
The Uses and Audiences of Preambles in Legislation

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This article documents the increased use of long and substantive preambles in federal legislation from 1985 to 2000. Only nine statutes had such preambles in the first five years of this study, while in the last five years, twenty-nine statutes did. Preambles were most frequently included in legislation arising from intergovernmental agreements, symbolic legislation, ideologically charged amendments of criminal and environmental laws, and legislation enacted in reply to court decisions.

Plato suggested that preambles should persuade citizens to obey important laws by speaking to their hearts and minds through both reason and poetry. The author contends that this ideal is not met by contemporary preambles. Though preambles are often included in important legislation, they rarely speak directly to citizens as they do not use popular language or a persuasive voice.

Various political uses of preambles are examined and the author concludes that contemporary preambles often seek to establish legitimacy by providing a narrative of the origins and purposes of the legislation. The professional uses of preambles are also examined, particularly the role of preambles in statutory and constitutional interpretation and in dialogues between the legislature and courts. The author concludes that while preambles have frequently oversold legislation and have been excluded from working versions of the law, they should still be included in important laws to better outline the purposes and processes which led to the enactment of the legislation and better communicate with the multiple audiences of modern legislation.

Cet article documente l'emploi croissant de préambules longs et substantiels dans la législation fédérale de 1985 à 2000. Dans les cinq premières années de cette étude, seuls neuf statuts avaient de tels préambules, alors qu'au cours des cinq dernières années le nombre de statuts passa à vingt-neuf. Les préambules étaient fréquemment inclus dans la législation provenant d'accords intergouvernementaux, dans la législation symbolique, dans les amendements de lois idéologiquement chargés tel que les lois de droit pénal et environnemental et dans la législation adoptée en réponse à des décisions jurisprudentielles.

Platon suggérait que les préambules devaient persuader les citoyens d'obéir aux lois importantes en s'adressant à leur cœur et leur esprit par la poésie et la raison. L'auteur conclut que les préambules contemporains ne satisfont pas cet idéal. Bien que les préambules soient inclus dans la législation importante, rares sont ceux qui s'adressent directement aux citoyens car ils n'utilisent pas un langage courant ou une voix persuasive.

Après avoir examiné divers emplois politiques des préambules, l'auteur conclut que les préambules contemporains recherchent souvent à établir la légitimité en présentant une narration des origines et des objectifs de la législation. Les emplois professionnels des préambules sont également étudiés en portant une attention particulière au rôle des préambules dans l'interprétation législative et constitutionnelle ainsi que dans les dialogues entre le législatif et les cours. Même si les préambules ont souvent mis en avant la législation et ont été exclus des versions de travail des lois, l'auteur conclut qu'ils devraient néanmoins être inclus dans les lois importantes afin de mieux déterminer les objectifs et les procédés ayant mené à l'adoption de la législation ainsi que mieux communiquer avec les nombreux auditoires de la législation moderne.

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Introduction**I. Patterns in the Use of Preambles in Recent Federal Legislation****II. The Platonic Ideal: Preambles Persuade Citizens****III. Can Preambles Persuade Citizens Today?****IV. Political Uses of Preambles***A. Narrative Uses**B. Aspirational Uses***V. Professional Uses of Preambles***A. Preambles and Statutory Interpretation**B. Preambles and Constitutional Interpretation***Conclusion**

Introduction

An interesting new trend in federal legislation is the increased use of long and substantive preambles. Writing in 1991, Pierre-André Côté remarked in his text on statutory interpretation that “[t]oday preambles rarely precede the provisions of a public statute.”¹ The next year, however, Parliament included a long preamble to its comprehensive amendments of the law of sexual assault in response to the Supreme Court of Canada’s decision in *R. v. Seaboyer*.² By 1994, Ruth Sullivan commented that “[a]lthough for a time preambles were out of fashion, particularly at the federal level, in recent years they appear to have enjoyed a revival.”³ Since then, Parliament has continued to add preambles to federal legislation not only when it enacted legislative replies to the Supreme Court’s decisions in *R. v. Daviault*,⁴ *R. v. O’Connor*,⁵ *R. v. Feeney*,⁶ and the *Reference re Secession of Quebec*,⁷ but also in other amendments to the *Criminal Code*,⁸ some federal statutes involving Aboriginal land claims,⁹ environ-

¹ P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed., trans. K. Lippel, J. Philpot & W. Schabas (Cowansville, Qc.: Yvon Blais, 1991) at 53.

² [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193 [hereinafter *Seaboyer*]. The legislative reply came in *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [hereinafter *Sexual Assault Amendments*].

³ R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 259.

⁴ [1994] 3 S.C.R. 63, 118 D.L.R. (4th) 469 [hereinafter *Daviault*]. Parliament replied with *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32 [hereinafter *Self-Induced Intoxication Amendments*].

⁵ [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 [hereinafter *O’Connor*]. Parliament replied with *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30 [hereinafter *Production of Records Amendments*].

⁶ [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609 [hereinafter *Feeney*]. Parliament replied with *An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*, S.C. 1997, c. 39 [hereinafter *Powers to Arrest Amendments*].

⁷ [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference*]. Parliament replied with *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26 [hereinafter *Clarity Act*].

⁸ R.S.C. 1985, c. C-46. Amendments include: *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16 [hereinafter *FGM Amendments*]; *An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence*, S.C. 1997, c. 23 [hereinafter *Criminal Organizations Amendments*]; *An Act to amend the Criminal Code (victims of crime)*, S.C. 1999, c. 25 [hereinafter *Victims of Crime Amendments*]; *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32 [hereinafter *Impaired Driving Amendments*].

⁹ *Gwich’in Land Claim Settlement Act*, S.C. 1992, c. 53; *Saskatchewan Treaty Land Entitlement Act*, S.C. 1993, c. 11; *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29; *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27; *Yukon First Nations Land Claims Settlement Act*, S.C.

mental legislation,¹⁰ and legislation to honour certain events.¹¹ Even the legislation creating the Law Commission of Canada has its own preamble setting out Parliament's expectations for that body.¹² For most legislation, however, substantive preambles are not used, raising the question of why preambles are included in some laws and not in others. In other words, what are the intended purposes of preambles and who are their intended audiences?

A study of preambles may provide insight towards building a general theory of legislation and in particular the fundamental issues of the purposes and audiences of legislation. In the pursuit of multiple purposes, legislation speaks to multiple audiences. The most idealistic purpose of legislation is to provide guidance to citizens about their rights and duties. Since the discussion of the role of preambles in Plato's *The Laws*,¹³ it has been recognized that preambles have the potential to do a better job of communicating with citizens than the actual text of statutes. Preambles attempt to explain and persuade before the text of the law commands.

The Platonic ideal of preambles, however, raises the larger question of the role of politics in our modern age. Many no longer have faith in a politics that speaks to all citizens and convinces them of the value, rationality, and importance of the laws. Politics is more complex in modern multicultural societies than in the Athenian state. Preambles can be a response to interest group politics that speak to only a subset of the citizenry. Even when they speak more broadly, the poetic preambles of Plato may have degenerated into a form of political advertising for statutes that promise much more than they deliver. Preambles can make extravagant claims about what legislation achieves or hopes to achieve that are not supported by the text of the law. The appeal to the heart of the evocative narratives, aspirations, and symbols used in preambles may also lead to legislation that is unreasonable and unbalanced in its passion. The form of the preamble could shape the substance of the legislation and not always for the better.

At the same time, the Platonic ideal of preambles can perhaps be reclaimed and reshaped for the modern age. By including narratives about why laws have been enacted, preambles have the potential to educate the citizenry and policy-makers. They

1994, c. 34; *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25; *First Nations Land Management Act*, S.C. 1999, c. 24; *Nisga'a Final Agreement Act*, S.C. 2000, c. 7 [hereinafter *Nisga'a Agreement*].

¹⁰ *Canadian Environmental Protection Act*, S.C. 1988, c. 22; *Canadian Environmental Assessment Act*, S.C. 1992, c. 37; *Alternative Fuels Act*, S.C. 1995, c. 20; *Oceans Act*, S.C. 1996, c. 31; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 [hereinafter *CEPA 1999*].

¹¹ *Workers Mourning Day Act*, S.C. 1991, c. 15; *National Day of Remembrance Act*, S.C. 1991, c. 36; *Child Day Act*, S.C. 1993, c. 18.

¹² *Law Commission of Canada Act*, S.C. 1996, c. 9.

¹³ Plato, *The Laws of Plato*, trans. T.L. Pangle (New York: Basic Books, 1980).

can provide some of the narrative detail and storytelling often missing from legislation. They can also be used as a device of deliberative democracy as they can convey some of the deliberations and accommodations that preceded the enactment of the legislation. A preamble can thus signal the sometimes contradictory directions that legislators have been pulled in before they have settled on the text of the law.¹⁴ More pluralism in the form of legislation may be necessary to better reflect the pluralism of the society being governed.

