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The Other Preamble: Civic Constitutionalism and the Preamble to the Bill of Rights

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ARTICLES

THE OTHER PREAMBLE: CIVIC CONSTITUTIONALISM AND THE PREAMBLE TO THE BILL OF RIGHTS

*John E. Finn**

This Article considers the civic constitutionalist nature of the Preamble to the Bill of Rights. Civic constitutionalism is a mode of reading constitutional texts that considers power in political, as opposed to legal, terms. Thus, the civic constitution gives citizens, not judges, the primary duty for ensuring a constitutionally compliant society. This Article also presents the underlying reasons, effects, and costs of the obscurity of the civic constitution and, more specifically, the Preamble to the Bill of Rights.

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INTRODUCTION

In this Article, I consider the significance of one of the preambular provisions of the Constitution for our understanding of civic constitutionalism. Civic constitutionalism, I argued in *Peopling the Constitution*, is a particular way of comprehending what kind of thing the Constitution is, what sort of authority it commands, and what kind of community it calls into being.¹ It conceives of constitutional authority in political rather than legal terms and assigns a very large measure of responsibility for achieving a constitutional way of life to citizens. Civic constitutionalism thus stands in contrast to most scholarly accounts of constitutional maintenance, which instead invest judges, primarily, and other constitutional offices, secondarily, with responsibility for holding us to our constitutional commitments. The Constitution's preambular provisions are especially important to understanding the Constitution's civic character. Preambles are the "key," in the words of Joseph Story,² to reading the Constitution and also to locating the Constitution's identity in politics rather than in law, or in what I have called the "Civic Constitution."

There are four preambles in the Constitution, including, obviously, the Great Preamble (We the People). But there are three other preambular provisions in the document. One is in Article I, Section 8, where Congress is given the power "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³ Most readings assume this

¹ See John E. Finn, *The Civic Constitution: Some Preliminaries*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 41–69 (Sotirios A. Barber & Robert P. George eds., 2001) [hereinafter *Preliminaries*] (coining the term "Civic Constitution"); JOHN E. FINN, *PEOPLING THE CONSTITUTION* 6–8, 129–31, 229 n.43 (Jeffrey K. Tulis & Sanford Levinson eds., 2014) [hereinafter *PEOPLING*] (explaining that civic constitutionalism bears a resemblance to popular constitutionalism, but is different in important ways); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); see generally *PEOPLING*, *supra*; ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

² BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* 50 (2009) (quoting Joseph Story: "It is an admitted maxim in the ordinary course of the administration of justice, that the preamble . . . is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the [text]") (citation omitted).

³ U.S. CONST. art. I, § 8, cl. 8.

clause simply establishes the power of Congress to grant patents and copyrights. Garry Wills, however, argues that unlike the rest of Section 8, which presents the powers of Congress “in the infinitive: to regulate, commerce, to coin money, to establish a post office, to declare war,”⁴ the founders decided in this instance to include a goal, or “mini-preamble,”⁵ along with the explicit power. As a result, this power is not presented as an infinitive power, but rather as a means of achieving the goal of promoting science and the useful arts.

Wills’s reading of this preamble, especially insofar as it ascribes to it a purpose to attain a more perfect constitutional order, is welfarist in character⁶—it conceives of an ongoing constitutional project committed to particular ends. This reading implies that its meaning is not purely exhortatory, but is instead substantive, and that it should influence how we make sense of and apply it (as a means to the realization of constitutionally desirable ends). More generally, it hints at how we should read all of the Constitution’s preambles by suggesting that their significance is not confined to their infrequent use as interpretive devices in constitutional litigation but is instead a function of their importance to the larger project of constitutional maintenance.

Another preamble opens the Second Amendment: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁷ The significance of this preamble has been a matter of intense scholarly and judicial exegesis for at least the last two decades.⁸ Much of this literature, especially in recent years, has concentrated on the question of whether the Second Amendment establishes an individual, judicially enforceable right to bear arms and equally on the Supreme Court’s recent jurisprudence concerning that question. But some of this literature has also considered whether the prefatory

⁴ *Deconstructing the Constitution in Support of the Arts*, PA. GAZETTE, May 12, 1998, <http://www.upenn.edu/gazette/0598/0598gaz5.html>.

⁵ *Id.*

⁶ See SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2009).

⁷ U.S. CONST. amend. II.

⁸ See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); see also *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). As I indicate below, however, my argument that the Preamble to the Bill of Rights tells us to embrace a civic reading of the Bill of Rights may have important implications for how we should read the preambular language in the Second Amendment. See *infra* p. 38 and notes 129–30 and accompanying text.

clause hints at a civic interpretation of the Amendment's operative clause. For example, some scholars, such as David C. Williams and Suzette Hemberger, have explored whether and to what extent this preamble is evidence of the civic meaning of the Second Amendment.⁹

My focus in this Article, in contrast, is on a different, largely forgotten preamble in the Constitution—the long neglected Preamble to the Bill of Rights, which in full provides:

Congress of the United States
begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and
eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the

⁹ See David C. Williams, *Civic Constitutionalism, the Second Amendment, and the Right of Revolution*, 79 IND. L.J. 379 (2004) [hereinafter *Civic Constitutionalism*]; see also Suzette Hemberger, *What Did They Think They Were Doing When They Wrote the U.S. Constitution, and Why Should We Care?*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE, *supra* note 1; Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); see generally David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) [hereinafter *Civic Republicanism*] (discussing the Second Amendment and civic meaning).

Legislatures of the several States, pursuant to the fifth Article of the original Constitution.¹⁰

At least as measured by academic treatments (which are very few) or by popular knowledge (which is nonexistent), the Preamble to the Bill of Rights is obscure if not forgotten.¹¹ Indeed, most copies of the Constitution

¹⁰ Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373, 381 n.22 (2003). This is not the original text. In the earliest versions, James Madison proposed a revision to the opening preamble so that it would read: “That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.” James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), in JAMES MADISON: WRITINGS 441 (Jack N. Rakove ed., 1999). This new text, in Madison’s plan, would immediately precede the well-known phrase “We the People.” *Id.* Similarly, most of the individual amendments were first proposed as amendments to Article I, § 9, i.e., as limits on congressional power: “The decision to propose the amendments as separate articles, while hotly controverted, was based on stylistic rather than substantive considerations.” DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, 856 (1996). In presenting his proposal to Congress, Madison observed that:

First. That there be prefixed to the Constitution a declaration—That all power is originally vested in, and consequently derived from, the people. That Government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

James Madison, *Speech in Congress Proposing Constitutional Amendments*, in JAMES MADISON: WRITINGS 441 (Jack N. Rakove ed., 1999). Roger Sherman of Connecticut replied, “The truth is better asserted than it can be by any words what so ever. The words ‘We the People’ in the original Constitution are as copious and expressive as possible.” *Five Items Congress Deleted from Madison’s Original Bill of Rights*, NAT’L CONST. CTR. (Dec. 13, 2015), <http://blog.constitutioncenter.org/2016/12/five-items-congress-deleted-from-madisons-original-bill-of-rights/>. As David Currie observes, “The principal objection voiced to amending the Preamble to affirm popular sovereignty was that the same idea was already expressed in the introductory phrase ‘We, the people.’” David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 852 n.450 (1994). The final language of the Preamble to the Bill of Rights was approved by the Senate on September 8, 1789. Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 175–76 nn.88–89 (2006).

¹¹ Ironically, the Preamble to the Bill of Rights is well known and oft quoted by citizens active in Second Amendment and guns-rights groups. See *Civic Constitutionalism*, *supra* note 9.

do not reproduce it.¹² One of the things I consider here is the reasons for its obscurity. A second consideration concerns the effects of that obscurity. As it turns out, these are very related questions—if indeed not the same inquiry put two ways.

The reasons for the obscurity of the Preamble to the Bill of Rights lie in a choice we have made about how to read the Constitution and in turn about how to read the Bill of Rights. As I have argued elsewhere, there are two principal ways to read the Constitution—two ways of understanding the Constitution’s claim to authority.¹³ Both of these are two very different ways of comprehending what kind of community the Constitution envisions and constitutes. One conception, the Juridic Constitution, locates the Constitution in law. The other, the Civic Constitution, grounds the Constitution in politics.¹⁴

The Juridic Constitution (and likewise most scholarly accounts of constitutional maintenance) invests judges with primary, if not exclusive, responsibility for maintaining our constitutional commitments. I call it the Juridic Constitution, not the legal constitution, because the word juridic highlights issues of ownership and exclusivity.¹⁵ Because it is law, the Juridic Constitution is the property of judges and lawyers, who have assumed primary institutional responsibility for maintaining the Constitution. Locating the Juridic Constitution’s authority in law influences how we read and understand the text: indeed, lawyers have reconstituted the text in their own image. “Our conception of the Constitution has been shaped by [lawyer’s] instincts and intellectual habits.”¹⁶

¹² An interesting question arises as to whether the Preamble to the Bill of Rights is actually a part of the Constitution or not. The Preamble was sent to the states with the proposed amendments, but whether the states, in ratifying those amendments, ratified the Preamble to them is a more complicated question and not only because not all of the original amendments were ratified. In any event, most copies of the Constitution and the Bill of Rights do not include the Preamble to the Bill of Rights. *But see* LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008) (reproducing the Preamble to the Bill of Rights in full, a notable exception).

¹³ PEOPLING, *supra* note 1, at 1–32.

¹⁴ *Preliminaries*, *supra* note 1, at 41–69.

¹⁵ *See* EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1938); ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

¹⁶ *Preliminaries*, *supra* note 1, at 41–69.

The Civic Constitution, in contrast, emphasizes the Constitution's identity as a political text. Civic constitutionalism embraces a very different understanding about what the constitutional enterprise means, about what it entails, and about how to maintain it over time than does the more commonly understood Juridic Constitution. The Civic Constitution does not reduce to or find its primary expression through law. Instead, its identity is found in politics. The Civic Constitution anticipates a community in which constitutional questions are, first, matters of publicly debatable civic aspirations to practice a constitutional way of life. Its purposes are to establish a community—a civic culture—that prizes questions about the fundamental principles and purposes of shared social life. These principles include, among others, the meaning of liberty, equality, and justice. Under the Civic Constitution, discussion about the “basic organizing” principles of constitutional life are therefore as much—and likely more—questions about politics as they are about legal reasoning. It requires that we consider that the juridic understanding of the Constitution is insufficient to the achievement of a constitutional way of life.¹⁷

Implicit in Juridic and Civic constitutionalism are two very different conceptions of constitutional maintenance and to whom it should be entrusted. The juridic conception embodies a particular and narrow conception of what the project of constitutional maintenance comprehends (preserving the law) and to whom it is assigned (judges). The civic conception of constitutional maintenance, in contrast, relies heavily on a robust understanding of civic duty and citizenship as well as an ambitious and deeply democratic project of civic education in the principles and commitments central to a constitutional way of life. The Civic Constitution assigns a broader, more expansive purpose to the text than simply subjecting the state to higher law, and consequently it asks more of citizens in realizing that purpose.

