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The Constitution as if Consent Mattered

Tom W. Bell

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INTRODUCTION

How should respect for liberty inform constitutional theory? At present, libertarians favor an originalist approach, joining the Right in trying to reconstruct the understandings of those people, now long dead, who first ratified the Constitution's provisions. Libertarians tend to reject the other major theory—the so-called "living" constitutionalism generally favored by the Left—on grounds that it strays from fidelity to the Constitution's text. This brief paper offers a third approach, one that combines the best of originalism and living constitutionalism in order to maximize the consent of the governed and, thus, render constitutional authority as justified as possible.

Its focus on consent makes this *a* libertarian constitutional theory, not *the* libertarian one. No single theory can plausibly claim that title, given the fractious nature of libertarians. These pages aim to show, however, that originalism does not deserve a monopoly on libertarians' allegiance and that they will find an attractive alternative in trying to maximize the consent of the governed—what we might call a "consensualist" approach to the Constitution.

Part I explains why libertarians, who transcend the traditional left-right political spectrum, should also transcend the false dichotomy between originalism and living constitutionalism, combining the best of both in a distinctly libertarian, consensualist theory. That has the advantage, as Part II explains, of maximizing the consent of those governed by the Constitution, rendering its authority as justified as possible. Part III offers some consoling words to libertarians who hesitate to move beyond originalism. No constitutional theory can honestly be all things to all people. By way of full disclosure then, Part IV discusses some areas where a consensualist approach might generate policy results that libertarians disfavor. Part V airs some objections to consensualism and briefly answers them.

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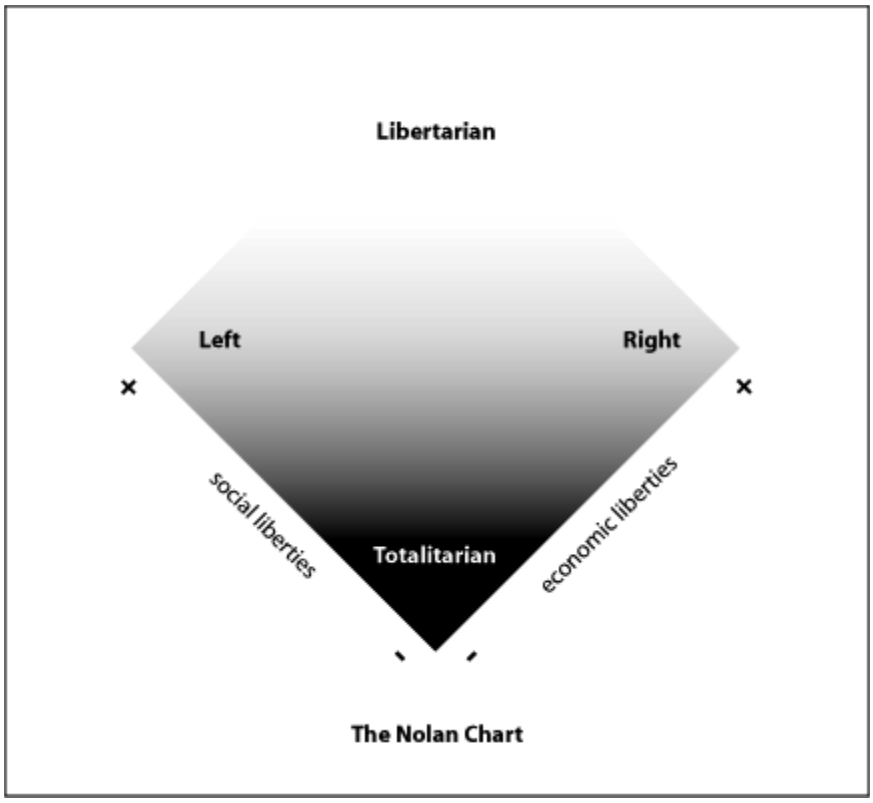
I. CONSTITUTIONAL THEORY IN 2-D