Although there is a risk that a preamble will oversell the legislation, preambles may also have a role in stating high aspirations, moral teachings, or “meta-legal messages”¹⁵ that could not be realistically reduced to and enforced through the operative text of the law in a society that is liberal and free.¹⁶ Preambles may provide a means for legislators to offer a somewhat more Romantic understanding of legislation, one that is “less general, less canonical, less instrumentally prescriptive, more intuitive, more aspirational, more narrative.”¹⁷ Preambles may once again, as Plato imagined, allow legislators to appeal to the heart as well as the mind and to persuade, explain, and inspire as well as command. I will explore these optimistic possibilities for preambles, but also express some reservations about excessive romanticism in the move towards preambles.

In addition to political and expressive purposes, preambles also serve professional purposes by speaking to those who administer the law. Yet, it is unclear how important preambles will be in the subsequent statutory or constitutional interpretation of legislation. Judges may be skeptical about preambles that are not supported by the law’s actual provisions. They may also conclude that in terms of the *Canadian Charter of Rights and Freedoms*,¹⁸ preambles speak only to the importance of Parliament’s objective, something accepted in the vast majority of cases, and not to the proportionality of its means. Cynicism about the instrumental and professional value of preambles is only promoted by the fact that preambles are excluded from many working versions of the law, including the commercial criminal codes that sit on the desks of

¹⁴ L.B. Tremblay, “La justification de la législation comme jugement pratique” (2001) 47 McGill L.J. 59.

¹⁵ R. Sullivan, “Some Implications of Plain Language Drafting” (January 2000) [unpublished], especially Part 2, “The Meta-Legal Messages of R.S.C. 1985”.

¹⁶ As Nicholas Kasirer has observed, lawyers have not associated legislation “with the gentle art of teaching.” N. Kasirer, “Honour Bound” (2001) 47 McGill L.J. 237 at 252. The idea that all law must be enforceable has “tended to limit the ambitions of legislatures which are shy to enact law which is perceived to be neither duty nor sanction bound” (*ibid.* at 246).

¹⁷ To paraphrase the new kind of statute suggested by R.A. Macdonald in “The Fridge-Door Statute” (2001) 47 McGill L.J. 11.

¹⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

lawyers across the country.¹⁹ A conclusion that preambles are often a form of symbolic politics that are ignored by the professionals who administer the law would not mean that preambles are unimportant, but it would complicate our understanding of the multiple purposes and audiences of legislation.

This paper will first document the use of preambles in recent federal legislation and attempt to assess the conditions under which preambles are likely to be used. A sense of when Parliament uses preambles and when it does not is crucial to understanding the purposes and audiences of preambles. Second, I will examine the discussion of preambles in Plato's *The Laws*—in which it is suggested that poetic and at times theoretical preambles can play an important role in persuading citizens to obey some of the most important laws. Third, I will examine the text of some recent preambles to assess whether they follow the Platonic ideal of speaking to citizens. If preambles do not always attempt to persuade citizens, this raises the question of what other political purposes they may serve. Fourth, I will examine and assess some of the other political purposes served by preambles, including their use to demonstrate respect for other nations and to provide symbolic gratification for interest groups. This section will also explore the ways that the Platonic ideal of preambles might be updated to move from an ancient age of poetry and a homogenous, engaged citizenry to a modern age of advertising and a multicultural, disengaged citizenry. Preambles are not only about politics, so in the final section I will examine some of their professional purposes with particular attention to preambles to *Criminal Code* amendments.²⁰ I will focus on what guidance preambles may give to those who interpret the legislation and assess its constitutional validity. In the end, I hope that this study of preambles serves to illuminate some of the multiple purposes and audiences of legislation.

I. Patterns in the Use of Preambles in Recent Federal Legislation

For this study, I examined the statutes of Canada from 1985 to 2000 and pulled those with preambles of any significant length. I then excluded pro forma or routine

¹⁹ The omission of preambles from commercially produced criminal codes is strange given the focus on “adding value” by providing not only copious case annotations but also synopses of the legislation. Thus the *Criminal Code* now tries to explain the text of the legislation in simpler terms while omitting the preamble. The implicit judgment, one that I do not share, is that the preambles are of no relevance to the working professional or student of law. See e.g. E. Greenspan & M. Rosenberg, eds., *Martin's Annual Criminal Code 2002* (Aurora, Ont.: Canada Law Book, 2001); D. Watt & M. Fuerst, eds., *Tremear's Criminal Code* (Toronto: Carswell, 2001). For an inclusion of preambles in teaching materials, see M.L. Friedland & K. Roach, *Cases and Materials on Criminal Law and Procedure*, 8th ed. (Toronto: Emond Montgomery, 1997) at 628, 727-28.

²⁰ *Supra* notes 2, 4, 5, 6, 8.

preambles that accompany acts to allow the government to spend more money²¹ as well as preambles from statutes that were essentially private acts on the rationale that such preambles did not involve public policy.²² What remained were the laws that contained preambles that articulated their purposes and policies. The number of such public policy preambles varied considerably in the years studied. For some years no such preambles were found while as many as eight were found in one year. The following list indicates the number of public policy preambles found in a review of the federal statute book from 1985-2000:

1985 (0)

1986 (2)

- *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23.
- *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27.

1987 (2)

- *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3.
- *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985 (3d. Supp.), c. 40.

1988 (5)

- *Canadian Environmental Protection Act*, S.C. 1988, c. 22.
- *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24.
- *Emergencies Act*, S.C. 1988, c. 29.
- *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31.
- *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65.

1989 (0)

1990 (0)

1991 (3)

- *Canadian Race Relations Foundation Act*, S.C. 1991, c. 8.
- *Workers Mourning Day Act*, S.C. 1991, c. 15.
- *National Day of Remembrance Act*, S.C. 1991, c. 36.

²¹ See e.g. *Appropriation Act No. 5, 1989-90*, S.C. 1990, c. 11; *Appropriation Act No. 1, 1990-91*, S.C. 1990, c. 12; *Appropriation Act No. 2, 1990-91*, S.C. 1990, c. 13.

²² For example, legislation to amalgamate the Salvation Army, East with the Salvation Army, West contained an eight paragraph preamble that simply explained the need for such legislation and was excluded from my data set as not being a substantive public policy preamble. See *Salvation Army Act, 1990*, S.C. 1990, c. 49.

1992 (4)

- *National Public Service Week: Serving Canadians Better Act*, S.C. 1992, c. 15.
- *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.
- *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38.
- *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53.

1993 (4)

- *Saskatchewan Treaty Land Entitlement Act*, S.C. 1993, c. 11.
- *Child Day Act*, S.C. 1993, c. 18.
- *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.
- *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44.

1994 (4)

- *Income Tax Amendments Revision Act*, S.C. 1994, c. 7.
- *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27.
- *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.
- *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47.

1995 (2)

- *Alternative Fuels Act*, S.C. 1995, c. 20.
- *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32.

1996 (6)

- *Law Commission of Canada Act*, S.C. 1996, c. 9.
- *An Act to amend the Canadian Human Rights Act*, S.C. 1996, c. 14.
- *Agreement on Internal Trade Implementation Act*, S.C. 1996, c. 17.
- *An Act to amend the Judges Act and to make consequential amendments to another Act*, S.C. 1996, c. 30.
- *Oceans Act*, S.C. 1996, c. 31.
- *Canada-Israel Free Trade Agreement Implementation Act*, S.C. 1996, c. 33.

1997 (8)

- *National Organ Donor Week Act*, S.C. 1997, c. 4.
- *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6.
- *Nuclear Safety and Control Act*, S.C. 1997, c. 9.
- *Canada-Chile Free Trade Agreement Implementation Act*, S.C. 1997, c. 14.
- *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16.
- *An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence*, S.C. 1997, c. 23.
- *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30.
- *An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*, S.C. 1997, c. 39.

1998 (5)

- *Canada Cooperatives Act*, S.C. 1998, c. 1.
- *Canada-Yukon Oil and Gas Accord Implementation Act*, S.C. 1998, c. 5.
- *An Act to amend the Canada Evidence Act, Criminal Code and Canadian Human Rights Act*, S.C. 1998, c. 9.
- *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25.
- *Parks Canada Agency Act*, S.C. 1998, c. 31.