We do not always appreciate that these different conceptions of constitutional authority and identity influence not only how we read the Constitution but also what parts of the Constitution we read and, indeed, whether we read them at all. Put more directly, our common understanding of the Constitution as essentially a creation and instrument of law, composed of powers, rights, and liberties enforced primarily by judges, has caused us

¹⁷ The material in this paragraph is adapted from PEOPLING, *supra* note 1, at 1–32.

not only to misapprehend the significance of the Great Preamble but also to ignore the other preambles in the Constitution. The purposes and significance we assign to these preambles depend in large measure on what kind of thing we think the Constitution is.

I. PREAMBULAR PROVISIONS AS CLAIMS ABOUT CONSTITUTIONAL AUTHORITY

My claim that preambles are important because they contribute to our understanding of the Constitution—of what kind of thing it is and what it tells us about our constitutional selves—should seem unexceptional. As Mark Tushnet has noted, “[P]reambles to constitutions are exceptionally informative in conveying the underlying meaning of the collective enterprise that is the constitution.”¹⁸

As is well known, however, the Great Preamble’s part in establishing constitutional meaning, especially for judges, is more symbolic than substantive, more rhetorical than real. If judges have not reduced it to “a steaming chunk of rhetoric,”¹⁹ the Great Preamble nonetheless is of no consequence in contemporary constitutional litigation. Joseph Story’s assessment, alluded to above, captures the general rule: a preamble “expounds the nature and extent” of the powers “actually conferred by the constitution” but it does not “create them.”²⁰ On this reading, a preamble creates no substantive powers and no substantive liberties, but it may be used to discern the purposes and objects of the Constitution broadly.²¹ This is the

¹⁸ GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 12 (2010).

¹⁹ WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 209 (2007).

²⁰ David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 *UCLA L. REV.* 1295, 1296 (2009).

²¹ Or, as Eugene Volokh concludes:

What then does the justification clause mean? It might have a political and educational goal--stressing to the public and government officials the connection between an armed citizenry and freedom, just as other provisions may aim to persuade people about the desirability of “a more perfect Union” or the virtue of local trials or the importance of the liberty of the press. But we still properly expect the clause, like all constitutional provisions, to have some legal meaning. To borrow from *United States v. Miller*, the only 20th-century Supreme Court case that deals with the Second Amendment at any length, it seems reasonable to say: “With obvious purpose to assure the continuation and render possible the effectiveness of [the Militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end

position adopted by Chester Antieau, who concludes in his well-known book, *Constitutional Construction*, that “[t]he Preamble . . . illuminates the objects of the Framers and, thus, can be a guide to construction, but it is not considered to confer powers or rights.”²² Judicial treatments of the Constitution’s other preambles confirms their general irrelevance in constitutional interpretation.²³

Embedded in these sorts of treatments are two claims about the meaning of preambles in constitutional design and maintenance. The first is that a preamble has little significance when judges take up the business of constitutional interpretation. The paradigmatic example of this position is Justice Harlan’s opinion for the Court in *Jacobson v. Massachusetts*,²⁴ where he observed:

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 such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble,

in view.” I believe the justification clause may aid construction of the operative clause but may not trump the meaning of the operative clause: To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can’t take away what the operative clause provides. And because we know that operative clauses may be at times broader and at times narrower than justification clauses, we should accept that the two clauses will sometimes point in different directions.

Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998).

²² CHESTER JAMES ANTIEAU, *CONSTITUTIONAL CONSTRUCTION* 31 (1982).

²³ See generally Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990); but see *District of Columbia v. Heller*, 550 U.S. 570 (2008).

²⁴ 197 U.S. 11 (1905).

it be found in some express delegation of power or in some power to be properly implied therefrom.²⁵

The second assumption, a fair but not strictly a necessary consequence of the first one, is that any significance the Great Preamble *does* have is merely exhortatory, subordinate, and secondary to the Constitution's meaning and enforcement: the project of constitutional maintenance.

Like the Great Preamble, the Preamble to the Bill of Rights declares an overarching purpose to achieve the “beneficent ends” of the constitutional enterprise, which is equally insignificant to the Juridic Constitution.²⁶ Read through a juridic lens, the Preamble to the Bill of Rights has little significance because it creates no substantive rights and has little to say about how any of the provisions of the Bill of Rights should be approached as rights claims.²⁷ A juridic reading of the constitutional text thus has no use for the Preamble to the Bill of Rights because it offers little of interpretive significance for how judges make sense of the individual provisions of the Bill of Rights in the process of constitutional litigation over their meaning and enforcement. Put another way, when read juridically the provisions of the Bill of Rights require no reference to the Preamble to the Bill of Rights because the Preamble to the Bill of Rights has no significant bearing on what the individual provisions of the Bill of Rights mean or how judges should enforce them.²⁸ Its peripherality

²⁵ *Id.* at 13.

²⁶ Volokh, *supra* note 21, at 807. Eugene Volokh has argued that many preambular provisions (although his focus is on the preambular language of the Second Amendment, a key part of Volokh's claim is that justification clauses were a commonplace of state constitutional design) include both justification and operative clauses—the former, he suggests, often create “political and educational goal[s].” *Id.* Such provisions “may aim to persuade people about the desirability of ‘a more perfect Union’” *Id.* These ends, standing alone, create no rights and impose no substantive limitations on the exercise of state power. In Volokh's view, however, “we still properly expect the clause, like all constitutional provisions, to have some legal meaning.” *Id.* My point, in contrast, is that its legal meaning does not exhaust or preclude other meanings, or even necessarily trump them.

²⁷ This is also true, one might note, of a civic reading of the Preamble to the Bill of Rights. This misses the point, however. The purpose of the Preamble to the Bill of Rights, read civically, is not to provide specific instructions to judges or very particular guidance about the meaning of the individual provisions of the Bill of Rights as enforceable rights claims. On the other hand, it is not completely irrelevant to an inquiry into what individual provisions might mean in litigation, as I suggest below concerning both the First and Second Amendments. *See infra* pp. 36–40 and notes 124–37 and accompanying text.

²⁸ The Ninth and Tenth Amendments might be the exceptions to the general rule that the Preamble to the Bill of Rights is irrelevant to how judges interpret the individual provisions

to a juridic reading of the Bill of Rights is one of the primary explanations for the obscurity of the Preamble to the Bill of Rights.

A juridic reading of the Bill of Rights assumes the correct, proper, and best way to read it is one that emphasizes its character as a limitation on powers through the device of rights that can be secured against the state through litigation, or as “a legalistic set of protected rights.”²⁹ Hence, the primary significance of the individual provisions of the Bill of Rights is that they may be enforced against the state in courts; therefore, they take on meaning through the practice of constitutional litigation. This point is of special significance: my claim is not only that the individual provisions of the Bill of Rights take on meaning through constitutional litigation, but rather, more specifically, that these provisions acquire a particular sort of legal meaning and simultaneously fail to take on other sorts of meanings, meanings that have a civic purpose and civic function.

A juridic reading of the Bill of Rights therefore emphasizes its character as judicially enforceable limitations on states rather than as civic educative statements about the body politic. This has two consequences: first, it means that the meaning of specific provisions in the Bill of Rights is determined by questions that speak to the problems of constitutional interpretation by judges and not, more expansively, as civic commitments and responsibilities. (For a good example, see my discussion in *Peopling the Constitution* about civic versus legal readings of Section 5 of the Fourteenth Amendment.) Second, and related, it means that it is judges who read the Bill of Rights and not citizens who hold little, if any, responsibility for their realization or enforcement. A juridic reading of the Bill of Rights embodies a particular and unique incentive structure: it simultaneously establishes incentives for judges to read the text and disincentives for citizens to do so. These disincentives trace from a kind of aphanisis, or what Tushnet calls the “overhang effect” of judicial supremacy,³⁰ in which the tendency of judges

of the Bill of Rights. I’ll say more about this below, but for now I would note that it is much more difficult to read either provision as establishing an individual rights claim.

²⁹ Donald S. Lutz, *Political Participation in Eighteenth-Century America*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 31 (Paul Finkelman & Stephen E. Gottlieb eds., 1991). As Amar observes, “We think the Bill of Rights is about individual rights, not majority rights.” Akhil Reed Amar, *Some Comments on “The Bill of Rights as a Constitution,”* 15 HARV. J.L. & PUB. POL’Y 99, 100 (1992) [hereinafter *Comments*].

³⁰ Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009). See also PEOPLING, *supra* note 1, at 133–34 (discussing interpretive aphanisis).

to assume responsibility for the constitutional text dissuades other constitutional actors from doing so. But the cause of civic neglect is larger and more comprehensive than a system of judicial review that installs a particular kind of judicial supremacy. It is instead a direct consequence of the Juridic Constitution itself, which significantly undermines the civic components of the constitutional enterprise by further distancing citizens from the constitutional project. In doing so, the Juridic Constitution trivializes the Bill of Rights as an instrument of civic education by advancing an understanding of the Constitution that emphasizes its legal character at the expense of its civic ambitions.³¹

This conventional reading of the Bill of Rights is “discontinuous” with an understanding of the Bill of Rights as fundamentally instructional. But Amar writes that:

[I]f we look carefully at the Bill of Rights, we will see it as much less discontinuous with the original Constitution than most of us have been led to believe. Most of us tend to embrace the conventional reading that the Bill of Rights is fundamentally, paradigmatically, not about structure—that is, not about things like federalism, bicameralism, representation, and constitutional amendment. Most of us also think that the Bill of Rights is not about majoritarianism.... We think the Bill of Rights is about individual rights, not majority rights. I think that is wrong. The essence of the Bill of Rights and the essence of the Constitution are profoundly populist, democratic, majoritarian, and structural.³²

³¹ This juridic (and, in some ways ironically Jeffersonian insofar as Jefferson opined that one of the benefits of a Bill of Rights may be their application by judges) reading of the Bill of Rights deprives it of its real significance for constitutional maintenance as a “political creed.” *Letter from Thomas Jefferson to Joseph Priestley, 19 June 1802*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-37-02-0515> (last visited Mar. 4, 2017). But these two purposes are not mutually exclusive, even if disharmonic. See my discussion of Jefferson’s appeal to the community concerning the Alien and Sedition Acts. *See infra* p. 14 and notes 39–41; *see also* PEOPLING, *supra* note 1, at 2–4; *see generally* JACOBSON, *supra* note 18 (discussing the harmonic and disharmonic components of constitutional identities).

³² *Comments, supra* note 29, at 100.

