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# *The preamble in constitutional interpretation*

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*From Plato's Laws through common law and until modern legal systems, preambles to constitutions have played an important role in law and policy making. Through a qualitative analysis of the legal status of preambles in different common law and civil law countries, the article highlights a recent trend in comparative constitutional law: the growing use of preambles in constitutional adjudication and constitutional design. The article also explores the theory of preambles and their functions. It examines the legal status of the U.S. preamble and shows how the U.S. preamble remains the most neglected section in American constitutional theory. The article then presents a typology for determining the legal status of preambles: a symbolic preamble, an interpretive preamble, and a substantive preamble. While focusing on Macedonia, Israel, Australia, and the Treaty of Lisbon, the article discusses the sociological function of preambles in top-down and bottom-up constitutional designs.*

## **1. Introduction**

The preamble to the United States Constitution has become a legend. The phrase “We the people of the United States” and the remaining forty-five words of the preamble are the most well-known part of the Constitution, and the section that has had the greatest effect on the constitutions of other countries. And yet, the preamble remains a neglected subject in the study of American constitutional theory and receives scant attention in the literature. Questions such as: what is a preamble to a constitution?; what role does it play in constitutional adjudication and constitutional design?; and why do states add a preamble to the constitution? have been seldom asked or answered.

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This article highlights the legal and social functions of preambles. First, it discusses the growing use of preambles in constitutional interpretation. In many countries, the preamble has been used, increasingly, to constitutionalize unenumerated rights. A global survey of the function of preambles shows a growing trend toward its having greater binding force—either independently, as a substantive source of rights, or combined with other constitutional provisions, or as a guide for constitutional interpretation. The courts rely, more and more, on preambles as sources of law. While in some countries this development is not new and dates back several decades, in others it is a recent development. From a global perspective, the U.S. preamble, which generally does not enjoy binding legal status, remains the exception rather than the rule.

Second, the article discusses one of the interesting merits of a preamble: its integrative power. A preamble is the part of the constitution that best reflects the constitutional understandings of the framers, what Carl Schmitt calls the “fundamental political decisions.” Its terms, thus, have far-reaching social effects. Consequently, preambles recently have been added or amended in some countries either due to a popular demand (a bottom-up change) or because of a government-led constitutional design (a top-down change). The article illustrates the potential of a consensual preamble to unite, or a disputable preamble to divide, a people. It emphasizes the sociological reason why it is necessary to carefully consider what is written in the text of the preamble, in particular, in those cases in which the preamble is granted binding legal force.

Section 1 explains the concept of preamble based on qualitative research of the preambles in fifty common law and civil law countries. Section 2 traces the origins of the U.S. preamble and its legal status. Section 3 presents a typology of three legal functions of preambles: the ceremonial-symbolic, in which the preamble serves to consolidate national identity but lacks binding legal force; the interpretive, in which the preamble is granted a guiding role in statutory and constitutional interpretation; and the substantive, in which the preamble serves as an independent source for constitutional rights. Section 4 demonstrates the importance of consensual preambles, sketches the risks inherent in nonconsensual preambles, and describes the benefits and disadvantages in the process of designing a preamble. Focusing on Macedonia, Israel, Australia, and the Treaty of Lisbon, the article examines the social function of preambles in top-down and bottom-up designs and suggests some lessons for a future design of a preamble.

## 2. How to talk about preambles

What is a preamble to a constitution and how can it be classified? *In formal terms*, a preamble constitutes the introduction to the constitution and usually bears the formal heading “Preamble” or some alternative, equivalent title,<sup>1</sup> while in other cases it appears without a heading. The formal classification provides a simple and technical

<sup>1</sup> The preamble to the constitutions of Albania and Bahrain is called “Foreword.” The preamble to the Constitution of Japan is called “Preface.”

identification of a preamble. Alongside a formal classification, it is possible to identify a preamble through its content. *In substantive terms*, a preamble does not require a specific location in the constitution but, rather, specific content.<sup>2</sup> It presents the history behind the constitution's enactment, as well as the nation's core principles and values.<sup>3</sup>

Analysis of a nonrepresentative sample of fifty democratic countries revealed that most have included a formal preamble in their constitutions:<sup>4</sup> thirty-seven countries have a preamble (74 percent)<sup>5</sup> while thirteen countries do not (26 percent).<sup>6</sup> Countries that do not have a formal preamble often include introductory articles that may be regarded, in substantive terms, as a preamble.<sup>7</sup> A preamble is, thus, a common constitutional feature. Moreover, most of the countries that have adopted a constitution in recent years, particularly in Eastern and Central Europe, have included a preamble.

The content of preambles can be classified into five categories.

*The Sovereign.* Most preambles specify the source of sovereignty. In some cases, sovereign power rests with the people (“we the people of . . .”).<sup>8</sup> This is a relatively neutral term with which most of the population can usually identify. Another phrase relates to the source of sovereignty as stemming from a particular nation (the “Lithuanian Nation,” the “Spanish Nation,” and the like). This terminology emphasizes a specific national group and is less neutral.<sup>9</sup> Some preambles combine a reference to the people

<sup>2</sup> The Charter of the United Nations, for example, has a formal preamble and a substantive preamble; the latter appears in chapter I of the Charter. See Hans Kelsen, *The Preamble of the Charter—a Critical Analysis*, 8(2) J. POL. 134 (1946).

<sup>3</sup> Another form of a preamble may be a declaration of independence, which, although not formally part of a constitution, may have some of the substantive elements of a preamble. Unless otherwise mentioned, the article does not discuss the declaration of independence as a form of a substantive preamble.

<sup>4</sup> Constitution defined here as a group of binding fundamental principles characterizing a state or society on a permanent basis. Therefore, a constitution could be either a formal document or substantive legal norms a society refers to as a binding constitution. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed., 1915).

<sup>5</sup> States that have a preamble to their constitution are Andorra, Albania, Argentina, Australia, Bosnia-Herzegovina, Brazil, Bulgaria, Canada, Croatia, the Czech Republic, Estonia, France, Germany, Greece, Hong Kong, Hungary, India, Ireland, Japan, Lithuania, Macedonia, Montenegro, New Zealand, Paraguay, Poland, Portugal, Philippines, Russia, South Africa, Spain, Serbia, Slovakia, Slovenia, Switzerland, Turkey, Ukraine, and the United States. All the preambles' phrasings were taken from the International Constitutional Law Project Information, available at <http://www.servat.unibe.ch/icl/>.

<sup>6</sup> States that do not have a formal preamble to their constitutions are Austria, Belgium, Cyprus, Denmark, Finland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Romania, Singapore, and Sweden.

<sup>7</sup> This is the case of Denmark (arts. 1–4), Italy (arts. 1–3), Norway (art. 1), Romania (art. I), and Sweden (arts. 1–2). Therefore, it emerges that only eight of the surveyed states (16 percent) do not have a preamble to their constitution, either in a formal or a substantive sense.

<sup>8</sup> This is the case in Albania, Estonia, France, Japan, India, Ireland, the Philippines, South Africa, the United States, and the Czech Republic (in the latter, the reference is to the “citizens”—“We, the citizens of the Czech Republic”). In Russia, the reference is to “We, the multinational people of the Russian federation.”

<sup>9</sup> It is not surprising that some preambles refer to the citizens of *all* national origins. See, e.g., the preamble to the Constitution of Bosnia-Herzegovina (“Bosnians, Croats and Serbs, as constituent peoples [along with others], and citizens of Bosnia and Herzegovina”), Poland (“We, the Polish Nation—all citizens of the Republic”), Slovakia (“the Slovak nation . . . that is, we, citizens of all Slovak republic”), and Ukraine (“The Verkhovna Rada of Ukraine, on behalf of the Ukrainian people—citizens of Ukraine of all nationalities”).

with a reference to representative bodies; others refer only to representative bodies; while others make no reference to a sovereign authority. In federations and unions, the preamble often identifies the constituent states—and their peoples—as the source of sovereignty.<sup>10</sup>

*Historical Narratives.* Preambles include, typically, historical narratives of a state, a nation, or a people, telling specific stories that are rooted in language, heritage, and tradition. These stories shape the common identity (“we”). The reference is often to past events that influenced the establishment of the state. The South African preamble, for example, declares that the people of South Africa “recognise the injustices of our past,” and “honour those who suffered for justice and freedom in our land.” The preamble to the Chinese Constitution notes that “China is one of the countries with the longest histories in the world” and details, at great length, Chinese history and the nation’s achievements. The Turkish preamble mentions that the Turkish Constitution is established “in line with the concept of nationalism outlined and the reforms and principles” introduced by the republic’s founder Atatürk. In Eastern and Central Europe—in countries such as Croatia, Estonia, Slovakia, Slovenia, and Ukraine—the preambles celebrate the nations’ struggles for independence and self-determination.

*Supreme Goals.* Preambles often outline a society’s fundamental goals. These may be universal objectives, such as the advancement of justice, fraternity, and human rights; economic goals, such as nurturing a socialist agenda or advancing a free market economy; or others, such as maintaining the union.<sup>11</sup> These goals tend to be abstract ideas, such as happiness or well-being. The preamble to the Constitution of Japan, for instance, is peace-loving (“never again shall we be visited with the horrors of war . . . desire peace for all time”), while the preambles to the Constitutions of the Philippines and of Turkey stress love.

