2014

Constitutional Purpose and the Anti-Corruption Principle

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Northwestern University Law Review Vol. 108

CONSTITUTIONAL PURPOSE AND THE ANTI-CORRUPTION PRINCIPLE

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INTRODUCTION

What was the purpose of the American Constitution? What was it made to do by those who made it? This question—which might be at the center of constitutional theory—is not explicitly asked as often as one might think. Instead, it frequently takes a backseat to other questions about the appropriate mode of constitutional interpretation or the specific purposes of particular texts. And yet it is an important question. How did the Framers (and then the second Framers, the amenders) imagine their own purposes? What are legitimate ways to determine their purposes? Most importantly, for the purposes of this colloquy, should their general purposes in constitutional design have any bearing on how courts review the constitutionality of congressional activity?

I have argued in many places—including in a prior piece in this colloquy—that the Constitution was designed *for* fighting corruption.[1] Others, including Professor Lawrence Lessig, have made similar arguments; in a brief to the Supreme Court in a recent case, Lessig chronicled in exhaustive fashion the depth and meaning of the word *corruption* to the men who wrote the Constitution.[2]

The argument shows how anti-corruptionism was understood as a central purpose at the time of its drafting. I have used the text of the Constitution, political debates, discussions, contemporary writings about the Constitution, and, most importantly, the debates inside the Constitutional Convention to show that the men who wrote the Constitution saw the Constitution's job—or purpose, or function—to be anti-corruptionism. My work builds on the so-called republican revival of the late 1980s, when liberal scholars, using the work of historians, most notably Gordon Wood and Bernard Bailyn, argued that a fundamental premise of

[*] Associate Professor of Law, Fordham University School of Law. Thanks to the terrific editors at the *Northwestern University Law Review*, most notably Nathan Brenner and Chloe Rossen, for their substantive engagement in the ideas of this piece, to Seth Barrett Tillman for a truly stimulating colloquy on central issues of constitutional theory, and for his generosity with his time looking over drafts and sharing ideas. Thanks also to Kara Stein, Neil Siegel, Joe Landau, Ekow Yankah, and participants in the intellectual "schmooze" of the American Constitution Society for their comments on earlier versions of the piece.

[1] Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012).

[2] *See* Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee, McCutcheon v. FEC, No. 12-536 (U.S. July 25, 2013).

the Constitution was self-government and the maximization of civic virtue on the part of representatives. The scholarship of Frank Michelman and Cass Sunstein exemplified this line of scholarship, which is now widespread and in many ways a response to what was perceived as the Lockean, free-market takeover of legal originalist history.

My work on corruption merely amplifies this story and argues that the anti-corruption principle should play a concrete role in judicial decisionmaking. I have argued that Wood's and Bailyn's arguments need to be connected to the law itself and to the reading of statutes and contemporary limitations. As such, I make a claim that constitutional purpose has a doctrinal role: because anti-corruption was a purpose of the Constitution, that purpose deserves legal attention.

What I have not done, until now, is explain how courts should distinguish between competing claims of constitutional purpose. A story of structural intent or purpose, in my mind, should pass a kind of rigorous, time-specific analysis. It should look primarily at the words of the actors themselves when they created the Constitution, and secondarily at other sources that can help make sense of those words by providing background ideologies that likely drove them.

In a prior essay in this colloquy, Seth Barrett Tillman acknowledged the historical support for my argument that the Constitution grew out of corruption concerns. However, he is unsure that the history matters. Purpose might not have a role, he suggests. As he writes, "I do not see how Teachout's anti-corruption principle, standing apart from the Constitution's text, can have a normative claim on Americans of today."[3] Tillman's challenge is an important one. It forces an explanation of how the great bulk of evidence that corruption was a reason for the Constitution has bearing on particular legal questions.

The question of constitutional purpose is analytically distinct from four other related questions, which make up much of constitutional theory. The first is, "How should courts interpret the text of the U.S. Constitution in general?" The second is, "What is this particular text for?" The third is, "What are constitutions (in general) for?" The fourth is, "What did people in general believe at the time of the Constitution?" All of these are important questions, and entangled with purpose, but none of them directly address whether and how the reasons for creating the Constitution, and creating it in the way it was done, should have any bearing on constitutional interpretation.[4]

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[3] Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 208 (2013).