Amar concludes that we should approach the Bill of Rights as a program of “popular education”: an idea that “resurfaces over and over in the Bill of Rights.”³³

II. THE CONSTITUTION AS A TEXT OF CIVIC INSTRUCTION

How should we read the Bill of Rights, if not as a set of legal prescriptions directed to judges? The Bill of Rights is both an instrument and evidence of the Constitution’s civic character. From the perspective of civic constitutionalism, the constitutional text is not just a collection of legal rules to be applied by judges; it is also an important part of the civic educational enterprise. Consequently, the civic educative part of the constitutional order extends to how we read and understand the text itself—as a text of civic instruction. The Preamble to the Bill of Rights is a piece of this fundamentally civic understanding of the constitutional order. Approached through the lens of civic constitutionalism, the Preamble to the Bill of Rights tells us to read the Bill of Rights as an ambitious program of civic education in the key tenets of the constitutional project.³⁴

As Rousseau counseled in *The Government of Poland*, a chief component of constitutional design must be how to facilitate the civic literacy of citizens of new regimes.³⁵ Highlighting this question has a profound effect on how we understand the constitutional order generally. The question of how we can create a constitutionally literate citizenry is a long and venerable one in constitutional theory. Sadly, it is not a question that much concerns contemporary constitutional theorists, who are instead often preoccupied with arcane disputes about the methodology of constitutional interpretation by judges.

It is easy to forget, especially in the shadow of the Juridic Constitution, that one of the most important functions of constitutional *texts qua texts* is to promote this very literacy. The civic import of preambles, if lost or irrelevant to most twenty-first century judges, was thoroughly apparent at the founding. As Konig writes, “the opening paragraphs of the

³³ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991) [hereinafter *Bill of Rights as Constitution*].

³⁴ PEOPLING, *supra* note 1; *see also Preliminaries*, *supra* note 1, at 41–69.

³⁵ JEAN JACQUES ROUSSEAU, *THE GOVERNMENT OF POLAND* (Willmoore Kendall trans., Hackett Publ’g Co. 1985) (1782).

new state constitutions” in which framers “proclaimed what appear to twenty-first century eyes to be idealistic but unenforceable principles and rights” are “among the most misunderstood and unappreciated features of the republicanism of the revolution.”³⁶ Breslin has likewise observed that preambles reflect a view of “the public text as a considerable force in resisting the rise of tyranny” or as reflecting faith in the text “as a public pronouncement.”³⁷ On this view, a preamble “serves important civic lessons,” in part by teaching us about the past and by serving as “constant reminders[] of our constitutional ambitions and principles.”³⁸ It is easier to appreciate the civic import of these provisions when we recall too that in the colonial era, “our modern notion of a judiciary that might review and void statutory law existed only in incipient form.”³⁹ David Thomas Konig notes, “[B]ecause these provisions were not judicially enforceable, it is easy to dismiss them as mere verbiage.”⁴⁰ Preambles were meant not to create judicially enforceable rights but rather “to rouse the citizenry to their exercise of republican citizenship.”⁴¹ Thus, “Our Constitution was self-consciously written down to teach successive generations of Americans about their rights and responsibilities, about the Blessings of Liberty.”⁴²

Preambular provisions in constitutional texts are important, if not critical, elements in these initiatives of civic education, often explaining elemental precepts of constitutional governance in general and ambitious terms. In addition, they include higher-order instructions about how to read the constitutional text of which they are a part. Read as calls to civic life and engagement, preambles help to install and reinforce a civic culture of constitutionalism.

Both Jefferson and Madison anticipated that civic education would play an important, if not critical, role in constitutional maintenance.⁴³ In Jefferson’s words, “[W]ritten constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful

³⁶ Konig, *supra* note 20, at 1318.

³⁷ BRESLIN, *supra* note 2, at 55.

³⁸ *Id.* at 52.

³⁹ Konig, *supra* note 20, at 1318.

⁴⁰ *Id.*

⁴¹ *Id.* at 1319.

⁴² Akhil Reed Amar, *The Bill of Rights and Our Posterity*, 42 CLEV. ST. L. REV. 573, 573 (1994) [hereinafter *Posterity*].

⁴³ See GEORGE THOMAS, *THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY: CONSTITUTING THE AMERICAN MIND* (2015).

may again rally and recall the people; they fix too for the people the principles of their political creed.”⁴⁴ On this reasoning:

The words of the Bill of Rights would themselves educate Americans; hence the appropriateness of didactic, nonlegalistic phrases such as “a well regulated Militia is necessary to the security of a free State.” Such maxims were the heart and soul of early state constitutions. Virginia’s famous 1776 Declaration of Rights even featured a maxim about the need for maxims! “No free government, or the blessings of liberty, can be preserved to any people, but by . . . virtue, and by frequent recurrence to fundamental principles.”⁴⁵

As a summary of those fundamental principles, a Bill of Rights “will be the first lesson of the young citizens.”⁴⁶ As Amar notes:

Patrick Henry and John Marshall agreed on very little in the Virginia ratifying convention, but when Henry declared that “there are certain maxims by which every wise and enlightened people will regulate their conduct,” Marshall went out of his way to agree that such maxims “are necessary in any government, but more essential to a democracy than to any other.”⁴⁷

Madison likewise alluded to the civic educational aspects of the Bill of Rights when, finally persuaded to draft a bill of rights, he wrote that “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of a free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”⁴⁸ In Colleen Sheehan’s words, “Over time, a bill of rights acts

⁴⁴ *Letter from Thomas Jefferson to Joseph Priestley, 19 June 1802, supra* note 31.

⁴⁵ *Bill of Rights as Constitution, supra* note 33, at 1208.

⁴⁶ *Id.* (quoting HOW DOES THE CONSTITUTION SECURE RIGHTS? 31 (Robert A. Goldwin & William A. Schambra eds., 1985)).

⁴⁷ *Bill of Rights as Constitution, supra* note 33, at 1209 (quoting 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 137, 223 (Jonathan Elliot ed., 1888)).

⁴⁸ As Elkin has concluded, for Madison: “[H]ow best to secure fundamental rights—surely one of the broad purposes of republican government and thus essential to understanding how to design it—is not a task for legal reason.” STEPHEN L. ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON

as a kind of republican schoolmaster, serving as a civic lexicon by which the people teach themselves the grammar and meaning of freedom.”⁴⁹ Another well-known quote by Madison makes a similar point:

What use then it may be asked can a bill of rights serve in popular Governments? . . . 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. [Whenever] usurped acts of the Government [occur], a bill of rights will be a good ground for an appeal to the sense of the community.⁵⁰

This is an important point in establishing civic literacy in citizens. By elaborating upon and making public the criteria for constitutional success, the Preamble to the Bill of Rights educates citizens into the meaning of constitutional precepts *and* gives them tools for the task of assessment it assigns to them. Ultimately, it provides the skills and information necessary for citizens to assume their constitutional responsibility to tend to the constitutional project.⁵¹

Importantly, the Preamble to the Bill of Rights and the Bill of Rights also go some way to defining what success—and failure—mean in constitutional terms. The Preamble to the Bill of Rights implicitly defines constitutional success (and likewise, constitutional failure) in terms of ends: discernible progress toward the achievements specified as desirable in the Preamble. The beneficent ends referenced by the Preamble to the Bill of Rights are the ends set forth in the Great Preamble. As judges frequently remark, the ends identified by the Great Preamble—to form a more perfect union, establish justice, insure domestic tranquility, provide for the common

100 (2006). Instead, “[i]t is ‘political law,’ not ‘ordinary law,’ and as such it must be interpreted by the various political organs that it calls into being, not just courts.” *Id.* at 99.

⁴⁹ COLLEEN A. SHEEHAN, *JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT* 108 (2009).

⁵⁰ *Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)*, in *THE PAPERS OF JAMES MADISON: VOLUME 11*, at 298–99 (Robert A. Rutland & Charles F. Hobson eds., 1977); see also *Bill of Rights as Constitution*, *supra* note 33, at 1209 (noting as further evidence of the civic character of constitutional maintenance that such appeals are to the community).

⁵¹ *PEOPLING* *supra* note 1, at 25–27. I use the word “tend” in a particular way here, as showing solicitude for the constitutional project.

defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity—are difficult to comprehend as individual rights that can be pressed in courts. They are programmatic ends, statements about desirable states of being, that have the character of political ambitions more than legal rules and whose meaning is necessarily subject to reasonable disagreement by all members of the community. Their realization, in other words, is beyond the ken of judicial actors.⁵²

Equally significant, progress towards the achievement of these constitutional ends cannot be settled by any metric located in law or utilized by courts.⁵³ Assessments of constitutional success and failure require an exercise of judgment: “Success and failures are not absolute states, but are instead matters of judgment, in part because the terms are political constructs, not bright-line legal tests, and in part because success does not require perfection.”⁵⁴ “Except in truly rare instances, whether we have succeeded or failed in achieving a constitutional way of life will involve crude and tentative assessments based on ambiguous evidence.”⁵⁵ Again, these kinds of assessments are truly and in the largest sense political questions, insusceptible of judicial resolution. Their resolution requires an exercise of political and civic judgment, not the application of legal rules; indeed, our courts have had little use for either Preamble for precisely this reason.⁵⁶

Conceived in this light, the purpose of the Bill of Rights is not simply to impose judicially enforceable limits on government but also to remind

⁵² LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004). Sager’s under-enforcement thesis holds that some principles of political justice, to which the Constitution is committed in abstract, “are wrapped in complex choices of strategy and responsibility that are properly the responsibility of popular political institutions.” *Id.* at 87.

⁵³ See generally JACOBSON, *supra* note 18, at 147–48 (2010) (discussing the Directive Principles of Social Policy in the Irish Constitution or the Directives of State Policy identified in Article 4 of the Indian Constitution); PEOPLING, *supra* note 1, at 45.

⁵⁴ PEOPLING, *supra* note 1, at 176.

A related difficulty goes directly to the meaning and measurement of failure: How would we know if we have failed? How do we distinguish between constitutional inadequacies, defects, imperfections, deficiencies, flaws, blemishes, shortcomings—and constitutional failures? What would constitute evidence of failure? Where would we find evidence of it? How much evidence is necessary to substantiate the proposition?

Id.; see also Keith E. Whittington, *Yet Another Constitutional Crisis*, 43 WM. & MARY L. REV. 2093, 2111 (2002).

⁵⁵ PEOPLING, *supra* note 1, at 176.

⁵⁶ *Id.* at 41.

governed and governor alike about the importance of constitutional literacy for the durability of the new constitutional order. Hemberger notes: “[A]nti-federalists demanded a Bill of Rights because they wanted Americans to have a shared understanding of the appropriate limits of governmental power.”⁵⁷ Hence, “[t]o identify when the national government had exceeded the bounds of its legitimate authority, citizens needed a ‘plain, strong, and accurate criterion’ and a ‘permanent landmark.’”⁵⁸ And Amar notes too, that “Madison had pointed to the importance of ‘public opinion’ in making the Bill of Rights more than a mere ‘paper barrier.’”⁵⁹

To reiterate: a juridic understanding of the Constitution and of the Bill of Rights in particular, as legal limitations on state power (a reading greatly facilitated by the incorporation doctrine⁶⁰), has little use for the Preamble to the Bill of Rights. On the other hand, a civic constitutionalist reading of the Constitution and of the Bill of Rights gives both meaning and purpose to the Preamble to the Bill of Rights. It reveals the Bill of Rights as part of a civic constitutionalist strategy for advancing the project of constitutional maintenance, conceived as a significantly more expansive and ambitious undertaking than constitutional interpretation by judges. Civic constitutionalism requires that we recalibrate how we think about the Bill of Rights, less in terms of individual rights and more in terms of creating and maintaining a shared civic identity, or as an ambitious program of civic education.