Most libertarians have encountered the Nolan Chart, an expository device that neatly explains how they transcend the typical left-right political spectrum.[1] The Nolan Chart graphs out two kinds of rights: *social rights*—e.g., freedom of expression, religion, and personal autonomy—on one axis, and *economic rights*—e.g., freedom to own and exchange property—on the other. The traditional, one-dimensional, left-right spectrum straddles the middle of the two-dimensional Nolan Chart. Totalitarians, who disregard all rights but their own, anchor the chart's bottom. Libertarians, because they respect both social and economic rights—indeed, because they generally regard social and economic rights as fundamentally indistinguishable—hold the high ground at the top of the Nolan Chart. Figure 1 illustrates.

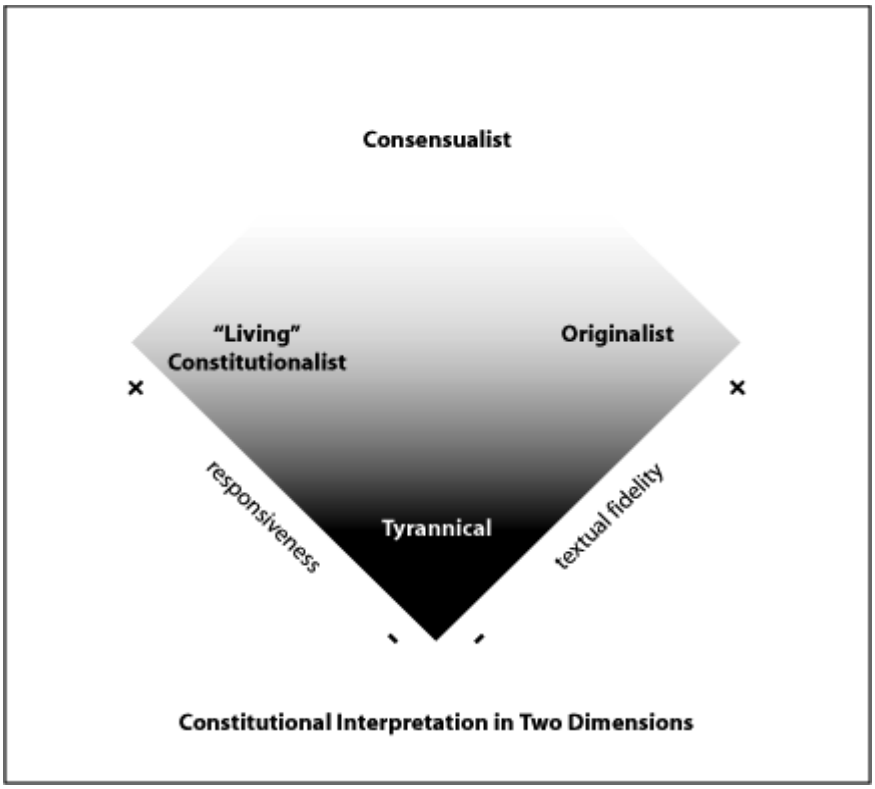
1 *See* NOLAN CHART, http://en.wikipedia.org/wiki/Nolan_Chart (last visited Feb. 11, 2013). Although I use the popular nomenclature here, it bears noting that Nolan popularized the chart but did not originate it. *See* BRIAN DOHERTY, RADICALS FOR CAPITALISM 321 n.92 (2007) (attributing the chart to Maurice Bryson and William McDill).