1999 (5)

- *Preclearance Act*, S.C. 1999, c. 20.
- *First Nations Land Management Act*, S.C. 1999, c. 24.
- *An Act to amend the Criminal Code (victims of crime)*, S.C. 1999, c. 25.
- *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32.
- *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

2000 (5)

- *Canadian Institutes of Health Research Act*, S.C. 2000, c. 6.
- *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.
- *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26.
- *Canadian Tourism Commission Act*, S.C. 2000, c. 28.
- *Canada Health Care, Early Childhood Development and Other Social Services Funding Act*, S.C. 2000, c. 35.

A number of patterns can be discerned from the above data. One is simply the increasing use of preambles. In the first six years of the study (1985-1990) there were only nine public policy preambles. In the next five years (1991-1995) there were seventeen preambles, and in the final five years (1996-2000) there were twenty-nine preambles. Why has Parliament made increasing use of preambles through the 1990s? One factor may simply be that the use of preambles created precedents that built on themselves. Once the first preamble to *Criminal Code* amendments was used in 1992, preambles became something of a status symbol for major amendments of the *Criminal Code*. Once departments and ministries saw their colleagues using preambles, this created a demand for more preambles. There is some evidence that interest groups may have demanded that their often high aspirations for law reform be reflected in preambles.²³

A second trend is the increased use of preambles with respect to *Criminal Code* amendments—particularly in amendments responding to controversial Supreme

²³ S. McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in J.V. Roberts & R.M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 306.

Court decisions or on high visibility subjects such as crime victims, child prostitution, or impaired driving. The first *Criminal Code* preamble came in 1992 as Parliament responded to the Court's decision in *Seaboyer*.²⁴ A second came in 1995 as Parliament responded to the Court's decision in *Daviault*.²⁵ In 1997 four different *Criminal Code* amendments contained preambles²⁶ and in 1999 two such amendments contained preambles.²⁷ During this period, the criminal law was the site of much ideological conflict and change as the traditional liberal concern with the rights of the accused often articulated by the courts was confronted by a greater concern with the rights of victims and groups such as women and children. Preambles may be a product of both this ideological conflict and the frequent use of legislation to reply to the Court's *Charter* decisions. Similarly, the use of preambles in environmental legislation may reflect ideological conflict within the law, high levels of interest group engagement, frequent litigation, and frequent law reform.²⁸

A third pattern is the use of preambles in overtly symbolic legislation that declares either a day or week of celebration to recognize some group such as public servants²⁹ or a day of mourning to recognize a tragedy such as the massacre at the École Polytechnique.³⁰ It is not surprising that preambles would be used for such overtly symbolic legislation as they can be written in evocative language.

A fourth pattern is the use of preambles in "foundational" legislation that relates to fundamental characteristics of the country. Thus the *Canadian Multiculturalism Act*,³¹ the *Official Languages Act*,³² the *Emergencies Act*,³³ the *Canada-United States Free Trade Agreement Implementation Act*,³⁴ the *Agreement on Internal Trade Implementation Act*,³⁵ the *Clarity Act*,³⁶ and various acts involving Aboriginal peoples³⁷ were all accompanied by preambles. Again, if preambles are seen as an appeal to the heart as well as the mind, one would expect them to be used in such foundational legislation.

²⁴ *Supra* note 2.

²⁵ *Supra* note 4.

²⁶ *FGM Amendments*, *supra* note 8; *Criminal Organizations Amendments*, *supra* note 8; *Production of Records Amendments*, *supra* note 5; *Powers to Arrest Amendments*, *supra* note 6.

²⁷ *Victims of Crime Amendments*, *supra* note 8; *Impaired Driving Amendments*, *supra* note 8.

²⁸ *Supra* note 10.

²⁹ *National Public Service Week: Serving Canadians Better Act*, S.C. 1992, c. 15 [hereinafter *Public Servants Act*].

³⁰ *National Day of Remembrance Act*, *supra* note 11.

³¹ R.S.C. 1985 (4th Supp.), c. 31 [hereinafter *Multiculturalism Act*].

³² S.C. 1988, c. 31.

³³ S.C. 1988, c. 29.

³⁴ S.C. 1988, c. 65 [hereinafter *FTA*].

³⁵ S.C. 1996, c. 17.

³⁶ *Supra* note 7.

³⁷ *Supra* note 9.

A final pattern is the use of preambles with respect to legislation based on intergovernmental agreements, whether these be agreements between the federal government and Aboriginal bands or communities, agreements between the federal and provincial governments, or international agreements (such as various trade agreements). It may be that with respect to intergovernmental agreements there is a particular need to establish a narrative of the interaction that led to the legislation as well as the aspirations that each government has for the legislation. Much international law is accompanied by lengthy preambles detailing the various aspirations of the parties and the narrative that led to agreement among the parties about the content of the law.³⁸

Preambles have been used more frequently but not indiscriminately by Parliament. They are found in high-profile legislation that relates to fundamental or controversial issues of public policy including criminal and environmental law, as well as in foundational legislation governing bilingualism, multiculturalism, and national emergencies. Preambles are also used for overtly symbolic legislation and legislation used to implement various forms of intergovernmental agreements. Although no central decision was made to add preambles to federal legislation, the increased use of preambles and the consistency of their use with respect to limited categories of legislation is quite striking.

II. The Platonic Ideal: Preambles Persuade Citizens

The idea that some laws should be accompanied by a prelude dates back to Plato's *The Laws* in which an old Athenian discusses his views about good politics. The focus of *The Laws* is on providing advice to lawmakers that is both philosophic and practical. The old Athenian suggests that the wise lawmaker will use preambles because "[h]e doesn't give orders until he has in some sense persuaded."³⁹ If the actual law was a "tyrannical command", the preamble or prelude to the law was included in order to persuade so that "he who receives the law uttered by the legislator might receive the command—that is, the law—in a frame of mind more favorably disposed and therefore more apt to learn something."⁴⁰ Preambles are akin to "warming-up exercises—which artfully attempt to promote what is to come."⁴¹ They are supposed to be more lyrical and poetic than the body of laws and as such appeal to the heart as well as the mind.

³⁸ See e.g. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d. Sess., Supp. No. 13, UN Doc. A/810 (1948).

³⁹ *Supra* note 13 at 720d.

⁴⁰ *Ibid.* at 723a-723b.

⁴¹ *Ibid.* at 722d.

The Laws provides a few examples of what a Platonic preamble would look like. For example, a law against robbing temples would provide the prohibition and the penalty, but the preamble would explain the evil of the offence and the steps that a person who was tempted to commit the offence could take to avoid its commission. To achieve its end, the preamble could be poetic and even melodramatic. The old Athenian suggests that the preamble should tell a potential temple robber to seek the company of good men, but if the temptation to rob the temple still prevailed to “look to death as something nobler, and depart from life.”⁴² A preamble to a law prohibiting older people from assaulting others might warn that an offender would “be spoken of as boorish, illiberal, and slavish”⁴³ to engage in violence. A successful preamble would persuade people not to break the laws, but also to hate themselves for having wanted to break them.⁴⁴

The Laws does not suggest that all laws should have a preamble or that they should all be in the same form. Only the most important or sacred laws such as those against temple robbing should contain preambles. Controversial laws should also be accompanied by a preamble because citizens will be most in need of persuasion to agree to abide by such laws. The best preamble may resemble the dialogues themselves in their probing rationality, but the lawgiver may also resort to the more popular forms of poetry and even theological orations in an attempt to persuade citizens to obey the law.⁴⁵ The over-the-top instruction that a person would be better off committing suicide than robbing temples suggests that even Platonic preambles could descend into less high-minded forms of communication. It also pulls out all the rhetorical stops by overestimating the harm that may result from the crime. The preamble against assault appeals to the potential offender’s sense of rationality and self-image in dissuading the use of violence. Platonic preambles rely not only on reason to persuade the citizen to obey the law, but also on the arts of poetry, metaphor, symbols, and evocative narratives. In short, they speak to the heart as well as the mind.

III. Can Preambles Persuade Citizens Today?

Does Platonic learning about preambles have any relevance today? In one sense, it does not. The old Athenian was able to construct preambles that appealed to a common heritage among the privileged citizens of Athens. Preambles today cannot

⁴² *Ibid.* at 854c.

⁴³ *Ibid.* at 880a.

⁴⁴ *Ibid.* at 907c-d.

⁴⁵ *Ibid.* at 445-49 (interpretative essay). As Professor Pangle writes, the Athenian makes clear that “the true legislator must be a poet—or, in biblical language, a prophet—who not only creates a way of life but who leaves behind a comprehensive justification of that life, viewed in the context of the whole of human existence” (*ibid.* at 490).

appeal to such a common memory or even a common love for poetry. At the same time, however, it may be possible to revive the Platonic ideal of having preambles explain to citizens the reasons why important, controversial, or symbolic laws have been enacted. It may also be possible for preambles to persuade citizens to obey laws and respect the aspirations behind the law. Although a return to poetry may be difficult, preambles today could also be written in a form that is both more accessible and more popular than the text of the law.

