *government* whose *name* was the United States of America. This was probably intended to track the preamble of the Articles of Confederation, which began:

> ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF [names listed]:
>
> ARTICLE I. The Stile of this confederacy shall be "The United States of America."

Despite the similarities, the Committee of Detail preamble significantly changed the document description from an agreement "between the states" to an agreement between "*the people of* the states" and, in Article I, changed "this confederacy" to "this government." This was undoubtedly a huge step, as the framers widely viewed the confederation as something less than a government. But in both Articles and the Committee of Detail draft, the United States was merely a name or "stile" given to the thing created by the document.

The Committee of Style not only changed the Preamble, but it also deleted the Committee of Detail's Article I. In the Committee of Style version, the United States of America was not a creature of the document—neither an interstate compact nor a government—but a pre-existing *people* of the United States, who were creating a government. That government needed no name, any more than the government of Pennsylvania needed to be

14. *Id.* at 177.

named or "stiled" in that state's constitution.[15]

Further insight into the Preamble is gained by reference to the end of the Constitution's text—the signature block: "done in Convention by the Unanimous Consent *of the States present*." Proposed on September 17, that bit of text was, according to Madison, an "ambiguous form drafted by [Gouverneur Morris] in order to gain the dissenting members, and [proposed by] Docr. Franklin that it might have the better chance of success."[16] It allowed dissenting members the freedom to later claim that they had not personally approved the Constitution, but had merely sat as part of a state delegation whose majority approved the Constitution. But it did more. Read in conjunction with the Preamble—all the more appropriate, perhaps, since both were written by Morris—the signature block confirms that the Constitution was *drafted and proposed* by representatives of the state legislatures[17]—but if ratified, would be the act of the People of the United States.

II. THE PREAMBLE'S FOUR POSSIBILITIES

Conventional doctrine misleadingly implies that there are only two possible ways to understand the Preamble: as a mere stylistic flourish or as a grant of powers. But there are at least four ways to understand the Preamble that have been asserted at one time or another. I consider them from least to most nationalistic.[18]

15. *See* PA. CONST. § 1 (1776) ("The commonwealth or state of Pennsylvania shall be governed hereafter by an assembly of the representatives of the freemen of the same"), in *The Avalon Project: Documents in Law, History and Diplomacy*, https://avalon.law.yale.edu/18th_century/pa08.asp; *cf.* AMAR, *supra* note 2, at 24 ("the phrase United States in the Constitution meant something different and much stronger than did the same syllables in" the Articles of Confederation).

16. 2 FARRAND, *supra* note 10, at 643.

17. The delegates were credentialed by their respective state legislatures and voted by state, rather than per capita. *See* 1 FARRAND, *supra* note 10, at 8 (Journal). Thus, the formula, though ambiguous, was technically correct.

18. The emphasis here is on the Preamble as a source of powers, an argument that has purchase in the drafting and ratification of the Constitution. I do not consider the possibility that the Preamble may be a source of individual rights, either as further limitations on governmental powers or as placing affirmative obligations on the federal government. *See, e.g.*, Welch & Heilpern, *supra* note 9, at 1116–35, and sources cited therein. Those arguments, grounded more in recent history than in drafting history, are beyond the scope of this Essay.

A. STYLISTIC FLOURISH (WITH A PRACTICAL TWIST)

Proponents of the conventional view have not been completely comfortable with the assumption that a highly pragmatic Convention would adopt a purely stylistic or symbolic preamble with no legal or interpretive significance. Some scholars have therefore posited a practical explanation. Article VII provided that the Constitution would go into effect between the first nine states to ratify, and the delegates purportedly worried that the Committee of Detail preamble—which listed all thirteen states—would prove embarrassing if fewer than all states ratified. The Committee of Style preamble was thus written as a solution to this "nine state problem."[19]

This wholly contrived explanation not only lacks supporting evidence, but it also fails to account for the critical changes: from "the states" in the Articles of Confederation to "the people of the states" in the Committee of Detail draft to the "people of the United States" in the Committee of Style version. The Preamble was not required to be framed as a declaration by *the People*.