[4] As a separate matter, there are also nontextual constitutional rules—rules that Stephen Sachs calls "constitutional backdrops"—rules that are not in the text but that predate the Constitution and are constitutionally protected. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816–18 (2012). The theory of backdrops is explicitly distinct from structuralism. *See id.* at 1886. In

In this Essay, I turn away from proving that corruption was a purpose that motivated the Constitution, and I ask the readers to assume, for the sake of argument, that it was. I instead shift to Tillman's challenge: should a motivating purpose of the Constitution play a role in constitutional interpretation? If so, what role? Original intent of particular clauses is frequently called upon to fill in textual gaps in the Constitution. But what of original intent of the Constitution as a whole? Structure, in at least two instances—separation of powers and federalism—is sometimes used both to interpret particular texts and to act something like a freestanding constitutional principle. Is this because separation of powers was a purpose of the Constitution? Purpose occupies an oddly undefined land—it is somewhere between structure, the purpose of particular clauses, and arguments about what constitutions in general are designed to do.

This Essay is an introduction to a generic argument about constitutional purpose and its role in court cases. It first examines what constitutional purpose might look like if it played a role in constitutional decisionmaking and explains how purpose is different than closely related modes of constitutional interpretation. I came to this Essay somewhat reluctantly—it seemed too much to introduce a method of constitutional interpretation at the end of a colloquy, in a short essay. However, the role of purpose has played an unexplored, unsettling background role not only in this colloquy, but also in many discussions about the role of the anti-corruption principle. I do not intend this Essay to answer or even fully explore purposivism and its relationship to other modes of interpretation, but to introduce it as an analytically distinct idea and to lay out some metes and bounds, if not set up precise rules.

I. WHAT IS CONSTITUTIONAL PURPOSIVISM?

I argue that the anti-corruption principle should have legal weight because courts should take into account general purposes of the U.S. Constitution when deciding particular cases that involve particular clauses. We will call this theory "constitutional purposivism."

Purposivism is a judicial and scholarly approach that "inquir[es] into legislative or regulatory purpose."[5] *Constitutional* purposivism, then, is the constitutional analogue. Purposivism is a teleological method of statutory

some ways constitutional purposivism aligns with McGinnis and Rappaport's "original methods" originalism. Original methods originalism suggests that the way we should interpret should align with the way the Framers intended us to interpret. The slight difference is that constitutional purpose can exist without an imagined method of interpretation—when there was a goal but a method of interpretation was entirely unimagined. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

[5] *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 737 (2002).

interpretation, where the purposes of laws are considered when attempting to interpret particular provisions within a law. Not all purposes are equal because not all purposes had a motivating role in the Constitution's design. (By constitutional design, I include the views of the Framers, the views of the ratifiers, and the views of those who put the federal convention in motion.) There are only a handful of purposes that played such a significant motivating role in the creation of the Constitution that they should take on a legally relevant position. In order to legitimately be called a constitutional purpose, it must have motivated the creation of the Constitution and played a role in many of the constitutional clauses. Determining which purposes fit this bill is not a straightforward task. Some purposes were so widespread and shared, they were not even discussed; other purposes were important in only a handful of clauses but were arguably more important than others. Purpose-based arguments should not be used lightly, but only when there is substantial, nontrivial historical support showing that the Constitution was designed to do certain things. It cannot be a precise science, but purpose ought to at least be recognized as a significant and independent source of constitutional interpretation, separate from text and structure.

Constitutional purposivism already occurs, but most of the time it is not treated as a separate type of interpretive discourse, and when it is used, it is used in an ad hoc manner, which uses history in terms of general purpose. It leads to special treatment of federalism and separation of powers, for instance, without a serious body of literature—or cases—explaining why those two purposes are given extra weight in scholarship.

This is not to say the question is never engaged. For example, in his dissent in *Poe v. Ullman*, a case involving the right of couples to challenge contraceptive bans, Justice Harlan described the importance of purpose in this way: "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[6] Justice Harlan's discussion was in the context of due process and privacy, and his line of reasoning has been followed narrowly in that realm, but the general point is the argument of this Essay: purposes should be tested against some objective measure. The measure of "rationally perceived and historically developed" is important because it constrains those purposes that can be called upon. For example, one should not be able to merely cite a single statement from James Madison showing that he did not want women to vote, and then, from that, infer that a constitutional purpose was to limit the franchise. Nor should one be able to rely on the tradition of the last several decades of treating separation of powers and federalism as constitutionally weighty purposes and reject others. Instead, one ought—in each case, or intellectual debate—to make a careful, historically supported argument

[6] 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

showing how the drafters and their contemporaries and supporters saw their own goal.

A final, secure "set" of purposes may never be defined because there is no infallible test for what constitutes a purpose. But the goal should be identifying—through historical investigation—those things that most of the Framers would agree constituted a "central purpose" or "persistent purpose" in the drafting of the Constitution.[7]

Constitutional purposivism is not radical—it is similar to Akhil Amar or Ronald Dworkin's view that the Constitution must be viewed as a whole. It is a subset of these approaches, one that focuses on teasing out substantial purposes driving the Constitution.