Figure 1



We can understand the bipolar character of contemporary constitutional law with a similar device. We begin by graphing *responsiveness to the understandings of living people* on one axis and *fidelity to constitutional text* on the other. Just as in the Nolan Chart, the chart's middle band approximates the traditional, left-right spectrum. The left-hand side of the spectrum corresponds to living constitutionalism, which aims to render the Constitution relevant to current conditions by encouraging judges to read its text loosely. The right-hand side of the spectrum corresponds to originalism, which prefers the meaning of those who first ratified the Constitution's text over its present meaning, but who at least take the text seriously. At the chart's bottom lies tyranny, where the Constitution means whatever those in power say. At the top, on the far side of the left-right divide, rises a distinctly libertarian position—one that aims to maximize the consent of those governed by the Constitution. This it does by seeking the plain, present, public meaning of the Constitution, an approach both responsive to present understandings and faithful to the text. Figure 2 illustrates.

Figure 2



Reading a constitution typically calls both for *interpretation* (finding the meaning of the text) and *construction* (applying contestable interpretations to particular problems).[2] A consensualist approach *interprets* the Constitution's words according to their plain, present, public meaning—the meaning that we, the living, faced with claims of federal authority, give to the Constitution's text. Consensualism *constructs* the words of the Constitution, applying them to the problem at hand, so as to maximize the consent of the governed. Specifically, a consensualist approach follows the same sort of rules of construction that common law courts routinely apply in cases involving standardized form agreements that allegedly bind individual consumers. In other words, we should not reify the Constitution, or indeed any founding political document, but should instead regard it as akin to a standard form agreement offering governing services on a take-it-or-leave-it basis to many relatively powerless individual citizen-customers.

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2 Lawrence Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY LEXICON (Apr. 27, 2008), http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html.

Why pursue both responsiveness and textual fidelity? In order to maximize the consent of the governed. As the next Part explains in more detail, the consensualist approach derives from a theory linking the justifiability of subjecting someone to the jurisdiction of a constitution to the degree to which that person has consented to it.[3] From the point of view of contract law—an instrument finely tuned to assess the justifiability of enforcing consensual agreements—constitutions look like standard form agreements (albeit ones formed under dubious circumstances). At least with regard to those provisions affecting liberties, rights, privileges, or immunities,[4] applying contract law to the Constitution helps to maximize the consent of the governed. As a further safeguard and as a remedy for the ills of self-judgment, consensualism also calls for giving those who litigate constitutional rights a direct say over who will decide their disputes—a process already routinely utilized in private arbitrations.[5]

Consensualism is not the only libertarian way to read the Constitution; many aspects of both living constitutionalism and originalism—indeed, their *best* aspects—also protect our liberties from political insults. Consensualism offers a compromise to those contesting views while drawing on both for inspiration. It moreover offers something new: a theory of justification designed to make exercises of Constitutional authority more normatively attractive than either originalism or "living" constitutionalism can claim.

II. MARGINALLY JUSTIFYING THE CONSTITUTION

Few but those who have taken oaths of office have expressly agreed to the Constitution's terms. That raises hard questions about the justifiability of federal power. As Lysander Spooner wryly observed:

> Where would be the end of fraud and litigation, if one party could bring into court a written instrument, without any signature, and claim to have it enforced, upon the ground that it was written for another man to sign? that this other man had promised to sign it? that he ought to have signed it? that he had had the opportunity to sign it, if he would? but that he had refused or neglected to do so? Yet that is the most that could ever be said of the Constitution.[6]

In Spooner's view, the Constitution has no legal authority because it makes no provision for individual citizens to sign on the dotted line (or, more pointedly, to *refuse* to sign it). Perhaps Spooner set too high a bar for

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3 *See* Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification,* 61 CASE W. RES. L. REV. 17 (2010).

4 Provisions pertaining to relations between government bodies, so long as they do not affect individual rights, privileges, or immunities, do not always raise the same concerns. A conflict between the executive and legislative branches, for instance, does not necessarily raise the problem of a vast difference in bargaining power; the two branches, in contrast to interactions between the federal government and an individual citizen, meet more or less as equals.