Nor does the need to solve the supposed "nine-state problem" explain the ultimate list of purposes written into the final version of the Preamble. Edmund Randolph, who composed the first working draft of the Constitution for the Committee of Detail, proposed that the preamble should *omit* both a declaration "of the parties for the observance of the articles" and a "designati[on of] the ends of government."[20] Randolph's view shows that other options were available for a preamble that would have created no nine-state problem: he suggested a short list of defects of the Articles of Confederation, followed by a passive-voice declaration "that the following are the constitution and fundamentals of the government for the United States."[21] He did not write this out, but we could imagine a preamble reading thus:

> Whereas the current federal government under the Articles of Confederation is inadequate to the exigencies of the Union; and

19. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 394 (1928); *accord* CLINTON ROSSITER, 1787: THE GRAND CONVENTION 229 (1966); Henry Paul Monaghan, *We the Peoples, Original Understanding and Constitutional Amendment*, 96 COLUM. L. REV. 121, 166 (1996).

20. 2 FARRAND, *supra* note 10, at 137 (Randolph draft for Committee of Style).

21. *Id*. at 138.

> Whereas [etc.] . . .
>
> It is hereby declared that the government for the United States shall be as follows:[22]

The conceptual gap between this Randolphan preamble and the one finally proposed and ratified is far greater than stylistic elegance and charm.

The argument that the Preamble meant nothing more than a stylistic flourish and solution to the nine-state "problem" was highly congenial to compact theorists, nullifiers, and secessionists.[23] This interpretation must therefore account for the implausible implication that these descendants of the Anti-Federalists better reflected the dominant views of the Framers than did the Federalists. Proponents of the conventional view have not provided such an account, and it is difficult to imagine that it could be done plausibly.

B. A REJECTION OF COMPACT THEORY

The Framers had theoretical problems far more important than the supposed "nine-state" problem or to the stylistic problem of how to begin a momentous document. Randolph's belief that a "display of theory, however proper in the first formation of state governments, is unfit here," was rejected by the Convention. The Preamble is an elegantly constructed display of theory. The Framers felt they had to clarify that the new government was a truly national government, and, moreover, one based on republican principles—that is, authorized by the sovereign people, not by a grand interstate compact. This was essential both to give the new government republican legitimacy, and to establish on sound theoretical principles that the Constitution was supreme law—with supremacy over both state law and enactments of the proposed Congress. Various Framers recognized these points both before and during the Convention and ratification debates.[24]

22. This imagined Randolphan preamble tracks the analogous provision of the Pennsylvania Constitution of 1776, to take one example. *See* Pa. Const. § 1 (1776), *supra* note 15 ("SECTION 1. The commonwealth or state of Pennsylvania shall be governed hereafter . . . in manner and form following").

23. *See, e.g.*, John C. Calhoun, *South Carolina Report* (Nov. 1831), in 6 THE WORKS OF JOHN C. CALHOUN 109 (1857) (the Preamble "may . . . be fairly considered as a concise mode of expressing the same idea that a formal enumeration of the States, by name, would have conveyed, and used to avoid prolixity").

24. *See, e.g.*, Letter from John Jay to George Washington (Jan. 7, 1787), in 4 THE

McCulloch v. Maryland (1819)[25] rightly rejected the argument "deemed . . . of some importance" by Maryland's counsel: that the Constitution must be understood "not as emanating from the people, but as the act of sovereign and independent States."[26] Chief Justice Marshall affirmed that "the people" ratified the Constitution. True, they did so when "assembled in their several States—and where else should they have assembled?"[27] But that ratification process did not make the Constitution's provisions "cease to be the measures of the people themselves, or become the measures of the State governments."[28] On the contrary,

> From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.[29]