How do the preambles recently enacted in federal legislation hold up to the Platonic ideal of persuading citizens that they should understand, respect, and obey the law? At first glance, these preambles relate well to the Platonic idea because they have generally been used in important or symbolic pieces of legislation that should be relevant to citizens.⁴⁶ Parliament is not wasting preambles on trivial or technical pieces of legislation that do not address important matters of concern to the citizens. Plato would be pleased.

Actual examination of the preambles, however, suggests that they often do not live up to the Platonic promise of communicating with citizens in an effective or inspiring manner. One feature of the Platonic preamble was its use of popular language—which at the time was poetry. The preambles in recent federal legislation are generally not poetic nor can they claim to be couched in popular or accessible language. They often contain clumsy words such as “whereas” and make references to technical provisions that would not be of significance to most citizens. Preambles also are sometimes directed at governments and from the perspective of a citizen may seem like insider backslapping or self-congratulation.⁴⁷ The length of preambles—often six paragraphs or more—may also lessen their accessibility and contribute to the appearance that they generally do not speak directly to the citizens.

With some minor alterations, some preambles could speak more directly to citizens. The *Multiculturalism Act*, for example, states that “the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society.”⁴⁸ This can be seen as an appeal to citizens to embrace tolerance and diversity as part of what it means to be Canadian. It is not quite “Joe” in the Molson’s ad telling us what it means to be Canadian, but it is moving in that direction. Unfortunately, this phrase is buried in the eighth paragraph of the preamble and prefaced not with a plea to citizens, but the

⁴⁶ Thus preambles have been used with respect to important *Criminal Code* amendments, inter-governmental treaties, international trade agreements, bilingualism and multiculturalism, and environmental protection.

⁴⁷ *Supra* notes 34, 35.

⁴⁸ *Supra* note 31.

standard clause “[a]nd whereas the Government of Canada recognizes.”⁴⁹ Clearly the aspirations in this preamble could be more directly stated.

Some preambles already speak directly to citizens. The preamble to the *National Organ Donor Week Act* provides: “And whereas it is desirable to encourage all Canadians to pledge to organ donation ...”⁵⁰ Similarly, the *CEPA 1999* declares that “the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.”⁵¹ Recent legislation relating to health research commences with a preamble indicating that Parliament recognizes “that Canadians value health as central to happiness and fulfilment, and aspire to be among the healthiest people in the world” and that “investment in health and the health care system is part of the Canadian vision of being a caring society.”⁵² The legislation to give effect to the *Nisga’a Agreement* starts with a praiseworthy preamble reminding the many citizens who opposed the agreement that “the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is of significant social and economic importance to Canadians.”⁵³ To the extent that Parliament wants to use preambles to educate the citizenry about the values and purposes of the law and attempt to persuade them to respect and share the aspirations of the law, these sorts of preambles stand out.

A paragraph in the preamble to *Criminal Code* amendments prohibiting female genital mutilation directly contemplates education of the citizens by stating that Parliament “believes that a clear statement that the criminal law of Canada applies to the practice of female genital mutilation will facilitate ongoing educational efforts in this area.”⁵⁴ Even this preamble, however, does not attempt directly to persuade a person who may believe such practices to be acceptable not to engage in them. A Platonic approach to such a preamble might attempt to speak directly to a person by persuading that person that female genital mutilation is not acceptable and—dare I say—un-Canadian. One difficulty with this Platonic use of a preamble is the assumption that citizens share common values and backgrounds. At the same time, preambles could be used as a means to attempt to foster common values among an increasingly diverse citizenry. The ideas in preambles, like the idea of rights, could be stated at the level of

⁴⁹ *Ibid.*

⁵⁰ S.C. 1997, c. 4.

⁵¹ *Supra* note 10.

⁵² *Canadian Institutes of Health and Research Act*, S.C. 2000, c. 6.

⁵³ *Supra* note 9. The next paragraph of the preamble proclaims that “reconciliation is best achieved through negotiation and agreement, rather than through litigation or conflict.” The force of this important aspiration is somewhat diluted by the fact that it is not stated directly, but prefaced by the phrase “Whereas Canadian courts have stated ...”

⁵⁴ *FGM Amendments*, *supra* note 8.

generality and aspiration so that they could be embraced more easily by a diverse citizenry.⁵⁵ This might help forge consensus at an abstract level, but the consensus could dissolve once the legislation was applied at a more concrete level.

With a few exceptions discussed above, most preambles in recent federal legislation seem to go out of their way not to address citizens. Thus a 1995 act to accelerate the use of alternative fuels for motor vehicles does not urge citizens to take steps to switch to greener technologies or reduce their use of cars, but rather states: “Whereas the federal government is a major user of [internal combustion] engines; and whereas government can lead the conversion to less harmful fuels by progressively replacing its motor vehicles with others using alternative fuels ...”⁵⁶ The self-reference to government may reflect the particular limitations of this piece of legislation, but it is also found in other preambles. The *Sexual Assault Amendments*—which included the much publicized “no means no” provisions defining consent for the purposes of sexual assault—contains a six paragraph preamble indicating Parliament’s concerns about sexual assault, various rights, and the likely effect of the law, but nowhere features the educational and evocative phrase “no means no”, which is also not contained in the text of the legislation.⁵⁷ The failure to include “no means no” in the preamble suggests a lost opportunity to convey the educational message behind this important reform of the criminal law which should speak to male citizens. Some might deride “no means no” as being more of an advertising slogan than a phrase worthy of being incorporated in legislation. There is some truth to this, but in my view that does not undercut the educational value of this phrase, as men need to understand that no really does mean no. Parliamentarians used the phrase repeatedly during the legislative debates yet it appears nowhere in the preamble or the text of the law. There is no reason that the preamble could not have featured this phrase.

My conclusion—that preambles rarely make an effort to speak directly to citizens and educate them—suggests something of a lost opportunity. At the same time, more thought needs to be given to the type of language that will speak to citizens, the implications of a diverse citizenry, and the dangers, as well as the advantages, of preambles becoming advertising slogans to sell legislation to citizens. These are issues that must be confronted, but they do not lead to the conclusion that preambles should be aban-

⁵⁵ For an argument that rights could hold together an increasingly diverse citizenry that has little else in common, see M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000). For a communitarian argument that rights are too thin to hold a citizenry together, see M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

⁵⁶ *Alternative Fuels Act*, *supra* note 10.

⁵⁷ *Supra* note 2. The text, however, does honour the “no means no” message by indicating that no consent is obtained where “the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity” (*Criminal Code*, *supra* note 8 at s. 273.1(2)(e)).

done. The abandonment of preambles would only increase pessimism about citizens' engagement with either politics or the laws.

IV. Political Uses of Preambles

Although existing preambles could be improved so as to speak to citizens more directly and effectively, the process of crafting preambles in a diverse modern society will clearly be more difficult than in Plato's time. In this section, I will explore the potential and pitfalls of using preambles to reflect the deliberations that led to legislation and to reflect the aspirations of legislation.

A. Narrative Uses

Preambles can provide a narrative about why particular legislation has been enacted and can even be used to reflect the process of deliberation that preceded the enactment of the legislation. This narrative and radically contextual use of preambles could mark something of a return to the past—some thirteenth-century English statutes featured narrative texts.⁵⁸ The move away from narrative and deliberation in modern legislation may have reflected not only a quest for efficiency, but a positivistic confidence that all that was required for obedience was command as opposed to persuasion. The subject of the legislation (who might not even have had the vote) could be ordered around without persuasion. The move back to narrative in postmodern legislation may suggest less confidence about governing a more diverse citizenry. In a globalized and multicultural society, the legislator may once again be trying to persuade a subject who does not feel particularly obliged to obey. Preambles can allow the legislature to explain the processes of deliberation, consultation, and accommodation that led to the enactment of legislation. Preambles that explain the consultation process that has preceded the enactment of the legislation are an implicit concession that in today's society the legitimacy of legislation does not follow automatically from three readings and promulgation. Thus, preambles can indicate some of the complexity and dynamism of modern governance.

The effectiveness of preambles when they reflect the deliberations and consultations that have preceded the enactment of legislation will be tied up more generally in the effectiveness of deliberative politics. Governmental departments often feel that they create legitimacy by consulting "stakeholders" before they introduce legislation.⁵⁹

⁵⁸ D. Manderson, "Statuta v. Acts: Interpretation, Music, and Early English Legislation" (1995) 7 Yale J. L. & Human. 317 at 357; Macdonald, *supra* note 16 at 15, n. 9.