A close reading of the Preamble to the Bill of Rights reveals four parts that look different when read civically rather than juridically. The Preamble to the Bill of Rights announces that it has two objectives: “to prevent misconstruction or abuse” of the Constitution’s grant of powers, and to extend “public confidence in the Government” by seeking to “ensure the beneficent ends of” government. To those ends, it proposes “declaratory” and “restrictive” clauses “in addition to, and amendment of” the constitutional text. None of these claims is as self-evident or as uncomplicated as it might seem.

⁵⁷ Hemberger, *supra* note 9, at 148.

⁵⁸ *Id.* (citing specific speeches by anti-Federalists).

⁵⁹ *Bill of Rights as Constitution*, *supra* note 33, at 1207.

⁶⁰ *See generally Bill of Rights as a Constitution*, *supra* note 33 (explaining that the incorporation doctrine can be read juridically as a limitation on state power).

A. “*Misconstruction or Abuse*”

Like the other civic-oriented provisions of the constitutional document, the Preamble to the Bill of Rights is a “statement about the Constitution in its entirety.”⁶¹ Somewhat unusually for a preamble, the Preamble to the Bill of Rights simultaneously looks backward, in the sense of instructing readers how to read the material that precedes it (Articles I–VII), and forward, in the sense of instructing readers how to read what follows it (Amendments I–X).⁶² The Preamble to the Bill of Rights begins by announcing a desire on the part of some states to “prevent misconstruction or abuse” of the powers delegated by the Constitution to the new national government. The narrower reading this elicits recalls the jealousy and fears of state governments, and of citizens, of an avaricious national government that would be disinclined to respect the limits of its powers. It thus instructs readers to adopt a reading of Articles I through VII that guards against overly capacious understandings about the reach of federal power. In other words, the Preamble to the Bill of Rights advances a general rule of constitutional construction;⁶³ grants of authority to the central government should be construed in ways that account for two other constitutional imperatives—respect for the states as sovereign political communities (a rule regarding federalism), and respect for individual liberty (a rule regarding rights). The Preamble to the Bill of Rights also tells citizens how to read the individual provisions of the Bill of Rights that follow it. It tells us these provisions are likewise geared to the prevention of misconstruction and abuse of power, and in doing so it tells us something about both the proper objects of federal power and the limited reach of those powers.⁶⁴

⁶¹ Edward L. Rubin, *How Statutes Interpret the Constitution*, 120 YALE L.J. 297, 305 (2011).

⁶² The structure of this reading is similar to how Maryland proposed we should read the necessary and proper clause in *McCulloch* in the sense that Maryland wanted to read the clause as modifying/restricting the entire catalogue of powers that preceded it textually. *McCulloch v. Maryland*, 17 U.S. 316 (1819); see also Burt Neuborne, “*The House was Quiet and the World was Calm the Reader Became the Book*” - *Reading the Bill of Rights as a Poem*, 57 VAND. L. REV. 2007 (2004) (reading the Bill of Rights as a single text, rather than serially).

⁶³ See KEITH E. WHITTINGTON, *YET ANOTHER CONSTITUTIONAL CRISIS: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (2001) (distinguishing constitutional construction from constitutional interpretation).

⁶⁴ See *infra* pp. 31–32.

The Preamble to the Bill of Rights is more concerned with the integrity of the constitutional project. It speaks simultaneously to the object of constitutional maintenance, conceived as preserving limitations on power, and to the mechanisms of maintenance (civic knowledge). It imagines that the mechanisms for maintaining the Constitution must include public knowledge of, and responsibility for enforcing, these limits. Both are evidence of a concern with the temporality of constitutional maintenance, or a concern about maintaining the Constitution through time, in a way consistent with its essential aims and the possibility that doing so will be corrupted by human ambition unless checked by a vigilant citizenry.

In announcing a purpose to prevent “misconstruction or abuse” of the Constitution’s grants of power, the Preamble to the Bill of Rights provides a set of interpretive instructions, presumably from governed to governors, about how to read the text.⁶⁵ I say “presumably” to highlight an open question—one that goes directly to part of what is at stake in adopting a juridic or civic reading of the Preamble to the Bill of Rights: are these instructions directed to judges or to citizens? The way we write a text, especially a constitutional text, is greatly influenced by who we think its readers will be. When we call a text into being we simultaneously call into being its readers.⁶⁶ Constitutions, like all texts, envision (or create) a particular relationship between author and reader, one in which the text interacts with, “instructs,” “directs,” or “controls” the reader in certain sorts of ways and on specific terms.⁶⁷ It is important to note as well that this process is simultaneously one of inclusion and exclusion. A juridic reading of the constitutional text assumes that its primary audience will be judges. It assumes, in other words, a particular understanding about what sort of an activity constitutional maintenance is (legal) and to whom it should be entrusted (judges and lawyers). It is a conception of constitutional maintenance that makes little provision for constitutional literacy in its

⁶⁵ It also reflects another fundamental assumption about the effort to construct a constitutional community through a written text—that there are correct and incorrect readings about what the text requires or forbids or, at a minimum, better and worse interpretations of textual commands.

⁶⁶ UMBERTO ECO ET AL., *INTERPRETATION AND OVERINTERPRETATION* 45–88 (Stefan Collini ed., 1992).

⁶⁷ Andrea K. Newlyn, *Redefining ‘Rudimentary’ Narrative: Women’s Nineteenth-Century Manuscript Cookbooks*, in *THE RECIPE READER: NARRATIVES – CONTEXTS – TRADITIONS* 12–31 (Janet Floyd & Laurel Forster eds., 2003).

citizens and indeed constructs barriers of education and expertise that serve as powerful disincentives for citizens to assume responsibility for tending to the Constitution.⁶⁸

But the language of “misconstruction” or “abuse” is better apprehended as a statement about the Civic Constitution, i.e., as a broad and expansive instruction to a robust and engaged citizenry about the meaning of the Constitution and the nature, sources, and limits of governmental power. Moreover, the language implicitly assumes that the power to adjudge misconstructions and abuses of grants of power to the national government is lodged in the people, a civic enterprise as much as a legal one. So, in addition to telling us *how* to read the Bill of Rights, a civic reading of the Preamble to the Bill of Rights tells us who its readers are, or *who* they should be.

What evidence do we have for this claim? First, the terms “misconstruction” and “abuse” evoke assessments grounded in judgment, uncertainty, and nuance rather than the precise and certain application of legal rules that yield dichotomous results.⁶⁹ We may say, for instance, that a judge has *misinterpreted* a statute or a specific constitutional provision, but when we *misconstrue*, we reference a different and less straightforward sort of claim. To misconstrue typically has two senses—the broader one I describe here—and a narrower one typically associated with the language of grammatical error. If the narrower reading seems to capture the character of legality, if not legalism, the larger one suggests a broader metric. And given the construction of the phrasing that couples the term “misconstruction” with “abuse,” the larger meaning should be preferred. The term “abuse” covers even more ground, referring, for example, to “[d]eparture from reasonable use; immoderate or improper use.”⁷⁰ The language of reasonableness, of immoderation and impropriety, educes a civic calculation more than a legal one especially since, as I explain further below, its referents (the individual provisions of the Bill of Rights) should be approached as political ambitions as well as enforceable rights.

⁶⁸ PEOPLING, *supra* note 1, at 38–42.

⁶⁹ See Wayne D. Moore, *Constitutional Citizenship*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE, *supra* note 1 (discussing the concept of dichotomy in constitutional reasoning).

⁷⁰ *Abuse*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/abuser> (last visited Mar. 4, 2017).

Second, my claim about the civic meaning of the Bill of Rights is supported by the circumstances surrounding the drafting of the Preamble to the Bill of Rights. In the earliest versions, Madison proposed a revision to the opening preamble, so that it would read:

First. That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.⁷¹

This new text, in Madison's plan, would immediately precede the well-known phrase "We the People" in the Great Preamble.⁷² This matters because, located here, it would be coupled with other broad statements of aspiration and civic ambition; it would take on a similar republican and instructional character. In other words, its location in the Great Preamble speaks to its civic purpose.⁷³ Similarly, most of the individual amendments were first proposed as amendments to Article I, Section 9, i.e., as discrete and individual limits on congressional power. David Currie suggests, "The decision to propose the amendments as separate articles, while hotly controverted, was based on stylistic rather than substantive considerations."⁷⁴ In some ways Currie's description misses the point: removing them and collecting them together facilitates their civic purpose by making them a

⁷¹ HERMAN VANDENBURG AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 185 (1897).

⁷² JAMES MADISON: *WRITINGS*, *supra*, note 10, at 441.

⁷³ See Destro, *supra* note 10, at 381 n.22 (discussing the legislative history of the Preamble of the Bill of Rights).

⁷⁴ Currie, *supra* note 10, at 856. Amar likewise agrees, "There is no evidence that this change was anything but aesthetic." AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 143 (1998) [hereinafter *CREATION AND RECONSTRUCTION*]. Amar further agrees that the change was more than simply aesthetic, however, noting that "[n]evertheless, the change had the unhappy effect of blurring the implicit rule of construction at work" (i.e., of limiting the application of the Bill of Rights to the federal government). *Id.*

single, memorable text, one that invites and is amenable to recitation and repetition by citizens as a civic creed. The stylistic change was necessary to advance a substantive purpose. As Amar observes, “[A] bill of rights was written to be memorized and internalized by ordinary citizens.”⁷⁵

Finally, it is worth noting that each of the three paragraphs in the Preamble to the Bill of Rights makes explicit reference to the People in their civic, sovereign, and collective capacity. By invoking the sovereign “people” in each referenced paragraph, it assumes that a final power of judgment about whether such powers have been misconstrued or abused rests in the sovereign citizenry. Each paragraph reads more as a political maxim, or as an expansive claim about the nature and purposes of constitutional government as a way of organizing political community, than as a legal rule. Amar has described this sentiment as “populist” in character, but the better word is civic, which implies and emphasizes our collective responsibility as citizens for superintending the constitutional project.

B. *“Public Confidence and Beneficent Ends”*

That the power to adjudge misconstructions and abuses is as much civic as juridical in character is further illustrated by the Preamble to the Bill of Rights’s several audiences. One audience for the Preamble to the Bill of Rights is Congress itself, as illuminated by Madison in introducing the Bill of Rights to Congress:

I appeal to those gentlemen who have heard the voice of their country, to those who have attended the debates of the State conventions, whether the amendments now proposed are not those most strenuously required by the opponents of the constitution? It was wished that some security should be given for those great and essential rights which they have been taught to believe were in danger Have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy? That they ought not to adopt the constitution until these important rights were secured to them?⁷⁶

⁷⁵ CREATION AND RECONSTRUCTION, *supra* note 74, at 131.

⁷⁶ KENNETH SHEAR, UNORIGINAL MISUNDERSTANDING 90 (Alice Porter ed., 2009) (quoting ANNALS OF CONGRESS 746 (1789)).

Madison’s appeal to his fellow representatives explicitly references the public’s concerns about the new constitutional order, strongly suggesting that the purpose of the Bill of Rights is to address those concerns and in so doing to help cement civic fidelity to that order.