II. WHAT DOES CONSTITUTIONAL PURPOSIVISM LOOK LIKE?

The question of the Constitution's purpose is rarely openly discussed in cases. However, purpose was a deciding factor in *EEOC v. Wyoming*, in which the Supreme Court held that Congress was within its constitutional rights to make the Age Discrimination in Employment Act (ADEA) applicable to state and local governments.[8] The particular question was whether the federal government could enforce a federal law prohibiting age discrimination against a state defendant, or whether such enforcement would violate the Tenth Amendment, as constrained by the Commerce Clause. The debate between Justice Brennan's majority opinion, Justice Stevens's concurrence, and Justice Powell's dissent centered on their different views about the fundamental purpose of the Constitution. Their views of purpose shaped their views of the relevant constitutional clauses.

Justice Stevens saw the primary purpose of the Constitution as being the reduction of trade barriers, whereas Justice Brennan saw the reduction of trade barriers as one purpose, but only a secondary one. Their disagreement led to a different sense of how much weight should be given to constitutional purpose. Justice Stevens concurred because he believed that the central purpose of the Constitution was "to secure freedom of trade, to break down the barriers to its free flow."[9] He argued that "the *generating source* of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check."[10] He went so far as to claim that these concerns "were the proximate cause of our national existence down to today."[11] Justice Stevens argued that in order to define the scope of the Commerce Clause, one needed to understand that the

[7] The "majority" is too flip a statement. I set aside for now exactly how many Framers would be needed. Rather than looking at the precise number, I am interested in those cases in which most of those involved would broadly agree on the purpose.

[8] 460 U.S. 226 (1983).

[9] *Id.* at 245 (Stevens, J., concurring).

[10] *Id.* (emphasis added).

[11] *Id.*

Commerce "Clause was the Framers' response to *the central problem* that gave rise to the Constitution itself."[12] The problem was solved when "they founded a nation, although they had set out only to find a way to reduce trade restrictions."[13] In support of this he also cited a *Harvard Law Review* article in which Professor Robert Stern argued that "[t]he Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce. . . . [T]he need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution . . . ."[14]

Justice Powell in the dissent rejected this claim, arguing that concerns about commerce existed, but they were only some of many, and there was no central purpose in the Constitution:

> No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a National Government within a federal system was far more central than any 18th-century concern for interstate commerce.[15]

Neither Powell nor Brennan provide a means of distinguishing between purposes; Brennan is more thorough in his sources, but both adopt a general purposivism as a legitimate method of interpreting discrete constitutional provisions. A more developed purposivism would require that these claims be supported by less conclusory, and more textual, analysis of the Constitutional Convention's records itself.

III. THE RELATIONSHIP BETWEEN THE PURPOSE OF GENERIC CONSTITUTIONS AND THE PURPOSE OF THE U.S. CONSTITUTION

Constitutional purposivism is important because our Constitution has its own set of purposes, and if they are not specifically investigated and argued, their content may be inappropriately assumed. Particular constitutions were created for very different reasons. One constitution could be created in order to appease a foreign power.[16] Another constitution could

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[12] *Id.* at 244 (emphasis added).

[13] *Id.* at 245 (quoting WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 26 (1947)).

[14] *Id.* at 245 n.1 (quoting Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1337, 1340–41 (1934)).

[15] *Id.* at 265–66 (Powell, J., dissenting).

[16] Professor Tillman pointed out, in correspondence, that this arguably explains the 1922 Irish Free State Constitution.

be created to find compromise between domestic powers in friction. A constitution could be for getting into the European Union, or for receiving international aid, or for limiting overreaching military powers, or for entrenching military powers. These reasons are not necessarily exclusive, but they are certainly not all going to lead to similar constitutional provisions and choices.

Sometimes when constitutional purpose is discussed in scholarship, it is not treated as rigorously as the statutory purpose: constitutional purpose is not grounded in history. A frequent kind of argument about constitutional purpose is that ours was designed for the same purpose that constitutions generally are designed for, and therefore no inquiry into our specific history is really needed or necessary. Some see constitutions (as a set) as embodying the moral commitments of a polity; others see them as creating explicit social contracts that reinforce stable commitments and continuity or as reinforcing particular political rights to ensure better democratic representation. These discussions involve general questions of constitutional society; while they refer to the U.S. Constitution, an imagined class of "constitutions" is assumed with generic characteristics and functions.[17]

In one view, for example, constitutions are important because they enable shared, nonviolent civic society—they create a shared identity that is separate from group or individual identity and build loyalty around it through a shared text. In another, a constitution is an actual social contract to which people implicitly bind themselves. In a third, a constitution is a practical tool that enables change and efficient arguments through a structured document. In discussions about the meaning of constitutions, the U.S. Constitution stands as an archetype—there is some slippage between the general idea and the specific one, but the question is a more general one about constitutions.