*National Identity.* Preambles usually contain statements about the national creed. Understanding the constitutional faith of each country, and its constitutional philosophy, cannot be complete without reading its preamble. Frequently, preambles include an additional element about future aspirations and may include a commitment to resolve disputes by peaceful means, to abide by the principles of the UN Charter, or to further national aspirations as stated in a declaration of independence.<sup>12</sup> These statements often refer to inalienable rights, such as liberty or human dignity.

*God or Religion.* A preamble may include references to God. Some preambles emphasize God’s supremacy, such as the preambles to the Canadian Charter (“the

<sup>10</sup> See the preamble to the Constitution of Australia (“The people of New South Wales, Victoria, South Australia, Queensland, and Tasmania . . . have agreed to unite in one indissoluble Federal Commonwealth”), and Switzerland (“We, the Swiss People and the Cantons”; emphasis is in original).

<sup>11</sup> Preambles that explicitly set a socialist agenda appear in Bulgaria, China, Cuba, India, Laos, Ukraine, and Vietnam. An example of a preamble declaring a quasi-capitalistic character appears in the Constitution of Bosnia-Herzegovina.

<sup>12</sup> See, respectively, the preambles to the constitutions of Brazil, Bosnia-Herzegovina, and Armenia.

supremacy of God”) or the Swiss Constitution (“in the Name of Almighty God”).<sup>13</sup> Other preambles refer to a religion: the Greek preamble refers to the Holy Trinity;<sup>14</sup> in the Irish preamble, the Holy Trinity is mentioned as “our final end” and a source of authority toward which all actions of “men and states must be referred.”<sup>15</sup> Conversely, the preamble may emphasize the separation of state and religion or the state’s secular character.<sup>16</sup>

While common characteristics can be identified, each preamble has its own distinguishing features. Preambles come in various lengths,<sup>17</sup> harmonize with or contradict the body of the constitution, and may be enacted together with the body of the constitution as well as in a later constitutional moment.

### 3. The American preamble

One of the greatest contributions of the United States to the world is the U.S. Constitution, and, perhaps, the most influential section of the U.S. Constitution is its preamble. It is, therefore, particularly interesting to trace its origins and legal status. The current preamble is different from the original introduced in 1787 at the Philadelphia Convention. The original preamble did not include the famous phrase “We the people of the United States” but, rather, designated the states as the source of authority; also, it did not specify the Constitution’s objectives. The original preamble stated, simply, that: “We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.”<sup>18</sup> The text was changed by the Committee of Style, whose members were William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King.<sup>19</sup> However, there is no historical record of the drafting process of the preamble, or the reasons for the changes made by the Committee of Style.

<sup>13</sup> See also the preamble to the Constitution of South Africa (“May god protect our people . . . God bless South Africa”), Germany (“Conscious of their responsibility before God and men”), and Argentina (“Invoking the protection of God, source of all reason and justice”). An interesting wording style appears in the Polish Constitution (“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”).

<sup>14</sup> The Greek preamble states: “In the name of the Holy and Consubstantial and Indivisible Trinity, the Fifth Constitutional Assembly of Greece votes.”

<sup>15</sup> The Irish preamble also notes: “We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial.”

<sup>16</sup> See the preamble to the Constitution of Turkey and India. Interestingly, all states’ constitutions in the United States include, or included in the past, an explicit reference to God. See 50 out of 50 States Recognize God’s Role, available at <http://dubyanell.blogspot.com/2004/04/this-just-in-50-out-of-50-states.html>.

<sup>17</sup> Examples of long preambles include the constitutions of China, Croatia, Egypt, Iran, Pakistan, Serbia, Syria, Thailand, Turkey, and Vietnam. Examples of terse preambles include the constitutions of Canada, France, Greece, India, Switzerland, and the United States.

<sup>18</sup> See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 177 (Max Farrand ed., vol. II, 1937).

<sup>19</sup> *Id.*, at 590, 651; Robert J. Peaslee, *Our National Constitution: The Preamble*, 9 B.U. L. REV. 2 (1929).

The framers of the American Constitution were well aware of other forms of preambles. The Petition of Rights of 1628, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, the Act of Settlement of 1701, the Articles of Confederation of 1777, and some state constitutions—all preceded the U.S. Constitution and set the pattern for the U.S. preamble. The question remains: Why was the preamble needed in the first place? During the Philadelphia Convention, Edmund Randolph argued for the inclusion of a preamble: “a Preamble seems proper,” he said, but “not for the purpose of designating the ends of government and human polities.”<sup>20</sup> This form of preamble, which Randolph referred to as a “display of theory,” was not necessary in his view. A preamble “is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states.”<sup>21</sup> For Randolph, a preamble was essential as a statement of the reasons for accepting the Constitution: “the object of our preamble ought to be briefly to declare, that the present foederal government is insufficient to the general happiness [and] that the conviction of this fact gave birth to this convention.”<sup>22</sup>

The preamble refers to the people as the source of authority<sup>23</sup> and outlines six lofty goals: “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.” Despite its central role in education and in the public debate, courts have rarely been inclined to rely upon the preamble only rarely. Empirical studies show that from 1825 to 1990, the sections of the preamble that refer to justice, general welfare, and liberty were independently mentioned by Supreme Court justices only twenty-four times, mostly in dissenting opinions (83.3 percent of all references), while only four justices (Black, Douglas, Burton, and Field) were collectively responsible for half of those references.<sup>24</sup> Courts have rejected, repeatedly, the argument that constitutional rights or limitations can be inferred directly from the preamble. The classic case establishing its nonbinding nature was decided in 1905. In this case, a convicted defendant challenged the constitutionality of a statute adopted by the state of Massachusetts that, in his view, contradicted rights protected by the preamble. Rejecting this argument, Justice Harlan noted:

Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution, and as such as may be implied from those so granted.<sup>25</sup>

<sup>20</sup> See SUPPLEMENT TO MAX FARRAND’S RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (James H. Hutson ed., 1987) (hereinafter SUPPLEMENT TO MAX FARRAND).

<sup>21</sup> *Id.* (emphasis is in original).

<sup>22</sup> *Id.*

<sup>23</sup> For an historical review, see Morris D. Forkosch, *Who Are the “People” in the Preamble to the Constitution?*, 19 CASE. W. RES. L. REV. 644 (1967–1968).

<sup>24</sup> See Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 120–121, fn 14 (1990–1991).

<sup>25</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 13–14 (1905).



Justice Harlan stripped the preamble of any legal force without providing any historical evidence or textual explanations. While he noted that individuals have no constitutional rights derived *directly* from the preamble, he neither stated, expressly, that the preamble has less significance than other constitutional provisions nor did he assert that it does not form a binding part of the Constitution. Yet, evidence suggests that the framers anticipated the role the preamble would play in constitutional interpretation.<sup>26</sup> Alexander Hamilton even stated that the Bill of Rights was not necessary since the preamble was able to function as one.<sup>27</sup> Joseph Story argued that the preamble “is a key to open[ing] the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished.”<sup>28</sup> James Monroe, similarly, stated that the preamble is “the Key of the Constitution. Whenever federal power is exercised, contrary to the spirit breathed by this introduction, it will be unconstitutionally exercised and ought to be resisted.”<sup>29</sup> These views, however, were not shared by everyone, and a dispute arose over the preamble’s role. James Madison, for one, expressed his reservations about the preamble’s power. “The general terms or phrases used in the introductory propositions,” he said, “were never meant to be inserted in their loose form in the text of the Constitution.”<sup>30</sup> A debate started over whether and in what manner the Constitution’s preamble should be used by the Court.<sup>31</sup>

Nevertheless, U.S. courts have invoked the preamble in constitutional interpretation. Although the references are inconsistent, rhetorical, and far from conferring independent constitutional rights, they still provide the preamble with some constitutional weight. Courts have used the term “We the people” to define the boundaries of the Constitution’s applicability,<sup>32</sup> hold the powers of the federal government,<sup>33</sup> indicate that the people—and not the states—are the source of the federal government’s power,<sup>34</sup> challenge sovereign immunity,<sup>35</sup> and define who is a citizen.<sup>36</sup> Similarly, the

<sup>26</sup> See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 365–366, 374–379 (1953); 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, 435–437 (1999–2000); Raymond Marcin, *‘Posterity’ in the Preamble and a Positivist Pro-Position*, 38 AM. J. JURIS 273, 281–288 (1993).

<sup>27</sup> See THE FEDERALIST NO. 84.

<sup>28</sup> See JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 218–219 (1833). In Story’s view, “there does not seem any reason why, in a fundamental law or constitution of government, an equal attention should be not given to the intention of the framers, as stated in the preamble.” *Id.* Story asserted, however, that “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* . . . its true office is to expound the nature, and extent, and application of the powers actually conferred by the Constitution, and not substantively to create them.” *Id.*

<sup>29</sup> See JAMES MONROE, *THE WRITINGS OF JAMES MONROE* 356 (vol. III, 1969).