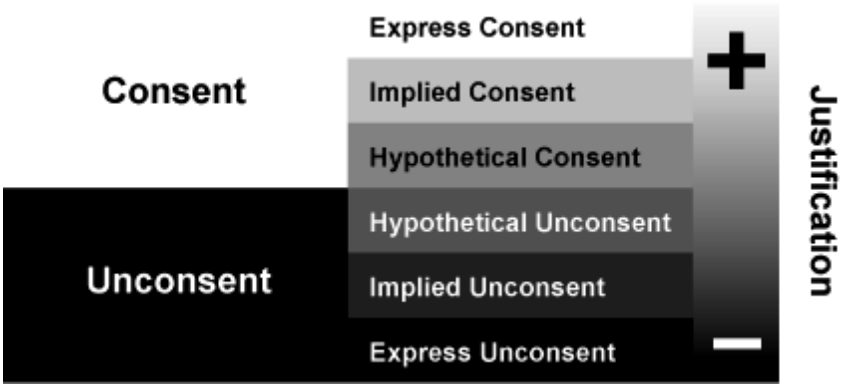
5 I refer here to citizen courts, an institution discussed in more detail below.

6 LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY 24 (1870), *reprinted in* LYSANDER SPOONER, NO TREASON AND A LETTER TO THOMAS F. BAYARD 24 (1973).

the Constitution by demanding it satisfy the strictures of contract law. Regardless, his complaint illustrates how the ideal of an expressly consensual exchange negotiated between equals serves as the measure when we have to calculate the justifiability of imposing constitutional authority on someone who at best only impliedly or hypothetically consents to it.

Where Spooner saw only black or white, the discerning eye can detect shades of grey. A study of the common law demonstrates that we typically evaluate the justifiability of a social institution's exercise of authority over an individual as not simply a matter of whether the person has consented to the institution's jurisdiction, but how strongly the person has consented to it. Consent, and thus justification, varies by degrees. Application of this graduated consent theory generates assessments of justification that apply both *relative to particular parties* (rather than relative to the whole undifferentiated mass of humankind) and *relative to alternative institutions* (rather than relative to an unrealized ideal). Figure 3, below, illustrates.

Figure 3: The Scale of Consent and its Relation to Justification



Because it failed to satisfy the requirements to create a binding agreement under contract law, Spooner concluded that the Constitution had no legal authority. Graduated consent theory offers a more tempered and precise analysis, explaining that the U.S. Constitution may have a more justified claim to authority over a specific subject than institutions touting only weaker proofs of consent. That is not to say that the Constitution is flatly justified, completely and for everyone. Unless it can claim the same sort of consent that makes an express agreement negotiated between equals so indisputably binding—and as Spooner noted, it cannot—the Constitution can always stand to win more consent. Good patriots, ardent to make their country as justified as possible, would thus aspire for it to win as much consent as possible from those it governs.

We can increase the justifiability of the Constitution by interpreting it in a manner most likely to maximize the consent of those it governs. How do we do that? By borrowing the interpretive tools that contract law (predominantly) and tort law (secondarily) have developed, over hundreds of years and through thousands of cases, to discern the proper boundaries of consensual transactions and the remedies for violating them. Applied to the Constitution, those rules suggest that we should interpret the document according to the understanding of the parties allegedly bound by it—the citizens and residents of the U.S. We should, in other words, give the Constitution its present, plain, public meaning.

Though that approach to interpretation might strike legal academics as too simple-minded to guide the subtleties of Constitutional jurisprudence, the Supreme Court itself has repeatedly avowed that "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[7] Whether we should recur to the

7 Dist. of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

plain and public meaning of the words at the time of their ratification, as originalism would have it, or at the present, as consensualism would, remains a separate and contestable question.[8] In either case, though, the Supreme Court at least nominally eschews giving the Constitution's text a meaning discernable only in the case law rather than on the document's face.