⁵⁹ Consultation as an inclusive process can be seen as good in itself regardless of its particular outcome. On the other hand, consultations are sometimes viewed with suspicion. They can be seen as a charade to the extent that those consulted may not have real power in shaping the legislation. They

If this is the case, a preamble that even briefly describes these efforts will make the legislation more worthy of respect. Consultations with the provinces, the defence bar, and women's and victims' groups routinely precede the enactment of criminal legislation. At various times, all of these stakeholders express concerns that they have no real power in the process; at other times, all of these stakeholders express concern that the government has been captured by some other stakeholder group. My point is only that the effectiveness of using preambles to reflect the consultations that preceded the enactment of legislation may vary depending on particular perceptions of the fairness and outcome of the particular consultation process.

Narratives are a particularly effective means of describing the consultation process and the events that precipitated legislation. Preambles are frequently used in legislation that implements intergovernmental agreements. In these cases, the preambles often refer to the process of treaty-making that led to the enactment of the legislation, whether the agreement be an international trade agreement, an intergovernmental agreement, or a treaty with Aboriginal groups. A description of the processes of consultation can add legitimacy to the legislation and affirm to the relevant parties the important role that they played in the legislation. This in turn may give them a sense of ownership and participation in the legislative process that might not otherwise be present. The narrative preamble may also be an attempt to claim and create legitimacy among a skeptical citizenry. It indicates that the legislation did not come out of the blue but was a product of much deliberation both in government and in civil society. If, however, the public feels it should have been included in intergovernmental consultations, the preamble may do little to enhance respect for the law.

Narrative preambles can also explain the events that led to the enactment of legislation. The first three paragraphs of the preamble to the 1997 anti-gang law explain the political genesis of the law as a response to a well-publicized act of violence by biker gangs:

Whereas the use of violence by organized criminal gangs has resulted in death or injury to several persons, including innocent bystanders, and in serious damage to property;

Whereas Canadians who have witnessed the extent and the indiscriminate nature of that violence demand that means be taken to bring that violence and destruction to an end;

Whereas the Parliament of Canada acknowledges the calls from those responsible for the administration of criminal justice to provide better means to deal with gang-related violence and crime ...⁶⁰

can also be seen as a sign of government's capture by powerful interest groups to the extent that the government appears to be listening to some groups more than others.

⁶⁰ *Criminal Organizations Amendments*, *supra* note 8.

This preamble documents the political background—what many criminologists would call the moral panic—that led to the enactment of the law. On the one hand, this provides a valuable sense of context. The law did not descend out of the blue; it was enacted in response to a specific and horrific event. On the other hand, there are dangers in legislating by narratives. One is that the attention to a horrific crime will make it easier to go overboard and ignore more universal concerns such as the presumption of innocence, the need to use the criminal law with restraint, and the existing laws that already provide many tools to respond to the crime. Another danger is that relating legislation to a particular narrative will oversell the legislation. The implicit promise in the 1997 anti-gang law seems to be that a law enhancing penalties for gang crimes will prevent more terrible deaths of innocent bystanders in wars between biker gangs.

Parliament has been inconsistent in its use of narrative preambles. Though it used a narrative preamble to accompany the 1997 anti-gang amendments, new legislation passed by the House of Commons in 2001 shortly after the gang-related shooting of investigative journalist Michel Auger did not contain any preamble. There was thus no narrative of the near murder of Mr. Auger even though this tragic event played an important role in the formulation of the legislation and may explain some of its overreaching.⁶¹ The *Anti-terrorism Act* contains a preamble proclaiming terrorism to be a threat to Canada's peace and security, but does not contain any mention of the September 11, 2001 terrorist attacks on the United States.⁶² Sometimes narratives are so overpowering that they need not even be stated.

Narratives can be so evocative that they can be overpowering. To say December 6, 1989 to a Canadian or November 22, 1963 to an American or September 11, 2001 to almost any person will not only evoke horrible and painful collective memories, but may also make many too willing to take drastic measures in the hope of preventing the recurrence of a perhaps atypical tragedy. The increasing use of preambles and titles in legislation designed to recognize and memorialize the past suggests that lawmakers are increasingly comfortable with the idea that legislation to guide future be-

⁶¹ *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c. 32. The legislation arguably overreacts to the shooting of Mr. Auger by making it a crime punishable by up to fourteen years to use or threaten to use violence, destroy the property, or repeatedly follow, watch, or communicate with a journalist in order to impede his or her reporting on a criminal organization. For an account of the political genesis of the 1997 and 2001 organized crime amendments that is critical of the expediency of expanding the criminal law in response to horrific and atypical crimes, see D. Stuart, "Politically Expedient but Potentially Unjust Legislation Against Gangs" (1997) 2 *Can. Crim. L. Rev.* 207; D. Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency" (2001) 28 *Man. L.J.* 89.

⁶² S.C. 2001, c. 41. On the various connections between Bill C-36 and the horrible crimes of September 11, 2001, with arguments by many commentators that the bill, as originally introduced, was an overreaction, see generally R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001).

haviour can be a justified response to a specific prior event. This use of narrative is politically powerful, but carries the danger of creating a dissonance between the text of the law and the grand claim of memorializing a tragedy and preventing it in the future. Criminal legislation named after a crime victim or with a preamble that invokes an awful crime raises concerns about, on the one hand, exploiting the past and, on the other hand, sacrificing basic principles of criminal justice. The narrative form of legislation can influence its substance and for that reason should be used with care and restraint.

The use of narrative is less dangerous and more appropriate in overtly symbolic legislation that is simply designed to recognize the past by declaring times of recognition or mourning. Such legislation generally makes no claim to prevent recurrence of the past—only to remember it. When such legislation does look to the future, it is through the expression of aspirations and not coercive laws. Some of the preambles to overtly symbolic legislation seem designed to achieve something akin to restorative justice or reparations for the past. For example, the preamble to the act establishing the Canadian Race Relations Foundation provides that “in concluding the Japanese Canadian Redress Agreement with the National Association of Japanese Canadians, the Government of Canada has condemned the excesses of the past, [and] reaffirmed the principles of justice and equality for all in Canada.”⁶³ The preamble to an act establishing a day of mourning for those killed on the job looks to the past, but also indicates a hope for the future by stating that “Canadians seek earnestly to set an example of their commitment to the issue of health and safety in the workplace.”⁶⁴ Similarly, legislation providing for a national day of remembrance and action on violence against women looks to both the past—“whereas on December 6, 1989, fourteen women died as a result of a massacre at the University of Montreal”—and to the future—“the Canadian people wish to reflect on the event in the hope of preventing further violence against women.”⁶⁵ The statute does not, however, create new offences or increase punishment for existing crimes.⁶⁶ Preambles can be important vehicles for the expressive purposes of legislation. The value of expressive concerns as an instrument of governance should not be underestimated. At the same time, however, the expressive task of the legislation may oversell its ability to achieve the instrumental tasks that we usually associate with legislation.

When using preambles for expressive purposes, governments should be cautious not to waste moral and symbolic capital. Thus a preamble providing “the people of

⁶³ *Canadian Race Relations Foundation Act*, S.C. 1991, c. 8.

⁶⁴ *Workers Mourning Day Act*, *supra* note 11.

⁶⁵ *National Day of Remembrance Act*, *supra* note 11.

⁶⁶ New offences—including mandatory minimum penalties of four years imprisonment—were, however, created in the *Firearms Act*, S.C. 1995, c. 39, s. 149, which was enacted in part in response to the Montreal massacre but without a narrative preamble.

Canada recognize the value of the services rendered by federal public service employees⁶⁷ in an act providing for a public service week rings hollow compared to the above uses of preambles to honour those who have died or suffered discrimination. Similarly the frequent use of preambles to explain the history of specially constituted organizations and corporations also falls short of the expressive and symbolic meaning of legislation that honours national tragedies. More study of overtly symbolic legislation will provide an interesting window on the multiple purposes of legislation.

B. Aspirational Uses

In addition to reflecting the narratives and deliberation that led to legislation, preambles are also often used to articulate the aspirations of legislation. The expression of aspiration in a preamble can be defended as an extension of the purposive approach to the interpretation of legislation and a candid recognition of the values and assumptions that led to the creation of the legislation.⁶⁸ It can also be defended as a means for legislatures to reflect the diversity of conflicting values often at stake in legislation.⁶⁹ These are the optimistic accounts of the aspirational ambitions of preambles. The pessimistic ones see the expression of aspiration as a means of overselling the legislation that will quickly generate disappointment and cynicism or as an attempt to achieve a consensus at such a high level of abstraction that it will quickly break down when anyone tries to apply the legislation.

