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The Constitution and Treaty Law

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[Neil Schutzman](#) · 2 months ago 🗨

I have a question for the lawyers out there.

While I like the professors analysis of the preamble and I understand the importance of a preamble in understanding any treaty or contract, I was also under the impression that the preamble of a contract is not the enforceable part of the contract. The enforceable part is stated in the body of the document.

If this is true then even if the preamble and the Federalist Papers never talk about dissolving the Union, if this is not mentioned in the body of the document how would this be interpreted in treaty or contract law?

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[J. Andrew Starr](#) Signature Track · 2 months ago 🗨

I'm not a Lawyer, and I don't play one on Television either. My guess is the Preamble is about as enforceable as the Declaration of Independence.

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[José eduardo schuh](#) · 2 months ago 🗨

I think the importance of the preamble is given by the establishment of "general principles" that should guide the formation of other constitutional norms and way of interpreting these rules.

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[Ugurcan Ozturk](#) · 2 months ago 🗨

The principles to interpret international treaties are laid down in 1969 Vienna Convention ([VCLT](#)) which

is believed to be the reflection of customary international law. It provides that;

<<

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its **preamble** and annexes:*(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:(a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*(c) *any relevant rules of international law applicable in the relations between the parties.*
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the *preparatory work of the treaty* and the *circumstances of its conclusion*, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:(a) leaves the meaning ambiguous or obscure; or(b) leads to a result which is manifestly absurd or unreasonable.

>>

Thus, looking at the Preamble (of the Constitution of 1787) is one of the leading ways to interpret the text itself and do bind parties to it.

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J. Andrew Starr

Signature Track

· 2 months ago 🔒

Good observations! Thank you very much. Without opening up a major can of worms, but let's suppose the Preamble does bind the parties to it. Who are the parties? The People? Which People? Those alive at the time of the ratification or those living today? I'm dancing and treading very carefully around arguments once raised by a certain Lysander Spooner.

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Ugurcan Ozturk · 2 months ago 🔒

The persons who have signed the document back in the day were actually the representatives of their respective States/peoples. In other words, their signatures -to some extent- bound those people(s) under International Law. So the parties to the Constitution were the States themselves.

The question of the binding effect of ancestors' deeds onto the next generations is a philosophical controversy rather than a legal one. I can think of a couple of arguments on this subject, such as of J. J. Rousseau's "social contract" theory which argues that the descendants cannot simply change or even oppose to it once such a contract comes into force and thus creates a new legal entity, State.

I hope I could be at least a bit helpful to your questions.

Kind regards.

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[+ Comment](#)



Gorgonio B. Elarmo, Jr. · 2 months ago 🔗

Pursuing the social contract theory line further and giving it a legal dimension, contracts are generally transmissible to the heirs of the contracting parties. Thus, the present generation is bound by the Constitution established by an earlier generation. Of course, the rule of transmissibility is a principle in the law of contracts in civil law (as opposed to common law, of which I am not too familiar) jurisdictions.

As we have already mentioned the law of contracts, let me offer my thoughts on the significance of a preamble in a contract. The preamble of a contract (also known as the "whereas clause[s]"), unlike the stipulations, clauses, terms and conditions of the agreement, is not considered as a source of a legally enforceable obligation. However, it serves as an interpretive tool in determining the true intention of the parties and in resolving any ambiguity in the provisions of contract.

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Matt Tait

Signature Track

· 2 months ago 🔗

The preamble of the US Constitution has been held to be an integral part of the Constitution in a number of SCOTUS cases, e.g. *Casement v. Squier* (1943):

By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. * * * The constitution can have no operation in another country."

So yes, it's a binding part of the "contract" of the Constitution. Although I'd be careful about over-thinking the "contract" analogy. It's not a contract. It's a constitution.

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**J. Andrew Starr**

Signature Track

· 2 months ago



Either the Constitution is a contract and thus the social contract applies or it isn't. Yes, I realize there is a difference between a philosophical contract and a legal contract. I'll concede it is a philosophical discourse. But after all, isn't really all law philosophical in nature?

The word "*posterity*" is in the Preamble could lend to the transmissibility of the Constitution to the current generation. So too would the naturalization process immigrants undergo or perhaps even signing up for the [Selective Service](#).

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Matt Tait

Signature Track

· 2 months ago



You can think of it as a "social contract" if you want to, but be careful about thinking of it as a legal contract. Constitutional law is fundamentally a different subject to Contract law, not a subset of it.