What is strange is not that state ratifying conventions could coalesce into the single act of "the People of the United States," but that constitutional interpreters after ratification could maintain any credibility as they persistently characterized the Constitution as a compact between the states. This tenacious adherence to "compact theory" was not regarded as the nutty idea

PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 502 (W. W. Abbot ed., 1995) ("No alteration in the Government should I think be made, nor if attempted will easily take place, unless deduceable from the only Source of just authority—*the People*"); Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON 382, 383 (Robert A. Rutland et al. eds., 1975) ("a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures"); Virginia-Pennsylvania Plan, Res. 15, 1 FARRAND, *supra* note 10, at 22 ("Res[olve]d that the amendments which shall be offered . . . by the Convention ought to be submitted to an assembly or assemblies of Representatives . . . expressly chosen by the people").

25. 17 U.S. 316 (1819).
26. *Id*. at 402.
27. *Id*. at 403.
28. *Id*.
29. *Id*. at 403–04.

of a fringe of extremist Virginia Republicans, South Carolina nullifiers, and southern secessionists. Rather, it was mainstreamed by such luminaries as Thomas Jefferson, James Madison, and a host of lesser constitutional authorities.[30] These compact theorists must have found it quite congenial to write off the final wording of the Preamble as an inconsequential stylistic flourish.[31]

Compact theory is antithetical to the plain import of "We the People of the United States . . . do ordain and establish this Constitution."[32] How such a view could thrive in the antebellum era is a story too big for this Essay. Suffice it to say here: if compact theory is a "substantive" constitutional argument—which, of course, it is—then so is its antithesis, the nationalist theory of "We the People." And so therefore is the expression of that theory in the Constitution itself: the Preamble.

C. AN INTERPRETIVE GLOSS ON THE CONSTITUTION

A handful of scholars have taken an interest in reconsidering the Preamble and have suggested that it be viewed as an interpretive gloss on the body of the Constitution.[33] In eighteenth-century legal drafting, preambles were not purely symbolic or stylistic flourishes. According to William Blackstone, "[i]f words happen to be still dubious, we may establish their meaning from

30. James Madison, *Virginia Resolution of 1798* ("this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties"); Thomas Jefferson, *Kentucky Resolution of 1798* ("this commonwealth as a party to the federal compact; . . . will not now, nor ever hereafter, cease to oppose in a constitutional manner, every attempt from what quarter soever offered, to violate that compact"), both Resolutions available at https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions; St. George Tucker, *View of the Constitution of the United States, in* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES . . . 151 (1803) (arguing that federal powers should be narrowly construed because the Constitution was a compact between the states rather than an act of a unitary people of the United States).

31. *See, e.g.*, 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 288–89 (Henry St. George Tucker ed. 1899) (arguing that the Committee of Detail draft reflected compact theory and that "we are driven to the conclusion that the members of the convention saw only a change in style" in the final draft); Calhoun, *supra* note 23, at 109.

32. *See McCulloch*, 17 U.S. at 403–04; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 318–19 (1833) (emphatically rejecting compact theory).

33. Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 36 (2019); Welch & Heilpern, *supra* note 9, at 1132–35; *see also* AMAR, *supra* note 2, at pp. 3–55, 473 (Preamble as important signalling device).

context . . . . Thus the proeme, or preamble, is often called in to help the construction . . . . "[34] Story's *Commentaries,* even while denying that the Preamble is a source of substantive power, argues that it is a valid interpretive guide.[35]

But this is not the end of the matter. One can backslide from the assertion that the Preamble plays this interpretive role into the conventional stylistic-flourish view, and I believe that is the usual fate of the "interpretive gloss" theory.[36]

1. The Enumerationist Version

One of the great ambiguities of the Constitution is whether the enumeration of federal powers is meant to be exhaustive and limiting, or instead illustrative.[37] Of the relatively few constitutional scholars who have suggested that the Preamble is an interpretive gloss, almost none have argued that the Preamble resolves this ambiguity in favor of broad national powers.[38] Yet the Preamble points so strongly in a nationalist direction that it is hard to imagine the textual basis for a Preamble-gloss advocate to argue otherwise. For example, if "provide for the . . . general welfare" *could* mean to legislate (and not than merely spend) for the general welfare—and James Madison called this the more natural reading of the clause, despite his intense opposition to that reading[39]—then a glossing preamble that makes "[to] promote the general welfare" a purpose of government points strongly toward the broader reading of the General Welfare Clause in Article I, section 8, clause 1.

34. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 59 (1803); *see* David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary American*, 56 UCLA L. REV. 1295, 1324–37 (2009) (arguing that eighteenth-century preambles offered interpretive guidance).

35. STORY, *supra* note 32, at 44.

36. *See infra* § II.C.1.

37. David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575, 581–82 (2017).

38. *See supra* notes 32–34. Recent scholarship excavating the Federalist Constitution suggests that the Preamble can be read, and was intended by the strong *nationalists* among the framers, to do at least this. *See* Gienapp, *supra* note 9, at 203; Treanor, *supra* note 9; David S. Schwartz, Jonathan Gienapp, John Mikhail, & Richard Primus, *The Federalist Constitution: Foreward*, 89 FORD. L. REV. 1669 (2021).

39. *See* David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 Wm. & Mary L. Rev. 857 (2022).

But this interpretive outcome is avoided, even by conventional "gloss" theory scholars, by assuming that the Preamble must be read to harmonize with enumerationism—the ideology that the Constitution must be read to limit Congress to its enumerated powers, even where doing so means that a truly national problem must go unaddressed.[40] Significantly, nothing in the Preamble makes "limited enumerated powers" an object, or—pace Madison—an "essential characteristic" of the national government.[41] The Preamble does not list "federalism," or "state sovereignty" or "balancing national powers with the rights of the states," among its great objects.

So, a question for enumerationist glossers is: what ambiguity does the Preamble help resolve, if not the ambiguity surrounding the enumeration itself? Absent an answer other than "none," there is little if any daylight between those who argue that the Preamble provides an interpretive gloss in harmony with enumerationism, and those who argue that the Preamble is a mere stylistic flourish.

2. The Nationalist Version

Story's *Commentaries* is typically quoted as the doctrinal source for reducing the Preamble to either a stylistic flourish or a "gloss" on the Constitution that merely reinforces enumerationism.[42] Story wrote, "The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given."[43] But Story's full quotation is more ambiguous than an "emphatic rejection" of the idea that the Preamble might be a source of power. The Preamble, Story wrote, "can never be the legitimate source of any implied power, *when otherwise withdrawn from the constitution*."[44] What to make of that significant qualification—might the preamble be a source of implied powers *not* "withdrawn" from the Constitution? Story

40. Schwartz, *supra* note 37, at 575, 581–82.

41. 2 Annals of Cong. 1898 (1791) (statement of Rep. Madison) (contending that limited enumerated powers is "[t]he essential characteristic" of the Constitution).

42. *See, e.g., Jacobson*, 197 U.S. at 22; *see also* Reinstein, *supra* note 33, at 36 ("Story emphatically denied that the preamble was a source of national power").

43. STORY, *supra* note 32, § 462, at 445.

44. *Id*.

continued:

> [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 to create them. For example, the preamble declares one object to be, "to provide for the common defence." No one can doubt, that this does not enlarge the powers of congress to pass any measures, which they may deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote, and the other defeat the [power], ought not the former, upon the soundest principles of interpretation to be adopted?[45]

For Story, then, the Preamble is an argument against strict construction of federal powers: a statement that the Constitution's grants of powers are to be liberally construed, to promote such things as "the general welfare." Significantly, Story suggested no constitutional ambiguities that might be cleared up by the Preamble *other than* the extent of federal powers.