Another audience was the states. As Kenneth Shear observes, “Congress acknowledged that the purpose of the Bill of Rights was to address the recommendations of states”⁷⁷ Calls for a Bill of Rights, at least as described by some Federalists, were located in a “spirit of jealousy”⁷⁸ and centered, understandably, on concerns about the relative sovereignties and competencies of the federal government and of state governments. On this reading, the primary purpose of the Bill of Rights was to reassure the states of the importance and inviolability of limits on federal power. As a strategy for limiting federal power—or for preserving state autonomy—this is a device that leans heavily on the fact that limits on federal power are transparent and public, easily referenced by citizens and not, contra Hamilton, in the complexities of constitutional theory or architecture.⁷⁹

Nevertheless, the aim of establishing “public confidence” tells us the primary audience for the Preamble to the Bill of Rights is not Congress or the states but citizens—thus reinforcing Jefferson’s description of the Bill of Rights as civic educative and preceptorial.⁸⁰ This is evident when the Preamble to the Bill of Rights speaks of “extending the ground of public confidence in the Government” by ensuring “the beneficent ends of its institution.” Public confidence in the constitutional project is best secured, on this logic, by making it more likely than not that we will realize our collective aims (those identified by the Great Preamble), achieving a more perfect union. The chief purpose of the Bill of Rights, then, is to advance the success of the constitutional project by helping us to achieve its beneficent ends, and those ends are best secured by making them public and by so doing educating the people about their significance. The unspoken assumption (shared by both

⁷⁷ *Id.*

⁷⁸ One source of the quote is: Alexander Hamilton, On the Adoption of the Constitution at the New York Constitutional convention (June 24, 1788). Another usage is in *Commonwealth v. Dallas*, 4 U.S. 229, 230 (Pa. 1801).

⁷⁹ ALEXANDER HAMILTON, THE FEDERALIST NO. 84 (1788). Madison’s view was more complicated. See SHEEHAN, *supra* note 49, at 108; THOMAS, *supra* note 43, at 100.

⁸⁰ SHEAR, *supra* note 76, at 198 (noting that “[t]he preamble mentions too that the purpose of the Bill of Rights included ‘extending the ground of public confidence in the Government’”).

Federalists and anti-Federalists), in other words, is that the best guarantee of constitutional success is a vigilant, informed, and responsible citizenry.

This last point is too often overlooked in studies of constitutional government in general and of constitutional maintenance in particular. It is much easier to maintain the constitutional enterprise, and equally to secure civic confidence in the desirability and durability of constitutional government, if the project can plausibly claim some measure of success in realizing constitutional ends, or some measure of success in actually achieving a constitutional way of life.⁸¹ So, the Preamble to the Bill of Rights identifies constitutional success as an important element of civic maintenance because success helps to establish and sustain civic fidelity to a constitutional way of life.

The Preamble to the Bill of Rights tells us that one of the purposes of the Bill of Rights is to advance public confidence in the prospect of achieving the ends identified in the Great Preamble and to give the people themselves a significant measure of responsibility for realizing them. Taking the Preamble to the Bill of Rights seriously, as the Civic Constitution asks us to do, therefore requires us to think carefully about its relationship to the Great Preamble. Some scholars have detected some tension between the two preambles. As Amar describes it, the discontinuity resides in the Great Preamble's deeply populist sentiments ("We the People" and the related claims of sovereignty) and the apparent individualistic character of the Bill of Rights. As I discuss below, for Amar this inconsistency is misleading because, in his view, the Bill of Rights is less insistently individualistic in nature than is commonly supposed. Instead, understood correctly, it is of a piece with the Great Preamble because both are fundamentally populist in character: "The Bill of Rights is not about individual rights and not

⁸¹ *But see* CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (4th ed. 1950) (comparing the post-World War Two literature on constitutional reconstruction). Barber's definition of constitutional success is similar in many ways; it includes, for example, establishing a regime characterized by a "healthy politics." Sotirios A. Barber, *Constitutional Failure: Ultimately Attitudinal*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 14 (Jeffrey K. Tulis & Stephen Macedo eds., 2015). He argues further that constitutional success depends ultimately on a stratum of diverse and self-critical citizens, who see each other as moral equals and parts of one national community. *Id.* at 13–28. These citizens, with the politicians among them, would be good-faith contestants regarding the meaning of the common good and the most effective means to secure it. This shows how the success of a constitutional democracy is more a matter of political attitudes than of institutional performance.

discontinuous with the Preamble, but rather consistent with its populist character.”⁸² Amar continues: “Whether you look at the Preamble, with its language ‘We the People of the United States,’ which sounds so populist, or Article VII, the last article of the original Constitution, the essence of the document, I would argue, is fundamentally participatory, democratic, and majoritarian at the most important level.”⁸³ So the apparent inconsistency between the Great Preamble and the Bill of Rights may be reconciled by appealing to a higher level of abstraction (both place some significance on the value of popular participation in governance).⁸⁴ There are also context-specific reasons that weigh in favor of continuity: the two provisions are proximate in time and share the same cast of constitutional actors in their drafting and ratification. Similarly, we might plausibly think the same “We” the people are speaking, in a single voice, albeit at two distinct moments in constitutional time.

Behind the claim that we should read the constitutional document to facilitate its consistency and coherency is the implicit assumption that consistency and coherency are desirable and healthy incidents of constitutional identity. But there are also reasons why we should not assume that what “We” said in the Preamble is consistent with what “We” said in the Preamble to the Bill of Rights. Many of these reasons are grounded in an alternative conception of constitutional identity, one that assumes the project of establishing identity is not confined to or definitively settled at a founding moment, but is instead a continuing part of the constitutional enterprise. These arguments caution us not to presuppose that constitutional identities are necessarily coherent, uniform, and stable, or that identity must cohere around claims, principles, and characteristics that are settled rather than

⁸² *Comments, supra* note 29, at 100.

⁸³ *Id.* at 101.

⁸⁴ Amar’s definition of “declaratory” likewise stresses the compatibility between the Preamble and the Bill of Rights in populist terms:

Thus, our First Amendment’s language of ‘the right of the people to assemble’ simply made explicit at the end of the Constitution what [was] . . . implicit in its opening. (Many other provisions of the Bill of Rights were also understood as declaratory, inserted simply out of an abundance of caution to clarify preexisting constitutional understandings.)

CREATION AND RECONSTRUCTION, *supra* note 74, at 28 (citation omitted).

repeatedly contested and re-negotiated. As Thomas Schelling,⁸⁵ Gary Jacobsohn, and others have argued, it is probably a mistake to overemphasize the harmonic elements of our identity at the expense of its disharmonic elements: both are common, if not indispensable, components of comprehensive constitutional identities.⁸⁶ Additionally, assumptions about consistency and coherency thus appear not to comprehend the Preamble to the Bill of Rights itself as a site or an object of continuing constitutional conflict.

Once we perceive that constitutional identities may have disharmonic elements, it becomes possible to imagine that what “We” said in the Great Preamble (or who we said “We” are) may not be entirely consistent with what “We” said (or who we said “We” are) in the Preamble to the Bill of Rights. For example, we might read the Great Preamble as establishing a national civic identity as well as incorporating an important principle of national citizenship.⁸⁷ But given the context of conditional ratification that surrounded Madison’s introduction of the Bill of Rights in the House of Representatives, we might read the Preamble to the Bill of Rights as an appeal to a conception of our identity that is located in states. On this reading, the Preamble to the Bill of Rights is somewhat at odds with the notion of national citizenship implicit in the Great Preamble.

We should recall that contests concerning our constitutional identity manifest early on and prominently in constitutional debates concerning the drafting of the Great Preamble. At some risk of simplification, it is not too much to claim that these contests resulted in a Preamble in which Federalist understandings about the identity of the collective “We” triumphed. Recall the letters of Brutus, for example, who argued against the Great Preamble precisely because it was hostile to federalism:

⁸⁵ Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 NAT’L AFF. 94, 98 (1980), http://www.nationalaffairs.com/public_interest/detail/the-intimate-contest-for-self-command.

⁸⁶ See JACOBSON, *supra* note 18, at 1–33.

⁸⁷ And that is braced later by the Fourteenth Amendment. One objection to this reading has always been that it sits uncomfortably with the process of ratification prescribed in Article VII and it is partly that inconsistency that Amar reconciles by appealing to a larger principle of populism. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 496 (1994) [hereinafter *Consent of the Governed*].

To discover the spirit of the Constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the Preamble . . . If the end of the government is to be learned from these words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government . . . The courts, therefore, will establish this as a principle in expounding the Constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.⁸⁸

In the Preamble to the Bill of Rights, by way of contrast, we see a reassertion of the anti-Federalist understanding of our constitutional identity. The Preamble to the Bill of Rights reflected the concerns of those who wanted a “guarantee that federal power would not be utilized to preempt important state laws, institutions, and values.”⁸⁹ In other words, part of the civic educational message of the Preamble to the Bill of Rights is the importance of federalism as an enduring and foundational constitutional value just as, perhaps, the civic educational message in the Fourteenth Amendment might be closer to the opposite.

So the civic story⁹⁰ related by the Preamble to the Bill of Rights, in contrast to the Great Preamble, might be about the importance of federalism to our constitutional identity. On this approach, the story of the Preamble to the Bill of Rights about who “We” are is at some odds with the understanding of the collective “We” in the Great Preamble. It reminds us that who we are is an enduring object of constitutional contest.⁹¹

⁸⁸ BRUTUS, ANTI-FEDERALIST PAPERS NO. 11 (1788), <http://www.constitution.org/afp/brutus11.htm>. See Eric M. Axler, Note, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 439–40 n.30 (2000) (“Among other objections to the proposed constitution, Brutus maintained that the spirit of the Constitution, as announced in the Pre-amble, would infringe on the rights of the states . . . Brutus supported this assertion by emphasizing that the Preamble speaks of ‘We the People,’ rather than in terms of the states.”).

⁸⁹ Destro, *supra* note 10, at 381 n.22.

⁹⁰ I take the language of “story” from Breslin’s discussion of preambles as stories in *Worlds*. BRESLIN, *supra* note 2, at 51.

⁹¹ In much the same way, the Reconstruction Amendments likewise remind us that fundamental issues about constitutional identity, in this case, concerning the tension between

The discontinuity between this message and the Great Preamble (and later the Reconstruction Amendments)⁹² may help to explain the relative insignificance of the Preamble to the Bill of Rights to contemporary understandings of the constitutional project. When faced with the prospect of constitutional inconsistencies, many of us assume we must minimize or harmonize them. One way to do so, as Amar has shown us, is to fold more particular conflicts into a higher level of abstraction or to find some point of commonality that undergirds, explains, and subsumes supposed conflicts.⁹³ Another might be simply to deny that there is any conflict or to ignore it by dismissing the Preamble to the Bill of Rights altogether.