<sup>30</sup> SUPPLEMENT TO MAX FARRAND, *supra* note 20, at 313.

<sup>31</sup> *Id.*, at 132–145.

<sup>32</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>33</sup> See *Chisholm v. Georgia*, 2 U.S. 419, 465, 471 (1793).

<sup>34</sup> See *Downes v. Bidwell*, 182 U.S. 244, 377–378 (1901).

<sup>35</sup> See *Employees v. Missouri Public Health Department*, 411 U.S. 279, 322–323 (1973).

<sup>36</sup> See *Dred Scott v. Sanford*, 60 U.S. 393, 404, 410–411 (1857).

phrase to “establish Justice” has been invoked to expand federal jurisdiction<sup>37</sup> and to support invalidation of legal tender legislation.<sup>38</sup> The phrase to “provide for the common defense” has likewise been used to broaden congressional power<sup>39</sup> and uphold exclusion from citizenship.<sup>40</sup> In addition to its interpretive role, the preamble exerts a meaningful, although indirect, influence of congressional decision making.<sup>41</sup>

In spite of these references, the U.S. preamble is not, by and large, a decisive factor in constitutional interpretation. Its relatively meager use in constitutional adjudication has been criticized. “It is regrettable that law professors rarely teach and that courts rarely cite the Preamble,” Sanford Levinson notes, as it is “*the single most important part of the Constitution.*”<sup>42</sup> For Levinson, the preamble is “the equivalent of our creedal summary of America’s civil religion.”<sup>43</sup> For Mark Tushnet, the “thin” Constitution of the United States is anchored in the principles of the Declaration of Independence and the preamble.<sup>44</sup> Milton Handler, Brian Leiter, and Carole Handler charge the courts with ignoring the preamble: “we can discern no reason why [its] rules of construction should not obtain in the constitutional context.”<sup>45</sup> They mention that disregard of the preamble conflicts with the status of recital clauses of contracts, legislative declarations of purpose in statutes, and preambles to international treaties<sup>46</sup>—*all of which do guide the court in judicial decision making.*<sup>47</sup> For them, the preamble ought to play a more significant role in constitutional decisions.<sup>48</sup> Other scholars have argued that courts should accord the preamble legal force for the sake of future generations. In referring to *Roe v. Wade*, Raymond Marcin has claimed that the question of yet-to-be-born descendants requires a solution that finds its foundation in the preamble—the blessings of liberty for the people but also for posterity—which includes fetuses, as well.<sup>49</sup>

While the preamble is written in a manner that appeals to many, it remains difficult to persuade jurists of its superior legal status.<sup>50</sup> Although Justice Harlan stripped the preamble of its legal force, its occasional use in constitutional adjudication indicates that while it is not an independent source of rights neither is it constitutionally irrelevant.<sup>51</sup>

<sup>37</sup> See *Rhode Island v. Massachusetts*, 37 U.S. 657, 730 (1838).

<sup>38</sup> See *Hepburn v. Griswold*, 75 U.S. 603, 622–623 (1870).

<sup>39</sup> See *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 860–862 (1984).

<sup>40</sup> See *Kennedy v. Mendoza-Matinez*, 372 U.S. 144, 212–213 (1963).

<sup>41</sup> See Peter W. Rodino, Jr., *Living With The Preamble*, 42 *RUTGERS L. REV.* 685 (1989–1990); Craig M. Lawson, *The Literary Force of the Preamble*, 39 *MERCER L. REV.* 879 (1987–1988).

<sup>42</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 13 (2006) (emphasis is in original).

<sup>43</sup> *Id.*

<sup>44</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181–182, 188–193 (1999).

<sup>45</sup> Handler, Leiter & Handler, *supra* note 24, at 123.

<sup>46</sup> For the role of preambles in the interpretation of international treaties, see art. 31(2) of the Vienna Convention on the Law of Treaties, 1155 *U.N.T.S.* 331 (1969).

<sup>47</sup> Handler, Leiter & Handler, *supra* note 24, at 123–127.

<sup>48</sup> *Id.*, at 131–148.

<sup>49</sup> Marcin, *supra* note 26, at 277–278.

<sup>50</sup> The appropriate interpretation of preambles forms a point of disagreement in *Heller*. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 n.3, 2826 (2008).

<sup>51</sup> See Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 *SETON HALL CONST. L.J.* 127, 160–166, 193–201 (1991–1992).



## 4. The legal status of preambles

The preamble has several functions. To begin with, it has an educational purpose: it is one of the most significant sections of the constitution that is mentioned in educational and public arenas. Unlike the constitution—usually a very long document including complex provisions—the preamble is relatively short and is written in a more accessible language. Next, the preamble has an explanatory purpose: it serves to specify the reasons for the constitution’s enactment, its *raison d’être* and eternal ideals. In addition, the preamble has a formative purpose: it constitutes a political resource for the consolidation of national identity and serves as a national “calling card.” The preamble has a legal purpose as well. This section sketches a three-part typology of preambles: a ceremonial preamble, an interpretive preamble, and a substantive preamble.<sup>52</sup>

### 4.1. Ceremonial-symbolic preamble

The concept of a ceremonial-symbolic preamble was first elaborated in Plato’s *Laws*. The preamble, Plato asserted, is designed to convince the people why laws are morally good. In Plato’s work, laws are intended to establish a self-controlled society; to that end, laws need to be virtuous. This virtue is established in the preamble—the soul of the law—which sets the tone for the people to freely comply with the law. It is a vehicle by means of which the legislator “sells” legislation to the people. As Plato asserted:<sup>53</sup>

[j]ust as a “free” doctor explains the patient’s illness to him, and tries to make him understand the reasons for the measures to be prescribed, in order to gain his co-operation, so the legislator must explain and justify his laws. Hence every law must be headed by a preamble justifying its provisions; further, the preamble must be rhetorical in character: it must not only instruct, but persuade. Only if a man ignores the preambles, must the sanction of actual law be applied.

Plato’s notion of a preamble is meant to justify the law. A good preamble would persuade the people to obey the law, not because of civil or criminal sanctions but because it is a good law. The purpose of the preamble is to mitigate the harshness of the law; a law without a persuasive preamble is a “dictatorial prescription.” Plato’s preambles use abstract terms and invoke poetic ideals.<sup>54</sup> However, they are not regarded as integral part of the law and do not create rights or have binding interpretative power.

The preamble of the U.S. Constitution is an example of Plato’s concept of a preamble because it is persuasive, symbolic, and, generally, has no legal force. An opposite example of a non-legally binding preamble, which has no persuasive power, is the preamble to the Canadian Charter of Rights and Freedoms. The preamble declares that Canada “is founded upon principles that recognize the supremacy of God and

<sup>52</sup> The classification is not clear-cut, and some preambles fall into more than one category. In addition, preambles differ in the meaning given to them by courts, not only in and of themselves.

<sup>53</sup> See PLATO, *THE LAWS* 137–145, 424–429 (Trevor J. Saunders ed., 2005).

<sup>54</sup> See Kent Roach, *The Uses and Audiences of Preambles in Legislation*, 47 *MCGILL L. J.* 129, 138–140 (2001).

the rule of law.” Courts have not granted the Canadian preamble legal force,<sup>55</sup> and some scholars have opposed granting it any legal weight,<sup>56</sup> *inter alia* because of the alleged contradiction between the supremacy of God and the rule of law and because the preamble contradicts some clauses of the Charter.<sup>57</sup> Courts refer to the preamble as a dead letter;<sup>58</sup> others, describe it as perfunctory, restricting the liberties embodied in the Charter and not intended for use even as an interpretative tool.<sup>59</sup> Canada, thus, is an example of a state in which the judiciary dissociates itself from the preamble.<sup>60</sup> One reason might be that the preamble is short and lacks significant usable details. Another reason might be that, unlike Plato’s preamble the preamble to the Canadian Charter has no persuasive value. In particular, it does not offer a persuasive explanation for the unusual reference to the “supremacy of God.”<sup>61</sup> Interestingly, when the legal status of the preamble to the Constitution Act of 1867 was discussed, the Canadian Supreme Court reached a different conclusion. In order to determine whether the secession of Quebec was constitutionally valid, the Court analyzed that preamble’s content to determine the fundamental values underlying the Canadian Constitution.<sup>62</sup>

## 4.2. Interpretive preamble

The interpretive role of preambles is rooted in the common law tradition. Edward Coke asserted that preambles to an act of parliament are a “good mean to find out the meaning of the statute” and “the key to open understanding thereof”;<sup>63</sup> they are “the key to

<sup>55</sup> See *R. v. Morgentaler*, 1 S.C.R. 30, 178 (1988); *Zylberberg v. Sudbury Board of Education*, 65 O.R. (2d) 641, 657 (C.A.) (1988); *R. v. Sharpe*, B.C.J. No. 1555 (1999).

<sup>56</sup> See DALE GIBSON, *THE LAW OF THE CHARTER: GENERAL PRINCIPLES* 65 (1986); PETER W. HOGG, *CANADA ACT 1982 ANNOTATED* 9 (1982).