This distinction between the designed function, the actual function, and the ideal function of a constitution is often subtly elided in constitutional theories. For example, Dworkin, in *Taking Rights Seriously*, argued that "[t]he Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."[18] This seems to be a fairly direct claim about constitutional purpose—but it is not. The language used is actually quite important; Dworkin claims that individual rights are what the Constitution *is* for, not what it *was* for. Dworkin's claim about the Constitution's current role might be about its original purpose. However,

[17] *See* William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution for?*, 98 CALIF. L. REV. 1235, 1239 (2010) (noting that the Constitution is "the soul of a city" and "commands loyalty and respect").

[18] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (7th prtg. 1980).

looking at the text of Dworkin's own argument, he shows little curiosity about the actual debates surrounding the creation of the Constitution. Instead, what he seems to mean by purpose is the best plausible function of the Constitution, given the limitations of its texts. That *can* be an attempt to understand original purpose, but it is not obviously so. Instead, the language gives a sense of relating to purpose (with the use of *designed*) but doesn't either ground itself in something other than purpose or explicitly embrace purpose.

Likewise, when Professor Jack Balkin argues that the purpose of *the* Constitution is to create a framework for decisionmaking, he derives this argument from his other argument that the purposes of constitutions *generally* are to create frameworks for decisionmaking.[19] At the same time, he argues that fidelity to original meanings should be limited to fidelity to the original meanings of words—not to the original purposes of words. Balkin asserts that the central purpose of the Constitution is "setting up a basic structure for government, making politics possible, and creating a framework for future constitutional construction."[20] He also states that constitutions in general

> are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future decisionmaking but to enable it. The job of a constitution, in short, is to make politics possible. That is why constitutions normally protect rights and create structures.[21]

Although Balkin typically focuses on intent when it comes to interpreting clauses, his method for determining the Framers' intent for the document as a whole is more abstract. Balkin seems to slip between claims about *constitutions* and *the Constitution* quite loosely. He suggests that the Framers had an "idea of separation of powers and checks and balances—a system that moderates, tests, and checks; and one that makes politics both possible and accountable to prudence and reason."[22] His theory of originalism is deeply intertwined with "the designer's perspective." From that perspective, which he imagines in abstract and generic terms, the Constitution is necessarily "a skeleton on which much will later be built."[23]

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[19] *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550–59 (2009).

[20] *Id.* at 549–50.

[21] JACK M. BALKIN, LIVING ORIGINALISM 24 (2011).

[22] *Id.* at 338.

[23] *Id.* at 31.

IV. THE RELATIONSHIP BETWEEN GLOBAL CONSTITUTIONAL PURPOSIVISM AND CLAUSE PURPOSIVISM

Constitutional purposivism should not be confused with clause-based purposivism, which only looks at the reason motivating particular clauses. For the constitutional purposivist, the original intent of the Constitution *as a whole* should shape the interpretation of particular elements. To consider the difference, assume that the purpose was anti-corruptionism. In a decision about the scope of the Due Process Clause in interpreting a bribery law, for instance, I would argue that a court should consider that there was a general anti-corruption purpose that motivated the Constitution. That purpose will then operate to shape the court's understanding of the Due Process Clause in the corruption context. The anti-corruption principle should not *trump* the Due Process Clause, but help make sense of how to interpret it.

An example closer to my own past work relates to the First Amendment. There is a great deal of debate about the purpose of the First Amendment. Jed Rubenfeld argues that a clause-purposivist approach towards the First Amendment leads away from balancing tests and towards First Amendment absolutes, such as, "The First Amendment does not allow government deliberately to stop protected speech on the ground that it will be harmfully persuasive. Period."[24] Putting aside the substance of the clause-specific claim, there is a procedural difference between Rubenfeld's clause-based purposivism and constitutional purposivism; it starts with the clause, not with the Constitution as the relevant document. Constitutional purposivism examines the clause in light of the constitutional purpose and the clause's purpose, not merely the latter. The First Amendment should be interpreted in light of the Constitution's general anti-corruption principle, not merely in terms of its own animating principles.

There is a large body of scholarship discussing purpose in the interpretation of particular clauses. In the extensive debates on the original meaning of the First Amendment,[25] or debates about the meaning of the scope of the Fourteenth Amendment,[26] scholars frequently examine the purposes of these clauses. These debates have become permanent and part of the structure of judicial review of state and federal statutes. In construing individual clauses, the judiciary explicitly looks at the purpose and intent behind the particular clause. Inasmuch as they do the same with the Constitution, they tend to do it less. There is a practical reason that clause-bound interpretations dominate. Theorists tend to reach the question of "what was the Constitution for?" only as a secondary matter—in the middle

[24] Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 805 (2001).