Constitutional scholars distinguish between interpretation—the art of discerning the meaning of the Constitution's text—and construction—the practical problem of figuring out what to do when that meaning proves elusive.[9] I've thus far written about interpretation, explaining why graduated consent theory tells us we should read the Constitution's text in light of the plain, present, public meaning of its words. The same graduated consent theory also tells us how to *construct* the Constitution when its words evade interpretation. Basically, to again treat the Constitution as much as a contract as possible, we should construct it as we would a standard form agreement, offered by its writer on a take-it-or-leave it basis, from an awesomely powerful party to a comparatively powerless one. Courts enforcing contracts formed in similar circumstances routinely read vague terms in favor of the party—usually a sole individual person—presented the agreement on a take-it-or-leave-it basis by the other party—usually a soulless collective legal person, such as a corporation or a state. In the Constitutional context, that basically gets us to the presumption of liberty that Randy Barnett has eloquently defended (albeit on other grounds).[10]

Another interesting result from consensualist constitutional theory: We should explore using citizen courts as an alternative to courts where only federal employees do the judging. No federal court would uphold a term of a standard form agreement, one offered by a gargantuan and powerful legal entity to a single natural person, providing that any disputes between the parties would be judged and enforced by its employees. If that holds true of commercial disputes between corporations and consumers, it also holds true of constitutional disputes between the federal government and those of us subjected to its authority. In no case can a party—be it a person, corporation, or State judge—judge his, her, or its own cause.

It follows, then, that we can do better than having federal judges alone decide disputes between those who claim authority from the Constitution and those subjected to their claims. We could adopt any of several remedies, but it seems most prudent to simply adopt the same sort of procedure routinely adopted in commercial contexts: Have a panel of three

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8 The passage from Heller continues a vein that makes its originalist leanings evident: "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576–77.

9 *See* Solum, *supra* note 2.

10 *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

adjudicators, one chosen by one party, the other by the other party, and the third by those two adjudicators, decide the dispute. I have said more on that point elsewhere;[11] it here suffices to note that consensualism tells us not only how to interpret and construct the Constitution, but also how to improve our mechanisms for judging it.

III. FOR RECOVERING ORIGINALISTS

Most libertarians, to the extent they adopt any particular approach to the Constitution, tend to adopt some version of originalism—specifically, the original public meaning version.[12] Randy Barnett, for instance, has argued, "the words of the Constitution should be interpreted according to the meaning that they had at the time they were enacted."[13] This section explains why libertarians should reconsider their allegiance to originalism.

Originalism offers a relatively objective and certain means of interpreting the Constitution, especially when compared to the usual alternatives, which favor precedents and judicial discretion over plain language. The virtues of originalism stem more from its fidelity to the words of the Constitution, however, than to its fidelity to what those words *used* to mean. Textualism, not historicism, gives originalism its charms.

For friends of freedom, originalism has the virtue of generating such substantively attractive results as limited government, the rule of law, and respect for individual rights. We can credit that both to the Constitution's bold and timeless words as well as to the supermajoritarian constraints imposed on its ratification proceedings.[14] Query, though, whether we should pick our preferred theory of constitutional meaning based solely on its substantive results. If so, we would favor libertarian philosopher kings over a Constitutional republic. Not just the results, but also the justifiability of our interpretive theory matters.[15]

At any rate, it is not so evident that originalism offers the best way to maximize liberty. Reading the Constitution today from a pretended eighteenth century point of view sometimes bolsters individual rights, granted, as when *District of Columbia v. Heller* gave an originalist interpretation to the Second Amendment.[16] In other areas, however,

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11 *See* Bell, *supra* note 3.

12 Lawrence Solum, *Legal Theory Lexicon 019: Originalism* (Jan. 18, 2004), http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html.

13 BARNETT, *supra* note 10, at 89. Barnett so argues because the Constitution is written and "[o]riginal meaning follows naturally, *though perhaps not inevitably*, from the commitment to a written text." *Id.* at 100 (emphasis added). That caveat suggests that Barnett at least sensed that respect for the written nature of the Constitution might entail not originalism, but something more responsive to the understandings of living subjects.