<sup>57</sup> It was argued that the term “supremacy of God” contradicts Canada’s being a “free and democratic society” (art. I of the Charter), the right to freedom of religion (art. 2[a]), and the rule of law (the preamble).

<sup>58</sup> *Sharpe*, B.C.J. No. 1555, at 78–80.

<sup>59</sup> GIBSON, *supra* note 56, at 65–66.

<sup>60</sup> See Lorne Sossin, *The ‘Supremacy of God’, Human Dignity and the Charter of Rights and Freedoms*, 52 U.N.B. L.J. 227 (2003).

<sup>61</sup> Some scholars made a case for a more binding preamble by arguing that the term “supremacy of God” does not mean religion but indicates a more fundamental principle according to which some rights are inalienable and derive from a source beyond state’s power. See David M. Brown, *Freedom From or Freedom For? Religion as a Case Study in Defining the Content of Charter Rights*, U.B.C. L. REV. Soc. 551, 560–563, 615 (2000); Jonathon Penney & Robert J. Danay, *The Embarrassing Preamble? Understanding the Supremacy of God and the Charter*, 39(2) U.B.C. L. REV. 287 (2006).

<sup>62</sup> See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, at para 51–54 (“The principles [of the Preamble] dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions . . . the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments”). See also *Reference re Remuneration of Judges of the Provincial Court*, [1998] 1 S.C.R., at para 95.

<sup>63</sup> See EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 79 (1628).

the statute and the key to the makers.”<sup>64</sup> William Blackstone referred to preambles as intended “to help the construction of an act of parliament.”<sup>65</sup> Blackstone noted that whenever the statute is dubious, “the proem, or preamble, is often called in to help the construction of an act of parliament.”<sup>66</sup> However, in a case of conflict between the preamble and the body of the act, the body of the act prevails.<sup>67</sup> This is still considered good law in common law states.<sup>68</sup> Some have a specific clause indicating the significant role of preambles in statutory interpretation.<sup>69</sup>

This common law rule remains effective on the constitutional level in states in which the constitution’s preamble embodies a guiding framework for constitutional interpretation. When several interpretations exist, courts prefer the option consonant with the preamble. For example, section 39 to the South African Constitution declares that, when interpreting the Bill of Rights, the courts “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”—words that appear in the preamble.<sup>70</sup> South Africa’s Constitutional Court has confirmed the preamble’s status as a guide when interpreting the Bill of Rights. While the preamble is not an independent source of rights, it is an inspiration for those rights.<sup>71</sup> In Ireland, similarly, the courts have been invoking the preamble to interpret the Irish Constitution, and as a tool to guide in understanding its spirit.<sup>72</sup> A proposal to amend the preamble by adopting a nonjusticiable preamble, offered by a Constitution Review Group, was rejected.<sup>73</sup>

The use of preambles as a tool in constitutional interpretation is common in civil law systems, as well. In Estonia, the preamble, in which the Estonian people undertake to “guarantee the preservation of the Estonian nation and its culture throughout the ages,” has been used by the Supreme Court to confirm the constitutionality of an act requiring adequate command of the Estonian language as a prerequisite for election to a local government council. The Court ruled that mastering Estonian—the state’s official language—is a legitimate requirement in light of the preamble.<sup>74</sup> However, in

<sup>64</sup> Cited in Anne Winckel, *The Contextual Role of a Preamble in Statutory Interpretation*, 23 MELBOURNE L. REV. 184 (1999).

<sup>65</sup> See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59–60 (1765) (1979).

<sup>66</sup> *Id.*

<sup>67</sup> For the common law rule, see Winckel, *supra* note 64. For civil law rule, see Csaba Varga, *The Preamble: A Question of Jurisprudence*, in LAW AND PHILOSOPHY—SELECTED PAPERS IN LEGAL THEORY 141, 150–161 (1994).

<sup>68</sup> See CHARLES PEARCE & R. S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 4.33 (3rd ed., 1988); Winckel, *supra* note 64.

<sup>69</sup> See, e.g., s. 5(e) to the New Zealand’s Acts Interpretation Act of 1924, 1924 R.S. No. 11; s. 13 to the Canada’s Interpretation Act, R.S.C. 1985; s. 8 to Canada’s Interpretation Act, R.S.N.L. 1990.; s. 15A(a) to the Australian Acts Interpretation Act 1901.

<sup>70</sup> Article 39, however, does not explicitly refer to the preamble. Therefore, the requirement to promote these values would remain even if the preamble is repealed.

<sup>71</sup> See, e.g., Lourens M. D. Plessis, *The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court’s Approach to Constitutional Interpretation*, 62 SASK. L. REV. 299, 314–315, 321–322 (1999).

<sup>72</sup> See JOHN M. KELLY, THE IRISH CONSTITUTION 49–64 (by Gerald Hogan & Gerry Whyte, 4th ed., 2003).

<sup>73</sup> See Report of the Constitution Review Group, 1–4, 1996, available at <http://www.constitution.ie/reports/crg.pdf>.

<sup>74</sup> See EST-1998-3-007 (Official Gazette) 1998, CODICES, available at <http://codices.coe.int>.

another case, the Supreme Court declared that an act forbidding Estonians to change their Estonian last name to a non-Estonian last name is unconstitutional, despite the provision in the preamble regarding the protection of Estonian national identity.<sup>75</sup> In Macedonia, the Supreme Court of the Republic upheld restrictions on the freedom of political association because certain activities were perceived as contrary to the preamble. It held that a political association that overtly denies the right of Macedonian self-determination is legally forbidden.<sup>76</sup> In the Ukraine, the Supreme Court invoked the preamble in order to declare the constitutionality of the use of Ukrainian as the state language, an act requiring its use by central and local government agencies, and, consequently, greatly restricting the use of other languages, such as Russian.<sup>77</sup>

A recent example of the interpretive role of preambles comes from Germany. On June 30, 2009, the German Constitutional Court decided that, in principle, no incompatibility exists between the German *Grundgesetz* and the Treaty of Lisbon and thus laid the groundwork for completion of the ratification process.<sup>78</sup> The treaty grants the European Union (EU) powers in matters of foreign and security policy and obliges member states to participate in European integration. The question was whether the treaty overrides the German constitutional order in a way that requires a constitutional amendment. The Court held that the treaty does not violate German sovereignty, although its confirmation does require some legislation processes. It referred to article 23(1) of the Basic Law, as well as to the preamble, taking note of the latter's intent "to serve world peace as an equal part in a unified Europe." In light of these stipulations, the Court was able to conclude that it is the will of the German people to be part of the EU. It noted that the preamble emphasizes "not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner of a united Europe."<sup>79</sup> The Court observed that Germany breaks with "political Machiavellianism and with rigid concept of sovereignty" and seeks to realize "a united Europe, which follows from Article 23.1 of the Basic Law and the Preamble."<sup>80</sup> Therefore, the Constitutional Court held, achieving "European integration and an international peaceful order" is the will of the preamble.<sup>81</sup>

The German preamble, generally, does not enjoy legal force in German constitutional law. However, the Treaty of Lisbon decision was not the first to invoke the preamble. Another example was the decision regarding the treaty signed between the Federal Republic of Germany and the German Democratic Republic. The 1949

<sup>75</sup> This case involved a married Estonian citizen who wished to add her maiden name to her new surname. The minister of the interior refused to permit this. The Court ruled that the preservation of Estonian identity, as ordered by the preamble, could not prevent the addition of a maiden family name. See *EST-2001-2-004* (Official Gazette) 2001, CODICES database.

<sup>76</sup> See *MKD-2001-1-004* (Official Gazette) 27/2001, CODICES database. The decision was made before the amendment of the preamble of the Macedonian Constitution in 2001.

<sup>77</sup> See *UKR-2000-1-002* (Official Gazette), CODICES database.

<sup>78</sup> See *BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1—421)*, available at [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

preamble lists unification as the highest priority, stating that “the entire German people is called upon to accomplish, by free self-determination, the unity and freedom of Germany.”<sup>82</sup> Although the preamble speaks in the name of the German people as a whole—acting “on behalf of those Germans to whom participation was denied”—it only applied in West Germany. On December 1972, after the treaty on the relationship between the Federal Republic and the German Democratic Republic was signed, a petition challenging the treaty was placed before the Constitutional Court claiming that the treaty, which seemed to support the idea that West and East Germany were two separate and independent states, violated the unification clause of the preamble. In determining whether the treaty was compatible with the Basic Law, the Court addressed the preamble.<sup>83</sup> It first decided that the preamble was a decisive source for determining the case, and then held that “the preamble to the Basic Law has not only political importance but also legal content.”<sup>84</sup> Hence, “reunification is a *constitutional command*.”<sup>85</sup> The Court noted that the treaty was a starting point for the future relationship between West and East Germany and gave the political branches wide discretion in deciding further political actions needed to bring about German unification.<sup>86</sup>

### 4.3. Substantive preamble

Preambles can also be legally binding constitutional clauses and serve as independent sources for rights and obligations. In *Constitutional Theory*, Carl Schmitt distinguishes between “constitutional laws” and the “constitution.” The former are constitutional provisions that govern behavior and set norms; the latter contains what Schmitt calls “fundamental political decisions.”<sup>87</sup> These decisions are not constitutional laws but the “fundamental prerequisite[s] of all subsequent norms”;<sup>88</sup> as such, they define the genuine objectives of a society. While fundamental political decisions may appear in the text of the constitution, or not be in the text of the constitution at all, they most often appear in the preamble. Indeed, “it is a typical error of prewar-era state theory to misconstrue” preambles as “mere statements,” declares Schmitt. Preambles, to a large extent, represent the society’s “constitution,” while “constitutional law,” as specified in the body of the constitution, is only “secondary to the fundamental political decisions.”<sup>89</sup>

An example of a substantive preamble that governs constitutional interpretation and represents Schmitt’s notion of “fundamental political decisions” is to be found in France. The preamble to the Constitution of the Fifth Republic (1958) states that the

<sup>82</sup> See at <http://www.ena.lu/basic-law-frg-23-1949-020003177.html>.