[25] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[26] *See, e.g.*, Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 20 (2007).

of interpreting cases or when understanding what the Constitution is currently for (or ought to be for).

While courts regularly rely on the purpose of a particular constitutional clause when interpreting it, what makes *EEOC* different is that the concurrence and dissent called upon the *general* purpose of the Constitution to interpret the *particular* clause at issue, rather than looking at the purpose of the clause on its own. One way to think about purpose and its relationship to the purposes of individual texts is to think about the relationship between a building and the objects inside the building. Imagine someone comes across a building in which there are many objects. One might want to know what the building was initially designed for and wonder what the building has recently been used for. Imagine that one person says the building was for worship, and the other argues that it was for housing. A bowl is found in the building. It is an object that has and might have had many (and may have in the future) different possible uses—it might be a bowl for drinking soup from, or it might be a bowl for washing, or it might be a bowl for blessed water used in sacraments.

Knowing whether the bowl was found in the room in which cooking took place or the room in which artistic endeavors took place would be useful to understanding the bowl's function. In order to understand the function of the bowl, some understanding of the overall project would be useful. Is the building a religious building or a dwelling? Is it a rental unit accommodating many discrete purposes? Is the bowl for washing, painting, or eating? The building will answer questions about the objects, and the objects will answer questions about the building as well.

The question of general purpose becomes extremely important to the question of specific purpose: if the historian who claims it was a religious house can support her claim by contemporary documents and oral histories of people testifying that it was a church, then the bowl's possible roles are very different than if she cannot support the claim, and the better historical claim is that the building was for housing. The archeological disputes might also extend not merely to objects, but to entire rooms—and while the nature of the structure might be quite clear (ten-by-ten feet, one window), the purpose of the structure will require looking outside the structure to interpret it.

Of course, purpose is not the only way to resolve a dispute about an object or a space. One might resolve the dispute about the object by poking it, throwing it against the wall, or touching it. One could examine how the room fits in relation to the other rooms, or to the objects in the room. And the information flows both ways—one might resolve disputes about the building itself by looking at how the rooms in the house interlock with each other (if they do), history, and objects found. But purpose plays a central role, and it is a role different than the role played by the structure of the building separated from any knowledge of purpose, and different than the role played by understanding the purpose of a particular object.

As with the objects and rooms in the building, so with the Constitution. An approach towards constitutional purpose that argues it has a role in constitutional interpretation argues that the clauses and sections of the Constitution are better understood if they are viewed in light of what the Constitution as a whole was designed for. To explore the purpose of the First Amendment without separately making claims about the purpose of the Constitution is to explore the purpose of a bowl without separately making claims about the building in which it was found.

The general interpretive position put forward here, which I continue to explore by separating it from other methods, has some interesting and difficult wrinkles. If purpose matters for the founding, then certainly it matters for the amendments as well—at which point the Constitution becomes a blend of purposes, just as a Methodist church reconfigured as a nursing home has a blend of purposes.

Likewise, it raises the question of how the Bill of Rights should be treated—was it seen as in harmony with, or at odds with, the original constitution? This particular question is important for Lawrence Lessig's, and my, arguments about the meaning of the First Amendment in light of the anti-corruption principle. One might argue that the First Amendment was designed to gut the anti-corruption principle—that the second purpose of the Amendments gutted the first purpose of the Constitution. More persuasively, as Professor Lessig has done, one can argue that the First Amendment reflects and entrenches the anti-corruption principle. This is not the place to fully engage that argument—which I find unpersuasive—just to recognize that amendments are important to understanding purpose, and changing purpose.

V. THE RELATIONSHIP BETWEEN STRUCTURALISM AND CONSTITUTIONAL PURPOSE

Constitutional purposivism also has a close relationship to structuralism, but they are not the same. Charles Black advocated a structural approach towards examining the Constitution. In his important 1969 book, Black argued that textualism and precedent could not—and should not—explain all of the Court's better decisions.[27] Instead, much of the best constitutional reasoning derives from the structure of the Constitution and the inferences therefrom. A structuralist argument considers constitutional provisions as they relate to each other, beyond the particular conclusions which arrive from clause-bound interpretations. It considers the reasonable inferences that can be drawn from the structure and the principles that the structure embodies.

[27] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–15 (1969).