But we should resist the temptation to paper over constitutional disharmonies. Disharmonies recognize diverse aspects of our constitutional identity; it is a mistake to assume they were settled conclusively at the first founding (or the second, or the third).⁹⁴ A civic constitutionalist approach to the Constitution reveals that the Great Preamble and the Preamble to the Bill of Rights both seek to constitute the political order around particular sorts of civic lessons.⁹⁵ Behind them rest different understandings about who the

our national and our state selves, is never fully settled—not by the Great Preamble, nor by the Preamble to the Bill of Rights. All involve conflict about the content of the civic educative message that the Constitution itself was meant to convey. Sometimes that conflict manifests at the level of constitutional amendments (as with the Bill of Rights, the Eleventh Amendment, and the Reconstruction Amendments), at others, in interpretations regarding the text's meaning (examples might include recent case law concerning Section 5 of the Fourteenth Amendment and the Voting Rights Act of 1965). *See, e.g.,* *Shelby County v. Holder*, 133 S. Ct. 2612, 2617–22 (2013); *see also* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 715–19 (2009).

⁹² As Amar notes, in “pervasive and powerful ways . . . the Fourteenth Amendment has reconstructed the meaning of the Bill of Rights in both the popular and the legal mind.” Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1284 (1992).

⁹³ Are we also to assume that these juridical conflicts can be settled by judges? An example of such a tendency may be the Court's recent decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

⁹⁴ *See* JACOBSON, *supra* note 18, at 1–32.

⁹⁵ Additionally, we might begin to think that neither the Great Preamble nor the Preamble to the Bill of Rights, taken alone and independently, expresses a single, coherent message. The Great Preamble identifies several objects as part of our pursuit of a more perfect union. Some of these objects may pull in different directions, thus indicating that we desire many things, some of which may be incompatible with each other, or at least in some tension with others. In this case, though, we should read them in ways that emphasize their consistency, a consistency that resides in their civic message about the limits of constitutional powers. SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984).

people are and around what propositions the people are constituted. This should remind us of a point too often forgotten in the process of constitution making: preambles are sites of contest as well as tools in contests over constitutional design and especially in design decisions that go to the heart of constitutional identity and the definition of our constitutional selves.⁹⁶

C. *“Declaratory and Restrictive”*

The Preamble to the Bill of Rights announces that adoption of the Bill of Rights will add “declaratory and restrictive” clauses to the constitutional text. There are two questions that we confront immediately. First, what do these terms mean? Second, which provisions in the Bill of Rights should we regard as restrictive and which as declaratory? Answers to these questions depend in part upon whether we adopt a juridic or a civic reading of the Preamble to the Bill of Rights.

1. *The meaning of “declaratory.”* Our first question should be: What does “declaratory” mean in constitutional terms? Amar’s take, one of the few to consider the issue, is that declaratory provisions aim to “clarify” what is already in the text: “Many other provisions of the Bill of Rights were . . . understood as declaratory, inserted simply out of an abundance of caution to clarify preexisting constitutional understandings.”⁹⁷ Intimately connected to this understanding of “declaratory” is the concept of civic education that occurs, in large measure, through these acts of declaration. This declarative function thus views the Bill of Rights as having a purpose that extends well beyond judicial enforcement of its specific provisions as restrictions on federal power. Instead, it sees the Bill of Rights as part of the great project of constitutional education: “[T]he very words of the Bill of Rights would themselves educate Americans—indeed, the Bill of Rights was written in clear, grand phrases that could be easily memorized and internalized (like scripture or poetry) in classrooms across the republic.”⁹⁸ Amar’s definition

⁹⁶ So maybe we should think of the Reconstruction Amendments, or at least Section 1 of the Fourteenth Amendment, as preambular provisions as well? I don’t go so far, but I do think it is instructive to think of the Fourteenth Amendment, like the Constitution’s several preambles, to be “a statement about the Constitution in its entirety.” Rubin, *supra* note 61, at 305.

⁹⁷ CREATION AND RECONSTRUCTION, *supra* note 74, at 28.

⁹⁸ *Posterity*, *supra* note 42, at 573–74; *see also Bill of Rights as Constitution*, *supra* note 33, at 1154.

of “declaratory” likewise stresses the compatibility between the Great Preamble and the Bill of Rights in populist terms:

Thus, our First Amendment’s language of “the right of the people to assemble” simply made explicit at the end of the Constitution what [was] . . . implicit in its opening. Many other provisions of the Bill of Rights were also understood as declaratory, inserted simply out of an abundance of caution to clarify preexisting constitutional understandings.⁹⁹

Asking this question as an inquiry into the Civic Constitution also alerts us to the possibility that the meaning of those declarations is not obvious but is instead itself the object of constitutional disagreement. Moreover, a civic constitutionalist approach to the Preamble to the Bill of Rights tells us that the meaning and function of “declaration” should not be hitched to *a priori* assumptions about what substantive point is declared. The amendments that comprise the Bill of Rights might “declare” things about the meaning and substance of the constitutional order that go well beyond clarifying or making explicit what is fairly implicit in the rest of the constitutional text. This is a familiar point of conflict in debates concerning the constitutionality of the Reconstruction Amendments.¹⁰⁰ They might declare principles that, far from “conservatory” in character, instead contravene or contradict or unsettle constitutional claims that were (thought to be) widely agreed upon and assumed to mean something else. They may declare principles, in other words, that contest rather than reaffirm prior constitutional meanings. To be more specific, the Preamble to the Bill of Rights might declare an understanding of the constitutional order that disputes the vision implicit in the Great Preamble.

Hence, to approach the Preamble to the Bill of Rights and the Bill of Rights as instruments of civic education is to invite us to see the purpose of “declaration” in an explicitly political light—as instruments and as evidence of political and civic conflict over the very nature and identity of the constitutional order writ large. In other words, the language of declaration, intuitively benign insofar as it suggests the simple purpose to clarify, may

⁹⁹ *Bill of Rights as Constitution*, *supra* note 33, at 1154.

¹⁰⁰ See PEOPLING, *supra* note 1, at 287 n.270 (regarding the disagreement between Walter F. Murphy and Mark Bandon about the constitutionality of the Reconstruction Amendments).

instead signal profound disagreement about what principles need to be declared. It is a strategy in an area of constitutional dispute. Ostensibly declaratory provisions may in fact embrace a contested understanding of the constitutional order and several of its cardinal principles.

Moreover, these conflicts are themselves a kind of civic education insofar as key tenets of the putative constitutional order compete for recognition and fidelity. These conflicts are also an exercise in constitutional maintenance or a strategy of constitutional maintenance rooted in conflict and contestation about the meaning of the constitutional order and about what it is that “We” must maintain.¹⁰¹ To ignore the Preamble to the Bill of Rights is to overlook significant points of conflict and disagreement about elemental constitutional principles in favor of a misguided quest for constitutional symmetry.

2. *The meaning of “restrictive.”* The second question is: what does “restrictive” mean? Restrictive of what? The obvious answer is that such clauses restrict the reach of the powers assigned to the new national government in Articles I-VII; in this way, the individual provisions of the Bill of Rights should be regarded as limits on powers that are manifest in and operationalized as rights claims by individuals. It is in this sense that we should understand the Bill of Rights as essentially *restrictive* in character—placing outside limits on grants of authority to the national government. These rights-claim readings are deeply juridic in character because they read the individual provisions of the Bill of Rights as creating rights claims that can be realized through litigation and they disregard or have no use for those parts of the Bill of Rights, such as the Ninth and Tenth Amendments, that cannot easily be made to conform to this model. Recalling Corwin’s famous metaphor, this approach sees rights as islands in an ocean of powers;¹⁰² it

¹⁰¹ In *Constitutional Democracy*, Walter Murphy pointed to several examples in which the process of constitutional change involved neither the extreme means of civil war or passive acquiescence, but instead a process of “mutual adjustment,” as happened in Germany following reunification or in the United States following *Brown v. Board of Education*. MURPHY, *supra* note 19; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Indeed, Murphy stressed how often constitutional change occurs through this process of adjustment. MURPHY, *supra* note 19, at 503–04. But the process of amendment can be a battleground over contested meaning as much as a process of mutual adjustment, and the benign language of adjustment can hide or minimize the fact of conflict.

¹⁰² Edward S. Corwin famously described two alternative understandings of our constitutional order. In one, rights are islands in an ocean of powers; a successful rights claim by a litigant required the litigant to land on an island. In the other, powers were islands in an

understands rights as exceptions to powers or as trumps on powers. But as I discuss below,¹⁰³ this may also distort the meaning of some provisions, such as the First and Second Amendments.

A civic reading of the Preamble to the Bill of Rights, in contrast, offers up a somewhat different understanding of the word “restrictive.” It suggests that the provisions of the Bill of Rights are not trumps on, or exceptions to, grants of power but rather are definitive, or constitutive, of those powers proper.¹⁰⁴ This says something not only about the reach of powers (and of rights) but also about the ontological status of rights as “preconstitutional.” We might argue, following this line, that the liberties identified in the Bill of Rights constitute a judgment “by We the People as a Sovereign High Court that certain natural or fundamental rights already existed.”¹⁰⁵ This assumes that rights predate power (presumably because the delegation of power comes from a sovereign invested with rights as a very condition of its sovereignty). There is little if any indication of this logic in the final language of the Preamble to the Bill of Rights, but Madison’s first drafts suggest this, especially where they declare that “all power is originally vested in, and consequently derived from, the people” and where they announce “that the people have an indubitable, unalienable, and indefeasible right to reform or change their government.”¹⁰⁶ Such claims are additional evidence for the civic character of the Preamble to the Bill of Rights, for they stand as meta claims about the nature and sources of rights in a constitutional state—claims highly didactic (and declaratory of first principles) in character.

ocean of rights. The metaphor, in effect, describes two different default options. WALTER MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 56 (4th ed. 2008).

¹⁰³ See *infra* notes 122–36 and accompanying text.

¹⁰⁴ I have in mind something similar to Barber’s argument that “[t]he Constitution limits the proper exercise of . . . powers to moves that are consistent with constitutional rights.” BARBER, *supra* note 95, at 24. On this line of analysis, Barber argues, “rights trump powers,” *id.* at 25, but I think a more nuanced description of Barber’s argument is closer to what I have written here: rights do not trump powers, or constitute an exception to them, so much as they are a part of the definition of powers. Thus, Barber later writes that “Constitutional powers are means to ends: more precisely, constitutional powers are authorizations to pursue desirable states of affairs.” *Id.* at 72. These ends themselves include the protection of certain civil liberties. See also *id.* at 106–07, 193–96.

¹⁰⁵ CREATION AND RECONSTRUCTION, *supra* note 74, at 48 (citing Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518 (1970)). This is a position that Amar convincingly finds implicit in the language of the First Amendment, as well as in the Ninth and Tenth Amendments. Amar calls this a “declaratory” judgment, thus confirming that declarations might announce restrictions. *Id.*

¹⁰⁶ See JAMES MADISON: WRITINGS, *supra* note 10, at 441.