<sup>83</sup> See BVerfGE 36, 1 2 BvF 1/73 Grundlagenvertrag-decision East-West Basic Treaty, available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=589](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=589)

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Emphasis added.

<sup>86</sup> *Id.*

<sup>87</sup> See CARL SCHMITT, *CONSTITUTIONAL THEORY* 77–79 (Jeffrey Seitzer trans. and ed., 2008).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

French people “proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the preamble to the 1946 Constitution.” The founding fathers of the Fifth Republic did not include a bill of rights in the Constitution.<sup>90</sup> Instead, they drafted a preamble referring to two previous documents: the Declaration on the Rights of Man and of the Citizen of 1789, and to the preamble to the Constitution of the Fourth Republic of 1946. The preamble to the 1958 Constitution did not originally enjoy binding legal force nor was it even considered an integral part of the Constitution.

On July 16, 1971, the Conseil Constitutionnel recognized the preamble’s binding force as an independent legal source of human rights. For the first time, the Conseil found an act passed by the French Parliament to be unconstitutional because it contradicted freedom of association, one of the “fundamental principles recognized by the laws of the Republic.”<sup>91</sup> These fundamental principles were not mentioned in the 1958 Constitution but in the preamble to the 1946 constitution.<sup>92</sup> In later decisions, the Council held that the preamble to the 1946 constitution enjoys legal force and constitutes an independent source of rights. Interestingly, at the time it was drafted, the 1946 preamble did not enjoy any legal status. Thus, the Conseil Constitutionnel, through a reference to the 1946 preamble in the 1958 preamble, effectively granted the 1946 preamble a higher status than it had previously enjoyed. Although not explicitly enumerated in the 1958 Constitution, the rights to strike, freedom of association, privacy, education, freedom of conscience, freedom of movement, and due process were all thereby recognized as constitutionally protected rights.<sup>93</sup> Some of these rights, such as freedom of association, were not even listed in the 1946 preamble but were incorporated by affirming the doctrine of the “fundamental principles recognized by the laws of the Republic,” anchored in the 1946 preamble.<sup>94</sup> The 1971 decision was France’s *Marbury v. Madison*. It applied an interesting method of judicial interpretation according to which the 1946 preamble, the 1789 declaration, and the fundamental principles of the Republic were *all* granted constitutional legal status *ex post facto*.<sup>95</sup>

India is another example that illustrates the growing use of preambles in constitutional interpretation. The Indian preamble includes three sections: declarative, in which the people of India establish the Constitution through the constituent assembly; principled, in which the people of India establish a socialist, secular, democratic

<sup>90</sup> See Michel Troper, *Judicial Review and International Law*, 4 SAN DIEGO INT’L L.J. 39, 50–53 (2003).

<sup>91</sup> See Decision of the Constitutional Council No. 44–71 (1971), available at <http://www.conseil-constitutionnel.fr/decision/1971/7144dc.htm>.

<sup>92</sup> The preamble of the Fourth Republic (1946) stated that the people of France “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.”

<sup>93</sup> Troper, *supra* note 90, at 52.

<sup>94</sup> See, e.g., The Press Law (1881), the Trade Unions Law (1884), The Unions and Freedom of Association Law (1901), and The Separation of Religion and State Law (1905). These laws have political significance, sometimes even more importance than the Constitution.

<sup>95</sup> See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 40–45, 66–78 (1992). Stone mentions that seven out of sixteen annulments made by the Council between 1971 and 1981 were based on the Council’s interpretation of the 1958 preamble.



republic; and operative, in which the people of India sanctify four supreme aims: “Justice, Liberty, Equality, and Fraternity.” The original preamble was adopted on October 17, 1949, and was subsequently amended in 1977 with the addition of the terms “secular” and “socialist.” These changes brought about a constitutional revolution and have been interpreted since to formally provide India with a social character.<sup>96</sup>

In a nearly thousand-page benchmark decision,<sup>97</sup> the Indian Supreme Court ruled that the preamble is part of the Constitution and enjoys legal force. The justices inquired into the theory of preambles and their uses. Some even cited American case law and Joseph Story’s *Commentaries on the Constitution of the United States* to conclude that the preamble is the key to understanding the Constitution and interpreting its clauses. The preamble, together with the Fundamental Rights and the Directive Principles of State Policy—the most important parts of the Indian Constitution—constitute the core of the constitution. Unlike France, India declared that the preamble cannot, in and of itself, impose additional rights to those explicitly stipulated in the Constitution. Nevertheless, the courts regularly resort to using the preamble when the text of the Constitution is vague. For example, the Supreme Court relied on the preamble in establishing that the constitutional authorities draw their strength directly from the people of India, clarifying the character of India as a socialist republic, recognizing the possibility of the nationalization of private industries in order to secure equality and justice, and granting the expression “social justice” the status of a constitutional right.<sup>98</sup> These references are interpretive, yet their quantity and length indicate a more substantive role of the Indian preamble in constitutional interpretation.<sup>99</sup>

A unique example of a substantive preamble appears in Nepal. Article 116(1) of the Nepalese Constitution proclaims 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.” This clause invalidates even a constitutional amendment that violates that spirit of the preamble. Nepal is unique not only for the specific provision indicating the legal status of the preamble but also for taking additional measures to protect the preamble’s *spirit*.<sup>100</sup> The concept of a constitutional amendment that is unconstitutional vis-à-vis the spirit of the constitution is found in Schmitt’s theory. For Schmitt, constitutional laws may be amended, and

<sup>96</sup> See RAMESH C. LAHOTI, PREAMBLE: THE SPIRIT AND BACKBONE OF THE CONSTITUTION OF INDIA (2004).

<sup>97</sup> See *Kesavanada Baharati v. State of Kerala* (1973) 4 S.C.C. 225.

<sup>98</sup> LAHOTI, *supra* note 96, at 38–41, 54–55, 63–86.

<sup>99</sup> India’s preamble should be treated as lying between the interpretative and the substantive models. For the growing reliance on the preamble in constitutional interpretation in India, see APARAJITA BARUAH, PREAMBLE OF THE CONSTITUTION OF INDIA: AN INSIGHT AND COMPARISON WITH OTHER CONSTITUTIONS 176–224 (2007); K. C. MARKANDAN, THE PREAMBLE: KEY TO THE MIND OF THE MAKERS OF THE INDIAN CONSTITUTION 76–97 (1984). The preamble in India has at least three interpretive values: (a) assisting in interpretation of the Constitution; (b) assisting in interpretation of statutes; (c) assisting in judicial thinking process.

<sup>100</sup> Article 116(1) to the Constitution also says that “this Article shall not be subject to amendment.” Similar articles exist in article 176(1) to the Turkish Constitution (“The Preamble, which states the basic views and principles underlying the Constitution, shall form an integral part of the Constitution”), and art. 81 to the constitution of the French Fourth Republic (1946).

even eliminated, by adhering to the amendment procedure of the constitution. Fundamental political decisions, however, cannot be amended or eliminated in the same way. “The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag,” Schmitt declared, just as “a majority decision of the English Parliament would not suffice to make England into a Soviet state.”<sup>101</sup> Legislators are not omnipotent; only the people, acting directly or through a constitutional assembly, can change fundamental decisions. In Nepal, this concept has been influenced by the Indian concept of “basic structure.”<sup>102</sup> A number of dissenting justices in India ruled that the preamble is not a regular constitutional clause and, therefore, its “basic structure” cannot be amended; representing eternal law, it cannot be set aside by an amendment, not even by the amendment procedure of article 368 to the Indian Constitution.<sup>103</sup> The fundamental values of the Constitution, as they appear in the preamble, cannot be altered.<sup>104</sup> In Schmitt’s terms, the amendment procedure of the constitution can amend constitutional laws but *not* the Constitution; a new constitution would have to be created and accepted.<sup>105</sup> The preamble “walks before the Constitution.”<sup>106</sup> Hence, it is not only a source of rights and powers but also of entrenchment.