Structuralism assumes "the necessary incompleteness of the written document"[28] and tries to provide limitations to the range of ways that incompleteness can be read. It tends to be a conservative approach, attempting to provide similar justifications for decisions over time. Unlike purposivism, it allows for the necessary limitations of the framing era records, as well as the necessary limitations of words themselves. As Black argued, "[T]the textual method, in some cases, forces us to blur the focus and talk evasively, while the structural method frees us to talk sense."[29] Sense, above all, drove his argument: the capacity of structuralism to force honest interpretations instead of shoehorning them into textual explanations, and the fact that structuralism, unlike textualism, "has to make sense—current, practical, sense."[30]

In his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson wrote:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[31]

Justice Jackson implies—correctly, I think—that nontextual glosses are particularly important when it comes to "the art of governing." This kind of interpretation may be necessary to give weight to what Justice Breyer calls "democratic harm[s]."[32] A violation of the separation of powers—like corrupt governance—is rarely experienced as a specific harm, almost always hurting society more in its indirect effects than its direct force. Unlike individual rights, the group rights accorded members of a democratic society must frequently come from structure and animating principles, rather than from particular clauses.

Structuralism requires integrated thinking and reasoning, and consistent explanation of core principles. It provides avenues of understanding that are only open because of the global perspective. As the Court said in 1934, "Behind the words of the constitutional provisions are postulates which limit and control."[33] Scholars have also contended that "[v]iewing the Constitution structurally provides insights that simply are

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[28] Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1661 (2000).

[29] BLACK, *supra* note 27, at 13.

[30] *Id.* at 22.

[31] 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[32] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 355 (2004) (Breyer, J., dissenting) (discussing potential "democratic harm" resulting from "purely political 'gerrymandering'" of district boundaries).

[33] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

not possible if the Constitution is seen as a list of liberties and little more."[34] As Justice Souter explained in *Alden v. Maine*, "The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure . . . ."[35] Souter importantly suggests that intentions plus structure have constitutional import. Justice Kennedy made a similar claim, holding that "the fact that the Eleventh Amendment by its terms limits only '[t]he Judicial power of the United States' does not resolve the question. To rest on the words of the Amendment alone would be to engage in . . . ahistorical literalism . . . ."[36] Sovereign immunity comes from "the structure of the original Constitution itself," from "fundamental postulates implicit in the constitutional design."[37]

The structural principle to which he referred was "the essential principles of federalism and . . . the special role of the state courts in the constitutional design."[38] A similarly nontextual structural argument showed up in *Shelby County v. Holder*, where Justice Roberts rested upon an equal sovereignty principle, one that derived from the general way powers were allocated in our federal system.[39]

There are, as Ernest Young sketches, different structuralisms. There is the Charles Black structuralism, which appears to be less focused on original intent, and there is the Anthony Kennedy structuralism that looks to "the original understanding of the general structure created by the Constitution."[40]

As a theoretical matter, structure and purpose are analytically different things. Structuralism, like the purposivism I describe, gives constitutional weight to things that do not show up textually. However, the entire document of the Constitution, its purpose as a thing, is not merely embodied in its "structure." The difference between structuralism and purposivism is that structural arguments do not always—or even often—flow from purpose, and that purpose does not always appear in structure. While the structure of the government may be created by the texts, it is not clear what constitutes the structure of the Constitution, inasmuch as it might be separate from the structure of government.

Structure might be an expression of a purpose, but it might not; furthermore, purpose might show up in ways that are not structural. And as difficult as it is to determine purpose, it is even more difficult to determine what constitutes structure—does any allocation of power in the Constitution make it structural? If not, which allocations?

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[34] J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1687 (2004).

[35] Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

[36] *Id.* at 730 (majority opinion) (alteration in original).

[37] *Id.* at 728–29.

[38] *Id.* at 748.

[39] 133 S. Ct. 2612 (2013).

[40] Young, *supra* note 28, at 1638.

Presumably, there are a great number of possible principles one might derive from the structure of the Constitution if guided by "pragmatism" (as Black suggests) or the meanings of the structure as understood at the time (as Young argues Kennedy uses).

Unfortunately, there are basically wide, relatively unexplored agreements about two structural principles that most judges consider to be legitimate and necessary features of judicial review: separation of powers and federalism.[41] The idea of the logic and the design of the governing institutions has been limited through intellectual habits to these without a serious explanation of how one should choose these structural principles among hundreds of possibly competing structural purposes.

Whether or not these principles are legitimate, they both appeared relatively late in the Supreme Court canon of interpretation, and unlike the text of the Constitution (where one can say, "These words exist and not others"), the widely accepted structural principles do not exhibit anything particular on their face to explain why they should be used over other potential principles.