The preambles to international trade legislation frequently include a laundry list of hopes and aspirations for the future effects of the agreement. For example, the preamble to the Canada-United States Free Trade Agreement indicates a desire “to strengthen the unique and enduring friendship” between the two countries, as well as the promotion of “productivity, employment, financial stability and the improvement of living standards.”⁷⁰ The preamble to this legislation is closer to a slick advertising campaign than a serious attempt to outline the purposes of the legislation in a way that reflects deliberation or that can assist those who must interpret the law. The preamble to the act to implement free trade between Canada and Chile indicates a desire both to “strengthen Canada’s national identity” and to “contribute to hemispheric integration.”⁷¹ It also indicates a desire “to enhance the competitiveness of ... firms in global markets” and to “protect, enhance and enforce basic workers’ rights.”⁷² This last phrase indicates another feature of preambles—the subtle truncation of goals by the

⁶⁷ *Public Servants Act*, *supra* note 29.

⁶⁸ Sullivan, *supra* note 15.

⁶⁹ Tremblay, *supra* note 14.

⁷⁰ *Supra* note 34.

⁷¹ *Canada-Chile Free Trade Agreement Implementation Act*, S.C. 1997, c. 14.

⁷² *Ibid.*

insertion of qualifiers like the word “basic”. Similarly, the *Official Languages Act* qualifies its commitment to achieving “full participation of English-speaking Canadians and French-speaking Canadians in its institutions” with the phrase “with due regard to the principle of selection of personnel according to merit.”⁷³ Preambles can express but also qualify a commitment to competing policies.

Preambles are used to provide a symbolic concession to values that are not really advanced by the legislation and thus provide an attempt to assuage those who may be concerned about the act. The *Official Languages Act* provides the following throw-away phrase in its preamble: “[T]he Government of Canada recognizes the importance of preserving and enhancing the use of languages other than English and French while strengthening the status and use of the official languages.”⁷⁴ This paragraph in fact combines the technique of recognizing competing policies and qualifying the pursuit of one policy with another. The preamble to the *Multiculturalism Act* provides recognition both of English and French as official languages and of Aboriginal rights⁷⁵ even though the idea of “founding nations” is not advanced in the act which focuses on the subsequent cultures and languages that have been added to the Canadian mosaic. The symbolic nature of preambles means that they are often concerned with the politics of recognition and preventing offence to groups that might feel insulted if they were not mentioned.⁷⁶ The optimist would defend this use of preambles as an attempt to respect differences among the population even when one group’s interests are not really being addressed in the legislation. The pessimist would argue that acknowledgement of a group in a preamble that is not supported in the text of legislation is a recipe for disappointment and cynicism.

The objectives of modern legislation can be multiple and conflicting, and preambles frequently recognize goals that are in some tension with each other. For example, preambles in various *Criminal Code* amendments concerning sexual assault indicate a desire by Parliament to respect both the rights of the accused and the rights of women and children who are victimized by sexual violence. One preamble provided that “the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse.”⁷⁷ Many would argue that in difficult cases, there is a conflict between the com-

⁷³ *Supra* note 32.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 31.

⁷⁶ Preambles reflect the new “language of shame, pride, dignity, insult, inclusion or exclusion, humiliation or recognition” that Alan Cairns sees in recent constitutional politics. A.C. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed. by D.E. Williams (Toronto: McClelland & Stewart, 1991) at 174.

⁷⁷ *Production of Records Amendments*, *supra* note 5.

peting rights of the accused to full answer and defence and of the complainant to privacy and equality. The “we can have it all” approach of the preamble has, however, been followed by the Supreme Court in a subsequent case upholding the constitutionality of the legislation. In *R. v. Mills*,⁷⁸ the Court stressed that it would allow judges to define rights relationally and the issue was not whether limitation on one of the competing rights was justified. At the same time, however, there are parts of the judgment that seem to hint that the rights identified by Parliament may in some cases conflict and that the rights of the accused should prevail.⁷⁹ The preamble to the *Anti-terrorism Act* similarly embraces a “we can have it all” approach by indicating that Parliament recognizes terrorism “is a matter of national concern that affects the security of the nation” and will take “comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights of Freedoms*.”⁸⁰ By proclaiming their commitment to conflicting values, these preambles obscure the trade-off between respect for the rights of the accused and the equality and other rights of potential victims of crime.

Criminal Code amendments that proclaim Parliament’s desire to reduce violence against women and children are a good example of both the strengths and weaknesses of using preambles to express aspirations for the law. By articulating Parliament’s concern about violence against women and children, these preambles can inform the subsequent application of the legislation. They also serve as a recognition of a problem and affirm the belonging of women and children as full citizens who should be protected from crime. Aspirational preambles can respond to the concerns of various groups who may, with legitimacy, believe they have been treated poorly by the law in the past. Preambles can be a valuable form of recognition and may even help create social capital and a sense of belonging.

At the same time preambles can oversell legislation. By definition, preambles will be better in securing expressive as opposed to instrumental purposes because they do not impose rights and duties. The instrumental claims made in various preambles to *Criminal Code* amendments designed to respond to violence against women and chil-

⁷⁸ [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1 [hereinafter *Mills*].

⁷⁹ *Ibid.* at paras. 22, 118, 132.

⁸⁰ *Supra* note 62. For arguments that anti-terrorism laws should be seen as a means to promote the human rights of potential victims of such crimes, see I. Cotler, “Towards a Counter-Terrorism Law and Policy” (1998) 10:2 *Terrorism & Pol. Violence* 1. Professor Cotler has more recently argued that while Bill C-36 “may be said to be inspired by, and anchored in, the principle of human security—both domestic and international—and while the Bill was subjected to a rigorous Charter scrutiny, this does not obviate civil libertarian concerns ...” I. Cotler, “Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy” in Daniels, Macklem & Roach, *supra* note 62, 111 at 121.

dren are dubious and border on being false promises. Given the low level of reporting of violence against women and children, it is doubtful that amendments relating to the trial process will significantly reduce such violence. Even the suggestion that the answer to violence lies in criminal justice reform may direct attention away from other factors that contribute to violence.

Preambles that indicate Parliament's "grave concern" about crimes such as child prostitution, impaired driving, crimes by criminal organizations, and terrorism can be a vehicle for the criminalization of politics that occurs when amendments to the criminal law are offered as the primary response to the larger social, economic, and cultural determinants of crime.⁸¹ Preambles often seem designed to show that Parliament is concerned about and responding to a specific type of crime. Closer examination of the text, however, might create doubts about the ability of the law to curb the mischief identified in the preamble. Thus a preamble to recent amendments relating to impaired driving provides that Parliament "is committed to ensuring that the provisions of the *Criminal Code* respecting impaired driving have a sufficient deterrent effect on potential offenders."⁸² The preamble suggests that tinkering with the penalties and offences for impaired driving can deter this harmful behaviour whereas the available empirical evidence suggests that criminal laws alone, without police enforcement and other measures designed to curb the consumption of alcohol, cannot effectively deter drunk driving.⁸³ Preambles speak to a "culture of public problems" in which simple and symbolic messages dominate and complex realities are often simplified.⁸⁴

In summary, there are a variety of political uses for preambles in modern legislation that go beyond the Platonic ideal of persuading the citizenry to obey the law. Preambles can use narratives to explain how legislation came to be developed and provide a vehicle for linking the attempt of the law to guide the future with a recognition of the past. The narrative uses of preambles are powerful and for better or worse can influence the substance of legislation. Preambles can also express hopes and aspirations for legislation, but there is a danger that they may overestimate what the legislation can achieve and even its actual text. Nevertheless, the symbolic, aspirational, and expressive ordering that occurs in preambles can be an important instrument of governance and in itself a form of legal pluralism that complements the usual instrumental ambitions of legislation. Preambles can provide a means to recognize the claims of those who might otherwise feel excluded from the legislation and they can recognize

⁸¹ See K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

⁸² *Impaired Driving Amendments*, *supra* note 8.

⁸³ M. Friedland, M. Trebilcock & K. Roach, *Regulating Traffic Safety* (Toronto: University of Toronto Press, 1990).

⁸⁴ J.R. Gusfield, *The Culture of Public Problems: Drinking-Driving and the Symbolic Order* (Chicago: University of Chicago Press, 1981).

competing rights and policy aspirations. There is a risk, however, that the recognition of competing goals can be unrealistic, at least at the instrumental level. The preambles to sexual assault amendments, free trade agreements, and the proposed anti-terrorism legislation suggest "we can have it all". Such an inclusive approach may be politically and symbolically useful, but it may also obscure or delegate a real choice that must be made between competing policies.