An interesting case of a substantive preamble appears in the Constitution of the Republic of Bosnia-Herzegovina (BiH). The Dayton Agreement (1995) divided the republic into two separate entities: the Federation of Bosnia-Herzegovina and the Republic of Srpska (RS), each with its own constitution. In an important decision, the BiH Constitutional Court found four sections of the preamble to RS’s Constitution unconstitutional because of its contradictions of the BiH Constitution. The Court decided that certain statements or phrases in RS’s preamble conflicted with the body of the BiH and its preamble; for example, “a state of the Serbian people,” “the Serb people’s self-determination,” “state independence,” and the like.<sup>107</sup> The Court held that the Constitution of BiH had established two independent political entities, not two

<sup>101</sup> SCHMITT, *supra* note 87, at 79–80.

<sup>102</sup> See Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal’s Supreme Court*, AM. U. J. INT’L L. & POL’Y 47, 57 (1996).

<sup>103</sup> See Kesavananda Bharati v. State of Kerala, 4 SCC 225 (Shelat and Grover JJ., dissenting); LAHOTI, *supra* note 96, at 41–46, 49.

<sup>104</sup> The concept of the unamendable “basic structure” of the Constitution appears in other constitutions. Article 89(5) of the French Constitution forbids a constitutional amendment that violates the republican form of France; article 79(3) of the German Basic Law forbids a constitutional amendment that violates human dignity or the nature of Germany as a republic, democracy, and social federal state; and article 4 of the Turkish Constitution forbids a constitutional amendment relating to the republic, democratic, secular, and social nature of Turkey. While the basic structure of the constitution in these cases does not appear in a formal preamble, one may treat this basic structure as a *substantive* form of preamble.

<sup>105</sup> SCHMITT, *supra* note 87, at 79.

<sup>106</sup> Kesavananda Bharati 4 SCC 225 (Khanna J). In Khanna’s opinion, only the provisions in the preamble that pertain to the basic structure of the Constitution are unalterable; other parts of the preamble are amendable as are other parts of the Constitution.

<sup>107</sup> See BIH-2000-3-003 (Official Gazette), CODICES database. Since Srpska’s preamble infringed upon the Constitution of BiH, the Court left open the question of whether it also infringed the preamble to the Constitution of BiH. *Id.*, at para 12.

separate nation-states.<sup>108</sup> The Republic of Srpska was part of the entire republic and did not belong exclusively to the Serb people. The Court dismissed RS's argument according to which its "preamble was not an operative part of the Constitution of Republic [of] Srpska and had no normative character," noting that:

As any provision of an Entity's Constitution [RS] must be consistent with the Constitution of BiH, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles . . . the provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force, thereby serving as a sound standard of judicial review for the Constitutional Court. Hence, the Constitutional Court must establish in substance what specific rights or obligations follow from the constitutional principles of the Preambles of both the Constitution of BiH and the Constitution of RS.<sup>109</sup>

This survey demonstrates the growing use of preambles in constitutional adjudication. Nevertheless, it is difficult to generalize under what circumstances it is likely that a preamble may play a functional role, whether interpretive or substantive. In some cases, preambles are more substantive when there is no explicit bill of rights in the constitution, as in France. In other cases, as in India, preambles are more likely to be substantive when they set up concrete norms rather than abstract ideas, such as happiness or love. On the other hand, when a gap between the content of the preamble and the text of the constitution exists, as in Canada, the preamble is less likely to play a role in constitutional interpretation. Nonetheless, going back to Hans Kelsen, the legal status of the preamble is still to be considered functional. In principle, a preamble "usually does not stipulate any definite norms for human behavior and thus lacks legally relevant contents. It has an ideological rather than a juristic character."<sup>110</sup> However, the legal status of the preamble depends on various criteria; among them is its content. A preamble may have a normative character whenever "its meaning is to establish . . . an obligation. A statement whose meaning is to establish an obligation is a norm."<sup>111</sup>

One question that arises is why would a preamble not be regarded as binding in the first place? Why is it required of those who want the preamble to have a legal meaning to make a case for its functionality? In many instances, it is clear that justices in various states have paid particular attention to the legal status of the U.S. preamble when determining the case before them. It does appear peculiar that one of the most comprehensive studies on the legal status of the U.S. preamble was not conducted by American scholars but by Indian justices in Delhi.<sup>112</sup> One thing, however, is clear: in many countries, it is no longer possible to treat the preamble as a prefatory rather

<sup>108</sup> The Court ruled that the reference to the "Serb people" is troubling since the Dayton Accords and the Constitution of BiH establish that all three peoples—Bosniaks, Croats, and Serbs—share equal rights throughout the territory of the Republic of Bosnia-Herzegovina.

<sup>109</sup> *Id.*, at para 10.

<sup>110</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE*, 260–261 (2007).

<sup>111</sup> *Id.*, at 142.

<sup>112</sup> Kesavanada Baharati, 4 SCC 225.

than as a dispositive piece of the constitution. Preambles are playing an increasing role in constitutional interpretation.<sup>113</sup> At least two lessons can be drawn: (a) parties to litigation should be aware of the growing role of preambles in constitutional adjudication, which means that they can invoke the preamble as a source of law; (b) future constitutional design must consider the legal status of the preamble. Constitutional framers either can determine the legal status of the preamble in the constitution themselves or let the courts decide the issue.

## 5. Integrative and disintegrative power of preambles

The preamble's strength lies not only in the legal sphere but also in its social function and effect.<sup>114</sup> The United States probably has the best example of an integrative preamble. However, just as preambles can foster integration by forging a common identity, so also they can be disintegrative, driving people apart and contributing to social tension. This occurs when a preamble reflects only the story of a dominant group. If the preamble states the fundamental principles underlying the constitution and enjoys legal status—that is, these principles are no longer political morality or nonbinding historical statements—it is necessary to consider what is written therein. Four cases are briefly discussed here: Macedonia, Israel, Australia, and the EU.

### 5.1. The Macedonian experience

Macedonia was established as an independent state after the dissolution of Yugoslavia. The state includes a substantial Albanian national minority (as well as other minorities), variously estimated at from one-fourth to one-third of the population. The preamble to the 1991 Constitution established Macedonia as “the national state of the Macedonian people” and referred at length to their history, culture, and identity. It was a strictly Macedonian preamble in the ethnic sense, noting only the “historical, cultural, spiritual, and statehood of the Macedonian people.” The preamble stated that Macedonia was founded in order to serve as the “national state of the Macedonian people” as well as other nationalities that reside therein.<sup>115</sup> The preamble secured full equality for all citizens, yet the Albanian minority fiercely opposed the nationalistic statements in the preamble and, in particular, the reference to Albanians as a national minority. During the 1990s, Albanian factions began to employ violence in order to

<sup>113</sup> See Kim L. Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 227, 248–251 (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>114</sup> See Dieter Grimm, *Integration by Constitution*, 3(2) *INT'L J. CON. L.* 193, 199 (2005).

<sup>115</sup> For the Macedonian case, see Biljana Belamaric, *Attempting to Resolve and Ethnic Conflict: The Language of the 2001 Macedonian Constitution*, 4(1) *S.E. EUR. POL.* 25 (2003); Zhidas Daskalovski, *Language and Identity: The Ohrid Framework Agreement and Liberal Notions of Citizenship and Nationality in Macedonia*, *JEMIE* 1/2002; Jenny Engstrom, *Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State*, *JEMIE* 1/2002.

force a constitutional amendment that would transform Macedonia into a binational state and grant Albanians full territorial and political autonomy in areas with an Albanian majority. Under pressure from the Albanian minority and the international community, the Macedonian preamble was amended in November 2001 following the Ohrid Agreement in August 2001. The Macedonian national statements were omitted, and the Albanian minority was listed as “part of the Albanian nation.”<sup>116</sup> The amended preamble is more inclusive and embraces a broader concept of civic identity:

The citizens of the Republic of Macedonia, the Macedonian people, as well as the citizens living within its borders, which are part of the Albanian nation, the Turkish nation, the Vlah nation, the Serbian nation, the Roma nation, the Bosnian nation and others . . . have decided to establish the Republic of Macedonia as an independent, sovereign state.

By including only a limited national narrative and expressing future aspirations of a specific national group, the original Macedonian preamble had excluded the Albanian minority from the mainstream of Macedonian life; it thereby weakened the Constitution’s political legitimacy.<sup>117</sup> The Albanians demand was for a more consensual, less partisan preamble with which all citizens could identify. Yet, one can be skeptical regarding the efficacy of such a preamble in those nation-states that, by definition, are not equally accepting of all national groups. More importantly, the amendment to the preamble has not resolved the social conflict. On the contrary, the deletion of Macedonia as a nation-state caused resentment among ethnic Macedonians, who felt that this change had been forced upon them by violence and international pressure. Similarly, ethnic Albanians continue to challenge their linkage to other minorities and their inferior status, which is derived, in their view, from the term “as well as” that appears in the preamble. They object to any preamble that falls short of referring to a fully binational Macedonia. This case thus emphasizes the power of preambles either to unify or to divide political resources; it also sheds light on the limits of constitutional design to ameliorate ethnic conflicts or foster a common national identity.