One way to show or establish the slight arbitrariness of these principles is to examine their own histories: the term *federalism* is almost entirely absent in the first 150 years of judicial review. Separation of powers does not appear as a dominant force in the logic of judicial opinions until the mid-1940s. Yet it is loosely taken for granted throughout the academy that these structural principles can somehow be divined from the Constitution. One can take a sampling from any recent law review article on the Constitution, such as the following: "In the United States, for example, federal courts create system-regarding rules based on the structural principles of separation of powers and federalism embodied in the U.S. Constitution."[42] This is not the place to fully excavate those principles and the strengths and weaknesses of their claim to be structural principles with a force independent of clauses that they are sometimes tied to—the Tenth Amendment and the Incompatibility Clause, for instance—but to point out that they are in fact treated as having an independent force due to "structure."

Why I find purposivism more compelling than structure is that it is not clear to me how to weight structure and how to "prove it." As difficult as it is to find the purpose in the Constitution, it strikes me as easier to make clear arguments for or against a particular purpose. If one purpose influenced the textual development of twenty different phrases in the Constitution and was a dominant theme throughout the Constitutional Convention, one can compare that purpose to another purpose that infected only one phrase and was rarely discussed at or around the Convention.

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[41] *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 456–58 (2003).

[42] *Id.* at 444–45.

VI. CANDIDATES FOR CONSTITUTIONAL PURPOSE

If we look at existing scholarship, there are already several purposes used to justify interpretative models. Although I do not provide full arguments for or against them, in this Part, I introduce certain purposes as possible candidates for purposes that could be given constitutional weight. Some candidates for purposes that rise to the level of constitutional weight include the purpose of a "more perfect union," the purpose of safeguarding individual rights, and the purpose of entrenching elite power.

Akhil Amar, in *America's Constitution: A Biography*, adopts the *EEOC* understanding of the purpose of the Constitution, taking the key phrase "to form a more perfect union" as the one that describes its purpose.[43] He argues that the Constitution was adopted to limit friction between the states. In his view, disputes about trade and foreign affairs made maintaining separate states in the period of independence unworkable. As Woody Holton writes, this story is so powerful and so embedded that "[w]hether the title is *Miracle at Philadelphia* or *The Grand Convention* or *The Great Rehearsal* or *The Summer of 1787*, it is almost as though the same book has been written over and over again, by different authors, every few years."[44] The core of the "more perfect union" story concerns the states' discord. The exemplary clauses of this story are the clauses that regulate commerce between the states and allow for unified foreign policy.

Apart from regulating commerce, perhaps the most frequently claimed constitutional purpose is the protection of individual rights. In a discussion of separation of powers, Justice Marshall concluded that the goal of different branches having different authorities was to protect individual liberties: "At base, though, the Framers' purpose was to protect individual rights. . . . Provisions for the separation of powers within the Legislative Branch are thus *not* different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."[45]

Popular references to the Constitution frequently associate the Constitution with individual rights. This view also has enormous traction among Supreme Court Justices and lawyers, and as a result, many have placed individual rights at the center of the Constitution. For example, Chief Justice Taft stated, "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."[46] In this sense, the Constitution becomes a proxy for freedom, and, for some, a fairly libertarian view of freedom. This is evident in the tendency to equate the Constitution and freedom in popular rhetoric. Randy Barnett argues that the Constitution is fundamentally a libertarian

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[43] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 21 (2005).

[44] WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 4 (2007).

[45] United States v. Munoz-Flores, 495 U.S. 385, 395 (1990).

[46] Truax v. Corrigan, 257 U.S. 312, 338 (1921).

document.[47] Scholars have interpreted Justice Black's jurisprudence as his understanding that the function of the Constitution is to protect against arbitrary government action.[48] But isn't this a post-Bill of Rights understanding? Had the Bill of Rights and Fourteenth Amendment not been added, would the remaining Constitution really merit this description—and if not, what are you to do with your anti-corruption material, most of which hails from debates on Articles I to VII?

Having said that, historians with theories about constitutional purpose rarely engage with either cases or judicial theory. One group of historians, sometimes called the New Left historians, understands the purpose of the Constitution through a different lens, with a more dismal view of its goals.[49] They understand it primarily as a power grab by elites in the face of widespread popular democracy. Charles Beard, in *An Economic Interpretation of the Constitution of the United States*, argued that the members of the Constitutional Convention designed the Constitution to enhance their own economic interests.[50] The modern version of this view, exemplified by Woody Holton's book *Unruly Americans and the Origins of the Constitution*, is that the Founders were self-interested elites who created a Constitution to protect their own interests against the unruly, overly democratic mob. In this story, Madison, Hamilton, Gouverneur Morris, and others are wise but fundamentally elite bourgeois. This story is exemplified by the clause that limits the impairments of contracts. Holt argues that tax and debt relief legislation at the time fueled the Constitutional Convention, claiming that it was both self-interested and genuinely derived for the purpose of wrongdoing.[51] Beard, though widely read, is rarely cited in constitutional theory—perhaps because his elitist reading feels disloyal, and because the integrity of originalism should not extend to what we now think of as democratic sins.