Story remained vague about how this interpretive principle might apply in practice. Intriguingly, the Story's sole example in this passage—the common defense—immediately precedes "the general welfare" in the Preamble and is paired with "the general welfare" in Article I, section 8. Might this have been Story's coded reference to the idea of a general welfare legislative power? As I have suggested, the Preamble's "gloss" on the Constitution's grants of power might be pushed as far as to construe the General Welfare Clause of Article I, section 8, Clause 1 as a grant of power to legislate for the general welfare. So viewed, there is very little daylight between reading the Preamble as a (nationalist) interpretive gloss and as a source of implied powers.

D. SOURCE OF IMPLIED POWERS

As Jonathan Gienapp has recently argued, Federalists and Anti-Federalists during the ratification debates and early republic both understood the Preamble "as reinforcing a theory of sovereignty and national union that expanded the scope of national power, beyond either those powers that were enumerated or those powers that might be aggregated from that

45. *Id.*

enumeration."[46] This nationalist reading, channeling the constitutional vision most acutely expressed by James Wilson, was thus a prominent reading—although so read with horror by Anti-Federalists—as Federalists in the early post-ratification years argued that the Preamble was indeed a legitimate source of implied powers.[47]

The argument did not die out with the Jeffersonian Republican electoral triumph of 1800. Even after eighteen years of Republican dominance of constitutional politics, the argument continued to be seriously made. At oral argument in *McCulloch v. Maryland*, the lead counsel for the Second Bank of the United States, William Pinkney, argued:

> Has congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power, than many other *powers which are acknowledged to exist, and which are but means to an end*. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. *These objects are enumerated in the constitution*, and have no limits but the constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defence provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast *objects, the government is armed with powers* and faculties corresponding in magnitude.[48]

In this passage, as the italicized phrases indicate, the "ends" of government are its "objects," and these are stated in the Preamble: "A more perfect union is to be formed, [etc.] . . ." Powers—whether implied *or enumerated*—are all means "for the attainment" of the "vast objects" stated ("enumerated") *in the Preamble*. As Pinkney would go on to argue, "An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government—the felicity of the people."[49]

The point here is not that Marshall adopted Pinkney's argument, but rather that Pinkney believed that the argument was sufficiently plausible to make before Marshall's Court. Pinkney was no fool; nor was he an ideologue inclined to offer wishful arguments. At age fifty-five, Pinkney was at the height of his

46. Gienapp, *supra* note 9, at 203.
47. *Id.* at 205–09; Treanor, *supra* note 9.
48. 17 U.S. at 381 (argument of Pinkney) (emphasis added).
49. *Id.* at 385.

powers as a seasoned Supreme Court litigator, whom John Marshall described as "the greatest man he had ever seen in a Court of justice."[50] Marshall did not embrace Pinkney's argument in *McCulloch*, but, as I have argued elsewhere, he did not foreclose it.[51] Instead, Marshall opted for studied ambiguity in his conceptions of "ends," "means," "powers," and "objects."[52] What has blinded constitutional doctrine to this, the most nationalist reading of the Preamble, is not something inherent in the Constitution, but a historically contingent series of post-ratification political developments that favored limitations on federal powers.

CONCLUSION

Just what the Preamble means remains ambiguous, conveying a range of possible meanings. I have tried to schematize what that range might look like. The Preamble might be viewed as a rejection of compact theory, as an interpretive guide to the powers granted in the body of the Constitution, or as a source of implied powers. But the view that reduces the Preamble to a stylistic flourish has no basis as a matter of text or history. The reading of the Preamble conveying Washington's Federalist Constitution was once, and perhaps should again be, part of our constitutional conversation.

50. DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND 47 (2019); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 230–37 (1988).

51. *See* David S. Schwartz, McCulloch v. Maryland *and the Incoherence of Enumerationism*, 19 GEO. J. L. & PUB. POL. 25, 52–56 (2021).

52. *See McCulloch*, 17 U.S. at 407, 409 (using "powers" and "objects" ambiguously).