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clinton mathews · 2 months ago

Good comments Matt! I suspect it to be true in most countries around the world that would-be revolutionaries would resort to the old-fashioned way of deposing their rulers/governments by armed insurrection rather than by legal arguments. That's what the Declaration was all about, and the Civil War, come to think about it. Dare I say it.....even the 2nd Amendment?

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[+ Comment](#)**Gorgonio B. Elarmo, Jr.** · 2 months ago

I agree that the Constitution is no ordinary contract. It is the Constitution. While analogies to a contract will always fall short due to the essential difference between the nature of a contract and the Constitution, however, analogies may be proper when the Constitution is viewed as a social contract as Ugurcan Ozturk. Indeed, the Preamble to the US Constitution and a number of constitutional principles have been based on Locke's ideas, including his social compact theory.

I have reservations about Matt Tait's statement above that "The preamble of the US Constitution has been held to be binding in a number of SCOTUS cases, e.g. *Casement v. Squier* (1943)". In fact, the quote from Casement says nothing about the binding effect of the Preamble. On the other hand,

Jacobson v. Massachusetts (197 U.S. 11, 22 [1905]) is categorical:

"Although [the] 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, it be found in some express delegation of power or in some power to be properly implied therefrom."

Thus, the Preamble is binding only insofar as it enlightens or clarifies the intent behind of the substantive provisions of the Constitution and not as, by itself, the source of substantive powers or rights.

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Matt Tait Signature Track · 2 months ago 🔗

The (US Constitution's) preamble doesn't confer powers, sure (that's what the Articles are *for*) but its not just a helpful non-legal comment at the top of the page. It is a real part of the document, and has direct legal implications on tax law in Puerto Rico (*Geofroy v Riggs*), the applicability of the Constitution in Puerto Rico (*Ochoa v Hernandez y Morales*), the applicability of US signed treaties to Washington DC (*De Lima v Bidwell*) and the applicability of the Constitution outside of the United States - specifically when it comes to the right of trial by jury (*Casement v Squier*).

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Alec D. Rogers · 2 months ago 🔗

Matt - can you be more precise? How did the preamble affect the outcome in those cases?

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Matt Tait Signature Track · 2 months ago 🔗

Just for example, in *Casement v. Squier*, (p 464 of 140 US page 900 of 11 S. Ct) **"By the constitution a government is ordained and established 'for the United States of America'** and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad ... The constitution can have no operation in any other country."

That paragraph is materially dependent on the precise wording of the preamble to the

Constitution, and the case as a whole is materially dependent on the conclusion of that paragraph. Hence I claim that the preamble to the Constitution has legal meaning beyond merely an informative but non-binding comment on, but not legally binding part of the Constitution.

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Alec D. Rogers · 2 months ago

Thanks - the case that actually uses this phrase is In Re Cook. Casement is a lower court decision citing Cook.

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Ugurcan Ozturk · 2 months ago

I agree on the argument that the Constitution of the US (or any other Constitution for that matter) is not a contract. However, it did start as an international treaty which is basically a contract of Public Int Law. This characteristic makes it unique among other Constitutions. As a result, in the beginning the Preamble was an interpretative measure, not a binding part of the text itself. However, the Constitution is not simply a treaty right now, it is the founding document of a federal entity. Thus, the rules of Constitutional Law, instead of those of Public Int Law, must be used to determine whether or not the Preamble is binding.

For many Constitutions around the world, there have been controversies on whether or not a Preamble is of binding nature of a Constitution. In some Constitutions, there are explicit or implicit indications that set forth that their respective Preambles are (or are not) binding. In some other countries there needed to be decisions from their respective Constitutional Courts (or Supreme Courts). As explained above by others, the Supreme Court of the US has answered this question with a positive response.

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Alec D. Rogers · 2 months ago

I few observations re the OP's original question.

Contract Law

As a general matter of contract law, there's no right of one party to "walk away" from his or her contractual duties. If a contractual duty is not fulfilled then the contract is in breach and damages awarded. It's rare that the party be forced to perform the duties though, rather than pay damages. Sometimes a party calculates cost of performance and cost of breach, and decides it makes more sense to breach ([efficient breach](#)).

In the absence of a provision that clearly delineates the terms under which one party may terminate a contract, a court will likely craft them using a number of tools.

In the odd case, a court may award "specific performance" (i.e. actually order one party to perform the contract). It's a highly disfavored remedy, though.

Treaties

Treaties generally provide for the possibility of "withdrawal" and under what conditions, procedures, etc. In the rare case they do not, a court would likely look to its intent and structure to determine whether withdrawal is possible without a violation.

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