It also recalls our earlier discussion concerning the meaning of “success” in constitutional terms. Here success means a regime that pursues preambular ends that include the protection of liberties instead of a conception in which liberties are exceptions to powers.¹⁰⁷

3. ***Which is Which?*** A third question we might ask is which provisions of the Bill of Rights we ought we to regard as declaratory or restrictive. Some authors have argued that every provision in the Bill of Rights should be regarded as declaratory. Thus, writing in *Weimer v. Bunbury*,¹⁰⁸ Judge Cooley stated that:

[T]he Bills of Rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.¹⁰⁹

One might further suggest that an approach to the Bill of Rights that stresses its civic educational purposes should regard all of its provisions as declaratory, in the sense that “to declare” means “to say something in a solemn and emphatic manner,”¹¹⁰ to publicize, to announce, to give voice to, and so on.¹¹¹ I would add that this latter understanding of “declaratory” makes no assumptions, unlike the definition proffered by Judge Cooley,¹¹² about the conservatory character of the principles so declared.

On the other hand, some scholars think there is a difference in meaning between declaratory and restrictive. Kurt Lash, for example, has

¹⁰⁷ See generally Barber, *supra* note 81; SOTIROS A. BARBER, *supra* note 6; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 33–38 (2004) (regarding an overview of a negative rights/libertarian perspectives).

¹⁰⁸ 30 Mich. 201 (1874).

¹⁰⁹ *Id.* at 214.

¹¹⁰ *Declare*, DICTIONARY.COM, <http://www.dictionary.com/browse/declare> (last visited Mar. 4, 2017).

¹¹¹ This is the approach Amar seems to favor. See CREATION AND RECONSTRUCTION, *supra* note 74, at 28; Akhil Reed Amar, *The Fifty-Seventh Cleveland Marshall Lecture “The Bill of Rights and our Posterity,”* 42 CLEV. ST. L. REV. 573, 574 (1994) [hereinafter *Cleveland Marshall Lecture*]; see also Amar, *Bill of Rights as Constitution*, *supra* note 33, at 1154.

¹¹² See *Weimer*, 30 Mich. at 214.

argued that the Tenth Amendment is declaratory, but the Ninth Amendment articulates a restrictive principle.¹¹³ The Tenth *declares* the principle that the federal government has only those powers the Constitution enumerates.¹¹⁴ The Ninth *restricts* power by declaring that rights are retained.¹¹⁵ “As a restrictive clause, the Ninth preserves the principle enshrined in the Tenth. Without such a rule preventing ‘misconstruction’ of the Constitution, the declaratory Tenth Amendment risks becoming an empty promise. Together, the two amendments prevent the ‘misconstruction or abuse’ of federal power.”¹¹⁶ As this example indicates, it is certainly possible to see the declaratory and restrictive provisions as working in tandem.

Following a similar logic, we might say that declaratory provisions are civic educational, and likely nonjusticiable, whereas restrictive provisions are rights claims that may be enforced as limitations on powers by judges against other state actors. This suggests a possible division of labor—restrictive provisions, if read as rights provisions, fall to the care and enforcement of judges whereas the declaratory provisions might be the province of other constitutional actors and citizens. My initial sense, though, is that categorizing some provisions as restrictive and others as declarative is not a good idea, chiefly because seeing the Bill of Rights as a project in civic education suggests that all of its provisions are declarative of principles that comprise constitutional literacy in the body politic.¹¹⁷ Moreover, this division of labor is not a good idea because it necessarily results in the withering of public responsibility for maintaining the Constitution over time.¹¹⁸ The Juridic Constitution does more than simply diminish the constitutional responsibilities of other actors with respect to the judicially enforceable constitution—its logic necessarily infects the entire constitutional order. It does this, in part, by instituting disincentives for other constitutional actors to take up their constitutional responsibilities,¹¹⁹ or what Tushnet calls a

¹¹³ Lash, *supra* note 10, at 174.

¹¹⁴ *Id.*

¹¹⁵ Lash supports the latter claim by noting that Madison thought that “preserving retained rights amounted to the same thing as prohibiting the undue extension of power.” *Id.*

¹¹⁶ *Id.* at 176.

¹¹⁷ See CREATION AND RECONSTRUCTION, *supra* note 74, at 28; *Cleveland Marshall Lecture*, *supra* note 111, at 574; see also *Bill of Rights as Constitution*, *supra* note 33, at 1154.

¹¹⁸ PEOPLES, *supra* note 1, at 133–34; see generally Tushnet, *supra* note 30.

¹¹⁹ This is especially so to the extent that our understanding of the Juridic Constitution yields, over time, a theory of interpretive authority that approaches judicial supremacy. And

problem of “overhang.”¹²⁰ This is not simply a consequence of a system of judicial supremacy, though supremacy exacerbates it—it is a condition of the Juridic Constitution itself.¹²¹ The juridic reading of the Bill of Rights¹²² has overwhelmed the civic educational ambitions of the Bill of Rights, resulting in a constitutional order characterized by profoundly low levels of constitutional engagement and constitutional literacy on the part of citizens.¹²³

4. ***Reading Individual Provisions.*** Although I cannot fully trace out the implications in this Article, I hope it is clear that different understandings of the constitutional text—civic or juridic—will also affect how we make sense of individual provisions in the Bill of Rights. Notable instances include the First, Second, Sixth, and Seventh Amendments.¹²⁴ I have argued elsewhere that a civic constitutionalist approach to the First Amendment, for example, requires that we recalibrate First Amendment jurisprudence to promote the structural conditions that facilitate civic literacy and civic engagement:

Understanding [these guarantees] as structural mechanisms that allow associational life to flourish, and thus as facilitating

as some have noted, “there are features basic to any democratic constitution that are likely to provide citizens with incentives of exactly the wrong kind—incentives that lead them to be selfish and lazy rather than public-spirited and active.” Christopher L. Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 *FORDHAM L. REV.* 2131, 2137 (2001). Among these features are the electoral institutions often associated with large-scale democracies. According to some critics, elections themselves reduce citizens “to alienated spectators,” and voting reduces to the pursuit of self-interest or partisanship. Benjamin R. Barber, *Neither Leaders nor Followers: Citizenship Under Strong Democracy*, in *A PASSION FOR DEMOCRACY: AMERICAN ESSAYS* 98 (1998). Moreover, as Eisgruber notes, some particular voting rules—such as the guarantee of anonymity—create an “incentive to act on the basis of self-interest” precisely because voters need not defend or account for their decision as an exercise of deliberation about the public good. Christopher L. Eisgruber, *supra*, at 2138.

¹²⁰ Tushnet, *supra* note 30, at 504.

¹²¹ PEOPLING, *supra* note 1, at 133–34 (regarding discussion on the Juridic Constitution).

¹²² Amar has argued that the juridic reading of the Bill of Rights has exacerbated the incorporation doctrine. *See generally* CREATION AND RECONSTRUCTION, *supra* note 74.

¹²³ In *Peopling the Constitution*, I argued the more nuanced view that civic illiteracy of the Constitution is less pronounced than commonly supposed, and equally a rational response on the part of citizens who have, under the Juridic Constitution, neither cause nor opportunity to engage constitutionally. PEOPLING, *supra* note 1.

¹²⁴ *See* Hemberger, *supra* note 9, at 142 (concerning Second Amendment rights); *Civic Constitutionalism*, *supra* note 9 (concerning the Second Amendment); *see also* John E. Finn, *Peopling the Constitution*, in *CONSTITUTIONAL THINKING* 105–06 (Jeffery K. Tulis & Sanford Levinson eds., 2014).

the learning of civic skills and habits, gives us some guidance about how such provisions ought to be interpreted. We ought to favor interpretations of the First Amendment that facilitate the flourishing of a wide variety of associations and communities of faith. Our interpretation of First Amendment guarantees ought to encourage social, cultural, and religious pluralism by enlarging opportunities for citizens to associate with others in civil society. In other words, we ought to favor interpretations of the First Amendment that both open up civic space and which help to populate it.¹²⁵

In contrast, a juridic approach to constitutional maintenance does not envision much of a role for citizens in realizing the guarantees of the First Amendment, trusting their enforcement instead to courts (and this is typical of most contemporary constitutional theory which, far from trusting citizens to enforce civil liberties, fears or belittles their capacity to do so).¹²⁶ Compare this with Amar's description of how constitutional guarantees, among them the First Amendment, might be maintained by the people:

The emphasis on popular enforcement would of course prove prescient. Less than a decade after the Bill of Rights became law, federal judges cheerfully sent men to jail for criticizing the government, but opponents of the Sedition Act—led by Jefferson and Madison—ultimately prevailed by “appeal[ing] to the sense of the community First, they attempted to “appeal” from judges to juries, who embodied this community sense. When blocked by judges, they used the media of state legislatures to transform the election of 1800 into a national public seminar on constitutional principles. Thus educated, ordinary Citizens on election day registered the “community sense” that the Act was a usurpation.¹²⁷

¹²⁵ PEOPLING, *supra* note 1, at 119.

¹²⁶ *See id.* at 222–24 (regarding the juridic approach to constitutional maintenance); James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509, 547 (1997) (discussing the perceived inability of the people to respect rights and its implication for constitutional theory) (book review).

¹²⁷ CREATION AND RECONSTRUCTION, *supra* note 74, at 132. Amar also writes: Though their personal labors in founding the University of Virginia signaled the special depth of their commitment, Madison and Jefferson were hardly unique in seeing the centrality of public education. In 1775, for example, Moses Mather declared that “[t]he strength and spring of every free government is the virtue of the people; virtue grows on

Amar's take on the Bill of Rights generally, and the First, Second, and Seventh amendments in particular, likewise stresses their civic educational aspects:

The idea of popular education resurfaces over and over in the Bill of Rights. As we have seen, each of the three intermediate associations it safeguards—church, militia, and jury—was understood as a device for educating ordinary Citizens about their rights and duties. The erosion of these institutions over the last 200 years has created a vacuum at the center of our Constitution. An uneducated populace cannot be a truly sovereign populace.¹²⁸

The Second Amendment may also be rich with civic significance. As Suzette Hemberger has noted:

For the Antifederalists . . . much more was at stake in debates over the militia than the question of who would go to war. Militia musters, even more than elections, were the occasions on which white men experienced their status as republican citizens Thus, when the Federalists held out the possibility of relief from this admittedly burdensome obligation, the Antifederalists foresaw the destruction of a vital civic institution¹²⁹

Other scholars, notably David C. Williams, have also explored the meaning of the Second Amendment in civic constitutionalist terms.¹³⁰

knowledge, and knowledge on education.” After quoting Mather, Gordon Wood sums up the ethos of the era in his own words: “And education, it was believed, was the responsibility and agency of a republican government. So the circle went.” “The most obvious republican instrument for . . . inculcating virtue in a people was education.” We should not be surprised, then, that each of the first six Presidents of the United States urged the formation of a national university. In the didactic language of the Massachusetts Constitution of 1780

Bill of Rights as a Constitution, *supra* note 33, at 1210–11 (citations omitted).

¹²⁸ CREATION AND RECONSTRUCTION, *supra* note 74, at 133.

¹²⁹ Hemberger, *supra* note 9, at 141–42.

¹³⁰ See *Civic Constitutionalism*, *supra* note 9; *Civic Republicanism*, *supra* note 9, at 551–615.