V. Professional Uses of Preambles

Although preambles have a range of political purposes and audiences, many seem designed to address those professionals who will administer the act or those who have a particular interest in the act. Thus some preambles indicate that the statute is designed to ensure compliance with some international or domestic instrument. For example, the *FTA* provides in its preamble that it "build[s] on Canada's rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation."⁸⁵ The preamble links the act with Canada's international obligations in a way that would be of interest to international trade experts. The preamble to legislation providing for warrants to search a house in order to make an arrest speaks to police officers and courts by indicating that such warrants will not be required in exceptional circumstances.⁸⁶ Preambles can be designed to explain the law to those who administer it and to explain some of Parliament's expectations about how the law will be administered and interpreted.

A. Preambles and Statutory Interpretation

Preambles may be used to advance an interpretation of the statute being enacted. For example, the preamble to the *FGM Amendments* provided that "the criminal law of Canada applies to the practice of female genital mutilation."⁸⁷ Again, when Parliament re-enacted the so-called "rape shield" law after it had been struck down by the Supreme Court, the preamble provided that "the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant."⁸⁸ This essentially amounted to a prediction or hope about how the courts would interpret the new restrictions on admissibility of a complainant's prior sexual conduct. The law itself was more complex and ambiguous as judges were simply instructed to balance a long list of factors in deciding whether sexual history evidence was relevant and admissible in a criminal trial.⁸⁹ The fact that this preamble was not included in the

⁸⁵ *Supra* note 34.

⁸⁶ *Powers to Arrest Amendments*, *supra* note 6.

⁸⁷ *FGM Amendments*, *supra* note 8.

⁸⁸ *Sexual Assault Amendments*, *supra* note 2.

⁸⁹ *Ibid.*

commercial criminal codes used by judges and lawyers, however, probably limited its use by those professionals. Even the Supreme Court made no reference to the preamble in its recent decision upholding the law from *Charter* challenge.⁹⁰ Though preambles may be used to provide courts with guidance about how they should interpret statutes, there is no guarantee that courts will follow this guidance.

There is some support for the jurisprudential utility of preambles. Ruth Sullivan has suggested that “[t]he primary function of a preamble is to recite the circumstances and considerations that give rise to the need for legislation or the ‘mischief’ the legislation is designed to cure.”⁹¹ Preambles can also include “principles or policies which it sought to implement or goals to which it aspired.”⁹² In addition, the preamble can speak to the legislative facts surrounding the law. “By spelling out the assumptions *the legislature* takes to be true, the policies and principles *it* wants to advance and the values to which *it* is committed, the preamble offers interpreters an authoritative form of guidance.”⁹³ At the same time, courts have frequently been reluctant to give great weight to preambles. La Forest J. has stated that “it would seem odd if general words in a preamble were to be given more weight than the specific provisions that deal with the matter.”⁹⁴ Similarly, a leading English case warns that although preambles may be helpful in identifying the mischief of the act, they are no replacement for the precise words of the enactment: “There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble.”⁹⁵ Courts are alive to the danger that preambles can oversell the fine print of the legislation.

The primary professional function of preambles is an articulation of the mischief or purpose of the legislation. This is important in modern purposive approaches to statutory interpretation, but it also supports the idea that the political purposes of preambles are primarily aspirational. Many of the mischiefs that are identified in modern legislation are quite intractable and will persist and perhaps even grow despite the legislation. The secondary professional function of preambles—to provide guidance on statutory interpretation—suggests that Parliament can use preambles as a vehicle to engage in an enterprise that is somewhat closer to adjudication than legislation. Courts may, however, be reluctant to accept such guidance and pre-judgment.

⁹⁰ *R. v. Darrach*, [2000] 2 S.C.R. 443, 191 D.L.R. (4th) 539, 2000 SCC 46 [hereinafter *Darrach*].

⁹¹ Sullivan, *supra* note 3 at 259.

⁹² *Ibid.*

⁹³ *Ibid.* at 261 [emphasis in original].

⁹⁴ *McVey v. United States of America*, [1992] 3 S.C.R. 475 at 525, 97 D.L.R. (4th) 193.

⁹⁵ *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436 at 467 (H.L.), [1957] All E.R. 49.

B. Preambles and Constitutional Interpretation

Preambles can be used as a vehicle for the legislature to provide its own interpretation of the law or the constitution.⁹⁶ For example, a number of paragraphs in the preamble to Parliament's response to *O'Connor* seem designed to indicate that Parliament, contrary to the findings of the majority of the Court in that case, concluded that the disclosure to the accused of the complainant's private documents affected not only the accused's privacy rights, but also her equality rights, and that production to the court also affected those rights. The preamble provides that Parliament

recognizes that violence has a particularly disadvantaging impact on ... the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 [of the *Charter*, and] that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make full answer and defence, that production may breach the person's right to privacy and equality.⁹⁷

Both of these clauses advance a proposition of constitutional law that, rightly or wrongly, had been rejected by the majority of the Court in *O'Connor*, but accepted by the minority.

In upholding the above amendment in *Mills*, the Supreme Court gave some recognition to Parliament's claim to interpret the constitution by indicating that "[c]ourts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups."⁹⁸ To the extent that the Court will recognize that Parliament has a role in interpreting the constitution, preambles may be a vehicle for Parliament to express its own interpretation of the *Charter*. Preambles allow Parliament to articulate the reasons for its interpretation of the *Charter* while the operative text will often only assert the conclusions that Parliament has reached.

⁹⁶ In cases in which Parliament believes a *Charter* decision of the Court should not be the last word, the preamble may engage in constitutional interpretation by asserting the relevance of other *Charter* rights that the Court did not consider, such as the equality rights of women and children victimized by crime. On the legislative replies to *Charter* decisions focusing on the rights of the accused, see text accompanying notes 97-107. For support of the idea that legislatures should interpret and act on their interpretation of the constitution in order to avoid judicial supremacy, see C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001) c. 6, 7. For arguments that legislatures are not well-suited to interpreting the constitution and that co-ordinate construction is not required to avoid judicial supremacy under the *Charter*, see K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) c. 13, 14.

⁹⁷ *Production of Records Amendments*, *supra* note 5.

⁹⁸ *Mills*, *supra* note 78 at para. 58.

Preambles can be a vehicle for Parliament to conduct a dialogue with the Court and to indicate its purposes in enacting legislation. It is noteworthy that the Court in *Mills* paid attention to the preamble, even though it is nowhere in the commercial criminal codes that sit on the justices' desks. In explaining the purpose of Bill C-46, the Court noted that

[t]he preamble to the Bill indicates that Parliament was concerned about the incidence of sexual violence and abuse in Canadian society, its prevalence against women and children, and its "particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the [Charter]." The preamble expressly declares that Parliament seeks to provide a framework of laws that are fair to and protect the rights of both accused persons and complainants.⁹⁹

In its decision to uphold the legislation, the Court accepted Parliament's indication in the preamble of the competing rights at stake, as well as Parliament's statement of its desire to respect both the rights of the accused and the complainant. The Court's use of preambles is not, however, consistent. A few months after *Mills*, the Court upheld the legislative reply to *Seaboyer* without mention of a similar preamble used in that reply and stressed that the legislation complied with its previous decision rather than offering an alternative interpretation of the constitution.¹⁰⁰

Parliament seems more consistent than the Court in its use of preambles. The preambles in legislation responding to *Seaboyer*, *Daviault* and *O'Connor* all indicated Parliament's view that both the accused and the complainant's *Charter* rights were at stake.¹⁰¹ When first articulated by feminist criminal law scholars, the equality approach to criminal law was controversial—even heretical.¹⁰² In less than a decade, however, it has been accepted—first by Parliament in preambles to *Criminal Code* amendments and subsequently by the Supreme Court. Evidently, preambles can be an important vehicle to introduce new ideas into the law and to contest existing ideas.

The preamble to the legislative reply to *Daviault* indicated Parliament's view that the factual and legal premises of the controversial extreme intoxication defence to sexual assault were faulty—to the extent that the majority of the Court held that extreme intoxication could produce involuntary conduct. The relevant paragraph in the preamble provides that Parliament "is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily."¹⁰³

⁹⁹ *Ibid.* at para. 48.

¹⁰⁰ *Darrach*, *supra* note 90.

¹⁰¹ *Supra* notes 2, 4, 5.

¹⁰² C.A. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989); C. Boyle, "The Role of Equality in Criminal Law" (1994) 54 *Sask. L. Rev.* 203.

¹⁰³ *Self-Induced Intoxication Amendments*, *supra* note 4.