## 5.2. The Israeli experience

Israel is considered to be among the few democracies not having a formal written constitution. In fact, one of the historical reasons for the failure to establish a constitution stems from the inability to achieve consent regarding the preamble’s content.<sup>118</sup> The Israeli parliament (the Knesset) preferred to create a constitution in stages

<sup>116</sup> See the preamble as well as articles 7 and 48 of the 2001 Macedonian Constitution.

<sup>117</sup> In Slovakia, similarly, the preamble to the Constitution declared that the Slovak Republic embodies national Slovak statehood. The Hungarian minority opposed the preamble and demanded that it be amended from “We, the Slovak nation” to “We, the citizens of the Slovak Republic.” See Farimah Daftary & Kinga Gal, *The 1999 Slovak Minority Language Law: Internal or External Politics?*, in *NATION-BUILDING, ETHNICITY AND LANGUAGE POLITICS IN TRANSITION COUNTRIES* 39, 43–45 (2003). For a similar clash in Poland, see Geneviève Zubrzycki, ‘We, the Polish Nation’: *Ethnic and Civic Visions of Nationhood in Post-Communist Constitutional Debates*, 30 *THEORY & SOCIETY* 629 (2001).

<sup>118</sup> See Session 41/19 of the Provisional Government, Feb. 2, 1949 (in Hebrew); Session 16/I10 of the Government, Dec. 13, 1949 (in Hebrew); Knesset Protocols, 5710, at p. 10, 726, 728, 731, 784, 801–804, 1711–1722, 1262–1263.

through the adoption of separate Basic Laws,<sup>119</sup> which—following the enactment of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation in 1992—have been declared by the Supreme Court a constitutional revolution and “substantive constitution.”<sup>120</sup> As a quasi preamble, the courts have used the 1948 Declaration of Independence. In 1994, the Knesset amended the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty. These amendments included two important sections declaring, for the first time, that Israel is a Jewish and democratic state and that human rights are to be respected in the *spirit* of the principles set forth in the Declaration of Independence. Articles 1 and 1A of the Basic Laws read as follows:<sup>121</sup>

I. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

This amendment is consonant with most of the substantive requirements of a preamble; it recognizes the fundamental values of the state of Israel and its national character. While it is not a formal preamble—bearing the title “preamble” or a similar title (“foreword,” “preface,” and the like)—it may constitute, in effect, a substantive preamble. It was also the first time in Israel’s legislative history that the Declaration of Independence was incorporated into law. The legal status of the Declaration of Independence has changed over the years. Soon after the state’s foundation, the Supreme Court refused to grant it legal status;<sup>122</sup> however, this attitude changed with the Supreme Court’s progressive reliance on the human rights guaranteed in the declaration for constitutional interpretation. The Court has repeatedly ruled that the declaration serves as a political act with legal implications that should be respected by all authorities, although it could not disqualify acts of parliament. The Court adopted a Blackstonian reading of preambles under which a law, interpretable in different ways, would be interpreted in the manner compatible with the preamble’s spirit or, in this case, the declaration’s.<sup>123</sup> Following the 1994 amendments, a few judges ruled that the legal status of the Declaration of Independence had been altered, significantly, and held that the Court may declare rights recognized by the declaration as constitutional

<sup>119</sup> See Dafna Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

<sup>120</sup> See C.A. 6821/93, *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221 (in Hebrew).

<sup>121</sup> In article 2 of Basic Law: Freedom of Occupation the text is almost identical.

<sup>122</sup> See HCJ Zeev v. District Commissioner of the Urban Area of Tel Aviv, 1 P.D. 85, 89 (Hebrew).

<sup>123</sup> See HCJ 73/53 Kol Ha’am v. the Minister of the Interior (1953) 7(2) P.D. 871, 884; C.A. 450/70 Rogozinsky v. State of Israel, 26(1) P.D. 129, 135; EA 1/65 Yardor v. Central Elections Committee, 19(3) P.D. 365; HCJ 953/87 Poraz v. Mayor of Tel-Aviv-Jaffa, 42(2) P.D. 309, 332; HCJ 262/62 Perez v. Kfar Shemariahu, 16 P.D. 2101, 2113 (in Hebrew).



rights.<sup>124</sup> In one case, a dissenting judge even ruled that the Disengagement Plan regarding the unilateral withdrawal from the Gaza Strip was unconstitutional, because it conflicted with “the right” of the Jewish people to settle in all the territories of the Land of Israel/Palestine, protected, in his view, by the Declaration of Independence.<sup>125</sup>

The Jewish and democratic character of Israel is its basic constitutional structure. This structure, as former president of the Supreme Court Aharon Barak argues, is eternal and, therefore, an amendment that denies it would be an unconstitutional constitutional amendment.<sup>126</sup> In fact, Israel has been a Jewish state from its foundation but, until 1994, it was an unwritten convention rather than a constitutional imperative. Legalization of the term “Jewish state” has granted the courts the power to decide the meaning of this character and has triggered social tension between secular and ultraorthodox Jews and between Jewish and Arab citizens. Arab citizens feel that the Basic Laws have excluded them from Israel’s social arrangement and have ignored their identity, culture, and heritage. By adopting a constitutional definition of Israel as a Jewish State, the Basic Laws exclude them from the Israeli mainstream and treat them as “second-class citizens.”<sup>127</sup> The Israeli experience demonstrates how the preamble’s design can raise ideological barriers to social integration as well as produce feelings of not belonging.<sup>128</sup> The “Purpose Clause,” considered Israel’s substantive preamble,<sup>129</sup> is not ideologically neutral; it does not state “we, the people of Israel,” and its meaning is the focus of ongoing disputes and social divisions.<sup>130</sup>

### 5.3. The Australian experience

Australia was established in 1900 through the Commonwealth of Australia Constitution Act that was passed by the British Parliament and established Australia as an indissoluble federal commonwealth; the act’s preamble has been regarded as equivalent to a constitution’s preamble. The preamble outlines the structure and powers of the government. It is very short and lacks any substantive content. Toward the end of

<sup>124</sup> See HCJ 726/94 Klal Insurance Company v. The Minister of Finance, 48(5) P.D. 441, 461; HCJ 1554/95 Gilat Ass. v. The Minter of Education, 50(3) P.D. 2, 24–25 (in Hebrew).

<sup>125</sup> See HCJ 1661/05 *The Regional Council of Gaza v. The Knesset*, 59(2) P.D. 481 (in Hebrew). The Supreme Court, however, has not yet decided the legal status of the Declaration.

<sup>126</sup> See Aharon Barak, *Unconstitutional Constitutional Amendment*, ISR. L. REV. (forthcoming, 2011) (holding that Israel has a basic structure of fundamental principles that cannot be amended by a constitutional assembly; this basic structure includes the character of Israel as a Jewish and democratic state).

<sup>127</sup> See Jousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies, The Case of the Palestinian-Arab Minority in Israel*, 26(2) WIS. INT’L L. REV. 345 (2008).

<sup>128</sup> This is not to say there are no other reasons for current tensions between Jewish and Arab citizens; ongoing discrimination against Arab-Palestinian citizens is, no doubt, a central reason.

<sup>129</sup> See Amnon Rubinstein & Liav Orgad, *The Legal Status of the Constitutional Preamble: The Israeli Case*, 20 HAMISHPAT L. REV. 38 (2005) (in Hebrew).

<sup>130</sup> See Amnon Rubinstein, *The Curious Case of Jewish Democracy*, AZURE 33 (2010).

the twentieth century, the preamble was criticized for no longer reflecting Australia's values. On November 6, 1999, a referendum was held on the question of adopting a new preamble.<sup>131</sup>

As in the Macedonian case, a legal change was triggered by a new reality. One of the reasons motivating the referendum was the need to reconsider the legal status of Australian Aborigines. In February 1998, a constitutional convention adopted a new preamble that would enable minority groups to identify with Australia.<sup>132</sup> The convention decided that a separate referendum would be held on the question of replacing the existing preamble along with the question whether Australia would become a Republic. Prime Minister John Howard announced his intention to abide by the decision regarding a separate referendum on the new preamble. His draft, published in February 1999, was met with criticism mainly from minority leaders, who requested that the Australian Aborigines not be mentioned as a "native minority" but as "the custodian[s] of our land." Howard, thereafter, drafted a second version of the preamble; however, it was rejected in the referendum—60.7 percent voted against it.<sup>133</sup>

The Australian experiences differ from those of Macedonia and Israel. First, it is very difficult to gain broad public support for a new preamble at a later constitutional moment, especially in multicultural societies. Second, the plan to adopt a nation-building preamble—that is, to use the preamble as a symbol for promoting national identity, similar to a flag or an anthem—requires public involvement. In the Australian case, expressions such as "recognising the nation-building contribution of generations of immigrants," or "honouring Aborigines and Torres Strait Islanders, the nation's first people[s], for their deep kinship with their lands"<sup>134</sup> were inadequate to compensate for the isolation in which the prime minister drafted the document. If the goal is to secure reconciliation between the state and its minorities, representatives of the minorities have to be involved in the drafting process. Third, the intention was not to replace the old preamble but to adopt a new preamble, devoid of legal power, to accompany the old one that enjoyed interpretative force. Yet, if the preamble is intended from the outset to be purely symbolic, and absent legal force,<sup>135</sup> the public's interest in the preamble is likely to decrease. In addition, the insistence on a nonjusti-

<sup>131</sup> See Bruce Stone, *A Preamble to the Australian Constitution: A Criticism of the Recent Debate*, 35 AUSTRALIAN J. OF POL. SCIENCE 291 (2000); Mark McKenna, *First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–1999* (2000), available at <http://www.apf.gov.au/library/pubs/RP/1999-2000/2000rp16.htm>.