VII. PURPOSIVISM AND THE ANTI-CORRUPTION PRINCIPLE

I have argued in several articles and a forthcoming book that a central purpose of the Constitution was protecting against corruption. Corruption was a constant topic in the founding era and a point of regular discussion

[47] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 356 (2004).

[48] MARTIN EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 246, 285 (1984).

[49] *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1998); JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788 (1961); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION: ITS ORIGIN, INFLUENCE AND RELATION TO DEMOCRACY (1907); Michael Parenti, *The Constitution as an Elitist Document*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 39 (Robert A. Goldwin & William A. Schambra eds., 1980).

[50] *See* BEARD, *supra* note 49, *passim*.

[51] *See* HOLTON, *supra* note 44.

throughout the Constitutional Convention and after. It was the lens through which many clauses—including surprising clauses involving the veto power and the size of districts—were measured. Ability to protect against corruption was the metric by which Hamilton and Mason, among others, said they would judge their own success. In all senses, it was a fundamental purpose and reason for the choices made at the Convention. As Madison said, he wanted the national legislature to be "as uncorrupt as possible."[52]

Tillman doesn't challenge these claims—instead, he challenges their relevance. If Tillman is right, the fact that the writers, Framers, and ratifiers wanted the Constitution to protect against corruption is irrelevant. No matter how many more texts historians dig up, no matter how many anti-corruption manifestos are shown to have motivated the Constitution, nothing matters that isn't in a clause. Therefore, the only question that matters for the interpretation of the scope of the First Amendment in cases like *Citizens United v. FEC*[53] or upcoming *McCutcheon v. FEC*[54] is whether the word *offices* in the gifts and emoluments section of the Constitution included elected offices, and therefore might shed light on the particular view the Framers had of gifts in relation to the First Amendment.

I think this argument has to fail. All meanings and sentences are contextual, and one of the most important contexts of individual commitments is the reason for the making of those commitments in the first place. I come as a pluralist in matters of constitutional interpretation and am generally open to seeing the Constitution in flexible ways over time. The way we read the simplest phrases depends on overall purpose. "I'll do the dishes," means one thing in the context of a fight in an intimate relationship, and another thing in the context of a contract for employment, because the goal behind the particular concession needs to be understood in terms of the goal of the relationship more broadly.

Furthermore, if global purpose is excluded—and only particular purposes included—it forces lawyers to find the line between global and specific purposes. What counts as particular? The motive behind only each word? In a sense, *all* purpose-based arguments—even the clause-based ones—necessarily draw on things outside of the text, in different degrees. If the purpose of *offices* is fair game, why not the purpose of the clause in which *offices* is found, or the Constitution in which the clause is found? Global purposes may be hard to delineate, but they are not logically distinct from clause-bound purposes.

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[52] 3 JAMES MADISON, *Journals of the Constitutional Convention, Saturday June 23. in Convention*, *in* THE WRITINGS OF JAMES MADISON 259, 261 n.1 (Gaillard Hunt ed., 1902).

[53] 130 S. Ct. 876 (2010).

[54] 893 F. Supp. 2d 133 (D.D.C. 2012), *appeal docketed*, No. 12-536 (U.S. Oct. 26, 2012).

CONCLUSION

Most of the time, the question of purpose is hidden in plain sight. A kind of rough purpose is assumed, and it shapes the thinking of scholars, lawyers, and the public. An understanding of the Constitution's designed social function often underlies other debates about methods of constitutional interpretation. Originalist interpretations of particular texts and nontextual original commitments rely on implicit (or explicit) claims about the proposed function of the Constitution.

In this Essay, I have suggested that constitutional purposivism should be embraced and made explicit as a mode of constitutional interpretation. There are many more paths to follow in this discussion: What would "living purposivism" look like? Might one argue that what the Constitution "is for" might be different than what the Constitution "was for"? Should constitutional purpose ever take on a freestanding power as a constitutional principle, as I have argued it might in the case of anti-corruptionism (and it has in the case of separation of powers and federalism), or should it only be a method for interpreting particular clauses? In practical terms, does the global anti-corruption principle get balanced *against* the First Amendment, or does it merely help us interpret it? Or both? (I would argue both.)

An implicit argument about constitutional purposivism drives separation of powers and federalism, both of which exist as freestanding doctrines and as interpretive lenses through which to see particular clauses. My hope is not to attack those principles, but that making purposivism explicit will lead to challenges of the special protected *place* these principles receive in modern constitutional scholarship and lead to more consistent distinctions between idealized purposes and historical purposes. By getting at the underlying logic of which principles get special treatment, there is more room for understanding why the overwhelming evidence that corruption was the motivator behind the Constitution ought to matter.