Preambles to “in your face” legislative replies to controversial *Charter* decisions may be used as a vehicle for Parliament to articulate an interpretation of the constitution that is at odds with the Court’s interpretation. They may also be a vehicle in the *real-politik* of institutional dialogue for Parliament to tell the Court why it and sometimes the majority of Canadians found the Court’s decision to be unacceptable. Perhaps more charitably, they may be a vehicle for Parliament to clarify its legislative objectives and the alternative regulatory options that it considered and rejected. In all events, preambles are used in a dialogic fashion by Parliament to send messages to the Court.¹⁰⁴

The preamble to Parliament’s response to the Supreme Court’s controversial decision in *Feeney* also seems to engage in constitutional interpretation.¹⁰⁵ In that case, the Court avoided addressing the question of whether circumstances other than hot pursuit would justify the warrantless entry into a person’s home in order to make an arrest. The preamble to the reply legislation, however, made clear that Parliament believed such entries were authorized in a range of exigent circumstances beyond the limited case of hot pursuit. The preamble proclaimed that warrantless entries were permissible and authorized in a broad range of exigent circumstances “that justify entry into a dwelling house ... in the absence of prior judicial authorization.”¹⁰⁶ Parliament was telling not only the police, but also the Court that in some cases it was permissible to enter a dwelling without a warrant in order to make an arrest. In this case, the preamble was backed up by the text of the legislation which defined exigent circumstances to include a reasonable suspicion that entry is necessary to prevent imminent death or bodily harm or a reasonable belief that entry is necessary to prevent the imminent loss or destruction of evidence.¹⁰⁷

The preamble to the *Victims of Crime Amendments* also suggests that Parliament believes that victims’ rights are entitled to the same sort of balancing that the Supreme Court has applied to competing *Charter* rights. One paragraph of the preamble attempts to constitutionalize victims’ rights by providing that Parliament “recognizes and is committed to ensuring that all persons have the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* and, in the event of a conflict between the rights of accused persons and victims of and witnesses to offences, that those rights are accommodated and reconciled to the greatest extent pos-

¹⁰⁴ On the dialogue between courts and legislatures, see P.W. Hogg & A.A. Bushell, “The *Charter* Dialogue between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 75; K. Roach, “Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures” (2001) 72 *Can. Bar Rev.* 481.

¹⁰⁵ *Supra* note 6.

¹⁰⁶ *Powers to Arrest Amendments*, *supra* note 6.

¹⁰⁷ *Criminal Code*, *supra* note 8, s. 529.3.

sible.”¹⁶³ As in the preambles to the legislation that responded to *Seaboyer, Daviault*, and *O’Connor*, this preamble may be influential in persuading the Court to consider the relevance of rights that it has previously not recognized. Preambles may be an important vehicle for Parliament to assert its own interpretation of the constitution or at least to re-frame issues of constitutional interpretation.

Preambles that involve legislative interpretations of the constitution may not always push back judicial interpretations of the constitution; they may also confirm and embrace such interpretations. The federal government followed up its *Secession Reference*¹⁶⁹ with its controversial *Clarity Act*¹⁷⁰ providing for parliamentary review of subsequent questions and votes on the separation of Quebec from Canada. Six of the eight paragraphs in the preamble commence with the phrase “Whereas the Supreme Court of Canada has determined” or words to similar effect. Parliament thus repeatedly stresses that the legislation follows from the Supreme Court’s decision. The preamble to the *Clarity Act*, as well as its provisions, attempt to incorporate, affirm, and elaborate on the Supreme Court’s judgment in the *Secession Reference* with regard to the illegality of unilateral secession, the need for a clear expression of the democratic will, and the role of legislatures in deciding whether a question and a majority vote are sufficiently clear. The fact that this preamble embraces the Court’s constitutional decision and attempts to trade on the Court’s prestige has not, however, made the legislation less controversial.

All of the above preambles are examples of Parliament employing the language and concepts used by the Supreme Court in interpreting the constitution. This suggests that preambles may be used as a vehicle for what Michael Mandel has called the “legalization of politics.”¹⁷¹ In contrast to narrative uses of preambles that relate the law to the concrete, the use of preambles to articulate aspirations and interpretations of the constitution tends to increase the level of abstraction in the legislation and may also promise more than can be delivered in either an instrumental or a jurisprudential sense.

It remains to be seen how useful preambles will be in *Charter* litigation. Many of the preambles speak to the importance of the objective, the rational connection of the legislation to the objective, and perhaps the overall balance between the objective and the right, but are frequently silent on the often crucial issue of whether there are less drastic means by which the legislature could have pursued its objectives. The preambles, however, may be more successful in encouraging the Court to frame a particular criminal justice issue as one of competing rights to be resolved by a relational ap-

¹⁶³ *Victims of Crime Amendments*, *supra* note 8.

¹⁶⁹ *Supra* note 7.

¹⁷⁰ *Supra* note 7.

¹⁷¹ See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson, 1994).

proach to rights. In *Charter* litigation this reframing of issues is often more than half the battle because once the courts conceive the issue as one of competing rights, they will pay significant deference to the balance that Parliament has set.

In summary, the professional uses of preambles can supplement, in certain circumstances, some of the political uses of preambles by setting out the mischief that the legislation is intended to address. This is not only relevant to the public and those who lobbied for the law, but also to the bureaucrats who administer the law and the judges who interpret it. The exclusion of some preambles from official and unofficial working versions of the law, however, raises real questions about whether preambles will provide guidance to professionals who administer the law. The systematic exclusion of preambles to *Criminal Code* amendments from both unofficial and official consolidations of the law may suggest that preambles are mainly a form of political theatre designed to recognize interest group contributions and express sentiments and aspirations at the time that legislation is enacted, but that, like the minister's press release, can be discarded from the "working law" after the legislation has been enacted. This does not mean that preambles have no symbolic or normative importance, but it does underline the variety of purposes legislation serves and the variety of audiences it addresses.

Conclusion

The increased use of preambles since 1985 has not been indiscriminate. Preambles are generally found in legislation that results from various intergovernmental agreements on both the domestic and international levels, legislation that declares fundamental and symbolic characteristics of Canada such as official languages and multiculturalism, legislation in ideologically contentious areas like environmental and criminal law, and legislation enacted in response to judicial decisions. What is to be made of the increased use of preambles in federal legislation?

An optimist would argue that the Platonic ideal of using preambles to persuade citizens is being reclaimed for a modern age. Preambles can introduce a more narrative, deliberative, and aspirational tone to legislation that speaks to both the minds and hearts of citizens. Preambles can also allow Parliament to explain its purposes, the process of deliberation and consultation, and even the events that led to the enactment of legislation. Preambles can speak to the interested citizen, the disappointed or the satisfied lobbyist, and to those in the bureaucracy and the judiciary who will apply and interpret the legislation in the future.

A pessimist would argue that the Platonic ideal of preambles cannot be reclaimed in a less rational and more divided modern age. The ideas expressed in preambles may be closer to advertising slogans than rational appeals. Preambles can oversell legislation either by expressing unrealistic hopes that are not always supported by the fine print or the text of the law or by suggesting that "we can have it all". The fact that preambles are not included in many working versions of the law,

such as commercial criminal codes, only increases the risk of cynicism and disappointment when the high hopes of the preamble are not achieved. When the narrative and symbolic form of preambles actually does influence the substance of the law, however, there is a danger that the legislation will be driven by horrific events and not respect more universal principles, particularly in the criminal law.

The experience to date with the use of preambles in federal legislation lends somewhat more support to the pessimist than the optimist. There have been too many preambles that have oversold legislation and obscured conflicts of values. Preambles have facilitated legislation by tragedy,¹¹² obscuring the need to respect broader principles that transcend particular narratives. Preambles have too frequently been excluded from working versions of legislation, especially the *Criminal Code*, not to produce considerable cynicism about their professional and instrumental, as opposed to their political and expressive, utility. On the one hand, lobbyists who have worked hard to include preambles in legislation may fail to realize how little weight they may hold in the subsequent administration and interpretation of the law. On the other hand, they may simply be more concerned with the political messages than the administration of legislation.

Despite these grounds for pessimism, the use of preambles in important legislation should not be abandoned. Preambles can be improved by being more consciously directed at their intended audiences. They can play a valuable role in describing the purposes of legislation and the deliberative processes and events that led to its enactment. It is better to use a narrative preamble to acknowledge the origins of overly broad criminal laws in tragic crimes than to pretend that the legislation came from nowhere. Preambles can be a vehicle for both increased populism in legislation and for legislatures to engage in dialogue with both courts and society.

Whether one leans towards optimism or pessimism about preambles, there should be agreement that the increasing use of preambles in federal legislation is a significant trend and one that provides a fascinating window on the multiple purposes and audiences of modern legislation.

¹¹² On “the criminalization of tragedy”, see K. Roach, “The Dangers of a *Charter*-Proof and Crime-Based Response to Terrorism” in Daniels, Macklem & Roach, *supra* note 62, at 138–42.