<sup>132</sup> See Report of the Constitutional Convention (Old Parliament House, 1998).

<sup>133</sup> The referendum was held on November 6, 1999. For the reasons for its failure, see Anne Winckel, *A 21st Century Constitutional Preamble—An Opportunity for Unity rather than Partisan Politics*, 24(3) U.N.S.W. L. J. 636, 638–48 (2001); Mark McKenna, Amelia Simpson & George Williams, *With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble*, 24 U.N.S.W. L. J. 401, 415–16 (2001).

<sup>134</sup> See Alex Reilly, *Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values*, 21 U.S.N.W. L. J. 903 (1998).

<sup>135</sup> The new preamble asserted that "the preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth." See McKenna, Simpson & Williams, *supra* note 133, at 411.

cial preamble revealed deep concern regarding the role of the preamble in judicial empowerment.<sup>136</sup>

#### 5.4. The EU experience

On December 1, 2009, the Treaty of Lisbon entered into force. The changes inserted in the Treaty of Lisbon's preamble express the differences in the conceptual framework of the rejected draft Treaty Establishing a Constitution for Europe. A process that began with high expectations and romantic visions concluded, essentially, in a watered-down product. It is interesting to compare the long, detailed version of the preamble of the draft constitutional treaty with the short, almost valueless preamble of the Lisbon treaty, whose almost sole purpose is to allow the EU more efficient functioning.<sup>137</sup>

At the end of 2004, representatives of the EU signed the draft Treaty Establishing a Constitution for Europe. The discussions during the drafting of the preamble revived old disputes forcing member states to address historical narratives, common motives, shared values, and future destinies.<sup>138</sup> In a document of approximately three-hundred pages, the preamble is particularly interesting. It includes the values and objectives of the EU's citizens, features that were fiercely debated within the framework of historical narratives, a reference to God or Christianity, and issues of identity.

It was first necessary to determine who speaks for EU citizens: the states themselves, the parliaments, or the citizenry. It was decided to refer to the heads of the state—his Majesty the King of the Belgians, the president of the Czech Republic, her Majesty the Queen of Denmark, and so on—as the entities ratifying the treaty. In the preamble to the Lisbon treaty, the people of Europe do not speak directly as one political body; no united “people of Europe” exists. By way of comparison, in the United States, one suggestion considered at the Philadelphia Convention had been to name the Union the “United People and States of America.”<sup>139</sup> The framers eventually adopted the phrase “We the people of the United States” because they were uncertain how many states would join the Union, and this term was more flexible.<sup>140</sup> Yet, in Europe, it seems that adding a new member state would require amending the preamble in order to insert another head of state.

Another interesting discussion took place regarding the question of whether to refer to Christianity. Poland and Italy advocated adding a reference to God whereas secular France and Belgium strongly opposed such a reference. At the end, it was decided to mention neither God nor Europe's Christian heritage. A similar debate arose sur-

<sup>136</sup> Winckel, *supra* note 64, at 644–648.

<sup>137</sup> For the text of the Treaty Establishing a Constitution for Europe, see <http://en.constitution.com/>. For the text of the Treaty of Lisbon, see [http://europa.eu/lisbon\\_treaty/full\\_text/index\\_en.htm](http://europa.eu/lisbon_treaty/full_text/index_en.htm).

<sup>138</sup> On the discussions relating to the EU preamble, see Armin V. Bogdandy, *The Preamble*, in TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 3 (Bruno D. Witte ed., 2003); Ingolf Pernice, *Integrating the Charter of Fundamental Rights into the Constitution of the European Union: Practical and Theoretical Propositions*, 10 COLUM. J. EUR. L. 5, 18–22, 45 (2003); Armin V. Bogdandy, *The European Constitution and European Identity: Text and Subtext establishing a Constitution for Europe*, 3(2) INT'L J. CONST. L. 295, 300–305 (2005).

<sup>139</sup> SUPPLEMENT TO MAX FARRAND, *supra* note 20, at 152.

<sup>140</sup> See Sanford Levinson, *Do Constitutions Have a Point? Reflections on 'Parchment Barriers' and Preambles*, 28 SOC. PHIL. & POL. 150 (2011).

rounding Europe's common history. The question was whether the horrors of the two world wars should be mentioned as a motivation for the creation of the EU. The member states first decided to adopt a terse reference to Europe as "reunited after bitter experiences" and to declare that "the peoples of Europe are determined to transcend their former divisions." However, this formulation was dropped in the Treaty of Lisbon, to be replaced by a thin statement according to which member states "draw [. . .] inspiration from the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."

A major challenge was how to frame common European goals. The preamble to the draft Treaty Establishing a Constitution for Europe was very detailed. It described common aspirations—such as "forging a common destiny" or "striv[ing] for peace, justice and solidarity throughout the world"—while declaring that the peoples of Europe are "united ever more closely" in the lofty goals of "continu[ing] along the path of civilization, progress and prosperity" and of accepting responsibilities toward "future generations." It celebrated the member states as "united in diversity." This formula, which is the official motto of the EU, indicates that Europe chooses unification in the realization of common goals while sustaining its diverse national identities; thus the peoples of Europe "remain [. . .] proud of their own national identities and history." In the Treaty of Lisbon, however, all these goals have been completely omitted. The preamble is much shorter. It merely declares a modest goal of "enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action."

With no united people of Europe, little common history, and fewer shared goals, the question of having a European identity became more significant. Should the preamble define a collective European identity or be neutral on the subject? In the first draft adopted in July 2003, the preamble began with a quote from the writing of Thucydides, in ancient Greek.<sup>141</sup> Its purpose was to refer to one of the historical sources of democracy as an enduring unifying symbol. With no overt desire to develop a collective idea of Europeanness, the Treaty of Lisbon's preamble avoids directly addressing Europe's collective identity.

The debate concerning the EU's preamble demonstrates the difficulties of forging a consensus around common values against a background of diverse national histories. It remains unclear as to whether the preamble will have any normative influence or foster a unified European identity. For now, the preamble's main merit is that it shows the importance of the drafting process, which, in turn, will demonstrate the purposes of the preamble. From a legal perspective, there is little difference between the draft Treaty Establishing a Constitution for Europe and the Treaty of Lisbon. The significant difference, after years of ongoing debates, is to be found in the content of the preamble.

<sup>141</sup> See Armin V. Bogdandy, *The European Constitution and European Identity: A Critical Analysis of the Convention's Draft Preamble*, in *ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE* (Joseph H.H. Weiler & Christopher L. Eisgruber, eds., 2004), available at <http://centers.law.nyu.edu/jeanmonnet/papers/04/040501-07a.pdf>.

## 6. Conclusion

Do preambles have a point? They surely do. For Plato, preambles are the soul of the laws, a device through which the legislator convinces the people to obey the law. For Schmitt, preambles express the society's fundamental political decisions. For Blackstone, preambles are the key to opening up to us the minds of the lawmakers. For individuals, preambles are the national consciousness; they define the constitutional identity and, as such, they define who the "we" is.

For a long time, preambles have been disregarded as symbolic statements. Students at American law schools do not learn that they can win a case by invoking the Preamble. This article shows that, in a global perspective, this premise is no longer valid. A growing number of countries have legalized the language of the preamble. The preamble's rights and principles have become more and more legally enforceable, rights that lawyers can bring to court (whether this is a desirable practice is a separate question). And yet, preambles are not simply legal provisions, like the other provisions of the constitution. The motives for writing preambles, their design process, and their sociological functions are different. The preamble's purpose is not only—perhaps not mainly—to guarantee rights or provide legal arguments but to set down the basic structure of the society and its constitutional faith. In no other place than the preamble is the constitutional understanding of the founding fathers and the national creed so clearly reflected.

Preambles have an important nonlegal purpose, as well. They reflect and affect social and political norms. They encourage cohesion or exacerbate divisions, express the constitutional identity, and are called upon to serve as a device of national consolidation or to reconcile past wrongs. Their impact depends on their wording but also on the political environment that once gave them life. Preambles may acquire a unique force, generally at a constitutional moment. The classic case is the U.S. Constitution. This was also the case with the preamble to the German Grundgesetz in which a defeated and shattered Germany, recuperating from the Nazi nightmare, was able to proclaim its attachment to a new Europe. In those moments, preambles enjoy popular consent. When those moments pass, popular consent is more difficult to achieve.