The civic dimensions of the constitutional text are also readily apparent in the provisions regarding juries, referenced in Article III, Section 2, and in the Sixth and Seventh Amendments. Like militias, juries were an occasion for civic engagement: “[B]oth were institutions in which ordinary citizens would exercise power, and both provided opportunities for local knowledge to be brought to bear in the implementation of national policies.”¹³¹ As Konig has noted of colonial era juries, “Guarantees of rights embedded in the text of the document, such as trial by jury, were thus guarantees of the public institutions and mechanisms that would protect the republican form of government necessary to individual freedom.”¹³²

Many democratic theorists have identified juries as an important instrument of civic education. As Tocqueville observed, “[T]he jury, which is the most energetic form of popular rule, is also the most effective means of teaching the people how to rule.”¹³³ Service on local juries was a vital institution for civic engagement and learning for the anti-Federalists.¹³⁴ Conceived as instruments of reason and deliberation, juries are a critically important device for civic education, not only because they teach, but also because they can have a “profoundly transformative effect” in converting “private individuals into public citizens, private interests into public judgments.”¹³⁵ “Simply put, deliberation promises to change how people act as citizens.”¹³⁶ Juries model a pattern of civility and conversation for the body politic more broadly. Moreover, because service on a jury involves a considerable expenditure of time and resources, in sharp contrast to ritualistic

¹³¹ Hemberger, *supra* note 9, at 145.

¹³² Konig, *supra* note 20, at 1321.

¹³³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Arthur Goldhammer trans., 2004).

¹³⁴ See Hemberger, *supra* note 9, at 144–47 (regarding discussion of the civic importance of local juries—and by implication why its mention in the constitutional document of 1789 is further evidence of the text’s civic and juridical dimensions).

¹³⁵ John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation*, 34 *POL’Y STUD. J.* 605, 605 (2007). Gastil and Weiser conclude that jury service has a measurable impact on civic engagement beyond voting. *Id.* at 619. They find in a large-sample survey of persons reporting for jury service that “a rewarding jury experience was associated with increases in a wide range of civic and political behaviors” *Id.* at 614. *But see* Lynn M. Sanders, *Against Deliberation*, 25 *POL. THEORY* 347 (1997).

¹³⁶ Gastil & Weiser, *supra* note 135, at 606.

exercises of citizenship like voting and saluting, jury service affords citizens an opportunity to practice the civic virtues.¹³⁷

5. *In Addition to, and Amendment of.* As a last matter, we may wonder why the Preamble to the Bill of Rights concludes by proposing articles that are both “in addition to, and Amendment of” the Constitution. To my knowledge, no one has ever proposed that there is any significance to this particular language.

I suppose the phrasing may simply be a rhetorical redundancy: amendments are necessarily additions to the constitutional script, not only in a literal sense, but also because they typically make provision for some concern that was overlooked or attended to insufficiently in the original text. On this line of thought, every constitutional amendment is necessarily an addition to the text. (On the other hand, some amendments simultaneously add to the text, in the literal sense, and subtract from it as well—repealing amendments, such as the Twenty-First, come to mind.) But is every addition to the text necessarily an amendment?¹³⁸ Is it possible to add to the text without amending it? The question is made both easier and more complicated if we accept that it is possible to amend the Constitution outside the confines of Article V. This opens up the possibility that some amendments, although additions to the Constitution writ large, are not formal additions to the constitutional document.¹³⁹

One way to get at the distinction between amendments and additions is to ask an obvious follow-up question: which of the proposed amendments referred to the states in the Bill of Rights would qualify as “additions” to the constitutional text, and which would qualify (instead) as “amendments” to the text? One possibility is that additions have the character of *additions* when

¹³⁷ *Id.*

¹³⁸ See, e.g., JACOBSON, *supra* note 18; see also MURPHY, *supra* note 19, at 504; Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 179 (Sanford Levinson ed., 1995). Another version of this question would expand “the Constitution” to include more than just the constitutional document, thus opening up questions about the relationship of the text to nontextual parts of the constitutional order writ large, as well as questions about amending either the text or the larger order through practice, interpretation, custom, and related “amendments” that might occur outside the ambit of Article V. There is a voluminous literature on this question. See generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000); *Consent of the Governed*, *supra* note 87.

¹³⁹ See generally ACKERMAN, *supra* note 138; *Consent of the Governed*, *supra* note 87.

they are essentially declaratory in nature, but are *amendments* when they do more than make declarations. In other words, *additions* to the constitutional text advance the self-announced declaratory purpose of the Bill of Rights as a whole by declaring principles and rules that are implicit elsewhere in the text, whereas *amendments* do more than declare—they effect some significant change to extant meaning (thus recalling Amar’s definition of declaratory discussed above).¹⁴⁰ Following Hamilton’s argument in *Federalist* 84 about how the entire Constitution should be read as a Bill of Rights, thus making a laundry list of rights unnecessary, if not dangerous, we might then argue that the first eight Amendments are not amendments effecting a substantial change in meaning, but instead represent additions to the text—additions that are perfectly consonant with its extant meaning.¹⁴¹

As above, an obvious objection is that the function of declaration need not necessarily be hitched to a priori assumptions about what substantive point is declared. The amendments that comprise the Bill of Rights might “declare” things about the overall meaning and substance of the constitutional order that go well beyond making explicit what is fairly implicit. They might, instead, declare principles that contravene or contradict or unsettle understandings that were widely agreed and assumed to mean something else. They may declare principles, in other words, that contest rather than reaffirm meaning.¹⁴² To be more specific, the Preamble to the Bill of Rights might

¹⁴⁰ See CREATION AND RECONSTRUCTION *supra* note 74, at 28 (1998); *Cleveland Marshall Lecture*, *supra* note 111, at 574; see also *Bill of Rights as Constitution*, *supra* note 33, at 1154.

¹⁴¹ HAMILTON, *supra* note 79.

¹⁴² This suggests a question: Does “amend” necessarily mean to “correct” or to “fix” a prior version of the constitutional text in some way, or should it also include significant and substantive alterations of the body politic? Put another way, is there a point at which amendments to a text are so far-reaching that they amount to more than just amendments? Is there a meaningful difference between additions to the constitution, amendments of the constitution, and revisions of the constitution? The California Supreme Court took up some of these questions in the fascinating case of *Raven v. Deukemejian*, where it struck an amendment to the state constitution, the “Crime Victims Justice Reform Act,” because it was a revision of the constitution and not an amendment to it. 801 P.2d 1077 (Cal. 1990). The Court concluded that the proposal would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process. *Id.* at 1089. Following this logic, articles that purport “to amend” the text, in contrast to “revisions,” do not effectuate some significant or substantive change in the meaning of the Constitution. But there are other ways to apprehend what it means to amend. One alternative sees the amendment process as a way of effecting or institutionalizing revolutions. This understanding captures Paul Kahn’s description of amendment as “simply a point of contest

declare an understanding of the constitutional order that disputes the vision implicit in the Great Preamble. This again underscores the possibility that the Preamble to the Bill of Rights and the Bill of Rights are sites of contested constitutional meaning, of contests about the nature and identity of the constitutional order itself. Indeed, the Preamble to the Bill of Rights might be seen as a re-constitution of sorts of the constitutional order, this time emphasizing elements of a constitutional identity that its proponents may have plausibly thought were undermined or undervalued by the original constitutional order (and the Great Preamble).

I do not want to assign too much significance or weight to these distinctions, if only because they seem artificial, if not esoteric, even to lawyers. We typically use the language of “amend” to encompass the concepts of change, alteration, and addition and subtraction pretty much interchangeably.¹⁴³ And also because the Preamble to the Bill of Rights indicates that all of the provisions in the Bill of Rights were proposed as “amendments” of the text. But I do think it is worthwhile to ask why the authors of the Preamble to the Bill of Rights chose to use the language of addition and amendment and to ask if the phrasing and distinction served a purpose.

At the risk of reading too much into it, I think the phrase “in addition to” does serve a distinct civic purpose. As Breslin notes, most constitutional amendments in the United States “have been . . . individual and often isolated attempts to manage specific political, legal, and cultural problems. We need look no further than the amendments ratified in the twentieth century to illustrate the point.”¹⁴⁴ Unlike the later amendments, which typically we read as individual, stand-alone modifications of the text (the Reconstruction Amendments are an obvious exception), the Bill of Rights is a complete text on its own—or at least, that is how we should read it.¹⁴⁵ So, the language of

between competing understandings of the political order.” PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 63 (2002).

¹⁴³ MURPHY, *supra* note 19, at 498 n.4 (discussing Gordon Wood’s treatment of the amending clause, arguing that Wood “conflates three concepts . . . (1) amendment . . . (2) revision . . . and (3) revolution . . .”).

¹⁴⁴ BRESLIN, *supra* note 2, at 105.

¹⁴⁵ Amar has made this argument repeatedly:

To many Americans, the Bill of Rights stands as the centerpiece of our constitutional order--and yet constitutional scholars lack an adequate account of it. Instead of being studied holistically, the Bill has been chopped up into discrete chunks of text, with each bit examined in

“additions to” is meaningful because it signals that the Bill of Rights is meant to be read as a whole and as having an instructional purpose and not simply as list of individual “corrections” of the original text.¹⁴⁶ In this way, the language of “in addition to” reveals a larger coherence and unity to the Bill of Rights, as well as underscores its status as a text of civic instruction.

III. CONCLUSION

Civic constitutionalist readings of the Constitution embrace a particular understanding about what the constitutional enterprise means, about what it entails, and about how to maintain it over time. In counseling a civic constitutionalist reading of the Bill of Rights, the Preamble to the Bill of Rights conceptualizes the constitutional project as an effort to achieve a constitutional way of life. It reads the Bill of Rights as an ambitious program of civic education in which the constitutional document is itself a text of civil instruction. The Preamble to the Bill of Rights is thus further and important evidence of the Constitution’s civic character, of its efforts to create a constitutionally informed body politic and to install a kind of civic constitutionalism, in which citizens bear a significant responsibility for maintaining the constitutional enterprise.

isolation. In a typical law school curriculum, for example, the First, Ninth, and Tenth Amendments are integrated into an introductory survey course on “Constitutional Law”; the Sixth, Eighth, and much of the Fifth are taught in “Criminal Procedure”; the Seventh is covered in “Civil Procedure”; the takings clause is featured in “Property”; the Fourth becomes a course unto itself, or is perhaps folded into “Criminal Procedure” or “Evidence” (because of the judicially-created exclusionary rule); and the Second and Third are ignored.

Bill of Rights as Constitution, *supra* note 33, at 1131; *see also* Neuberne, *supra* note 62.

¹⁴⁶ Currie, *supra* note 10, at 856. Amar agrees, “There is no evidence that this change was anything but aesthetic.” CREATION AND RECONSTRUCTION, *supra* note 74, at 143. Amar agrees that the change was more than simply aesthetic, however, noting that “[n]evertheless, the change had the unhappy effect of blurring the implicit rule of construction at work,” i.e., of limiting the application of the Bill of Rights to the federal government. *Id.* at 153.