14 John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J. L. & PUB. POL'Y 917, 925 (2008).

15 *But see* Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J. L. & PUB. POL'Y. 901, 905 (2008).

16 But see below for an argument that a consensualist approach to the Second Amendment

resurrecting linguistic usages from over 200 years ago would threaten our twenty-first century rights, as when courts seek the meaning of such words as "speech" (arguably mere public oral presentations in the Founding era) or "cruel and unusual" (a phrase that evidently *did* not, and therefore in Justice Scalia's view *does* not, bar public floggings).[17]

Consensualism offers all the textual fidelity of originalism without getting stuck in imagined understandings from long, long ago. Indeed, by relying on the plain, present, public meaning of the Constitution's text, consensualism can achieve greater exactitude than originalism—which relies crucially on a limited set of various and variously interpreted written documents to try to recreate patterns of linguistics—could ever offer. Originalism limits itself to long-dead authors. Today, in contrast, we can invoke a wide variety of mechanisms—polls, publicly edited encyclopedias, empirical studies of word counts and associations—to discern how the Constitution's *living* subjects understand its words. And only our understanding—not the understandings of our long-dead predecessors—can bind us.[18]

Originalists evidently admire the Founders, and rightly so. We can all appreciate the boldness of Thomas Jefferson, the wisdom of James Madison, and the independence of Benjamin Franklin. Those and others of their generation did not demand our allegiance to their reading of the Constitution, however. They realized that we would read it by our own lights, for our own times. They doubtless hoped that we would share their courage in casting off the dead chains of distant rulers for the living bonds of self-governance. Consensualism honors the Founders not by enthroning their opinions but by following their example.

IV. WHAT DOES A CONSENSUALIST GIVE UP?

Eugene Volokh once observed that every constitutional theory ought to make its proponents sacrifice some policy that they care about deeply.[19] If not—if your constitutional theory generates all of and only your substantive preferences—the rest of us have reason to doubt its objectivity. What does a consensualist approach to the Constitution ask libertarians to give up?

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generates more powerful protections for rights to keep and bear arms than the originalist approach used in *Heller*.

17 Scott Baker, *'Providential': Scalia Defends Constitution in Lively Debate With Breyer*, THE BLAZE (Nov. 13, 2010, 7:38 AM), http://www.theblaze.com/stories/2010/11/13/scalia-breyer-bandy-about-how-to-decide-cases/ (describing "a rare public debate" in which Justice Breyer proclaimed public flogging as unconstitutionally cruel and unusual, while Justice Scalia countered that because such punishments were common in the Founding era, they would remain constitutional—though "stupid"—today).

18 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996) (describing as "the central problem of written constitutionalism" the problem of binding present generations with the judgments of prior ones).

19 Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 813 (1998) ("Interpretation means sometimes having to say you're sorry.").

This section discusses three areas where a consent-based approach to the Constitution risks generating results that libertarians might find regrettable: with regard to the right to keep and bear arms, with regard to the federal welfare rights, and with regard to the proper scope of the Privileges or Immunities Clause of the Fourteenth Amendment. In the first case, consensualism arguably generates a stronger right to keep and bear arms than does the originalist approach—a result that might make even libertarians, to say nothing of other political persuasions, blanch. In the second case, consensualism arguably proves more receptive to the constitutionality of federal welfare than originalism does, a result that some libertarians would rue. In the last case, while its meaning remains somewhat shrouded in mystery, a consent-based approach to the Privileges or Immunities Clause would suggest a more parsimonious reading than some libertarians have voiced.

A. The Right to Keep and Bear Arms

At first glance, a consensualist reading of the Constitution appears to threaten the individual right to keep and bear arms—a matter about which libertarians care profoundly. The problem arises because the Second Amendment's first two clauses—"A well regulated Militia, being necessary to the security of a free State"—arguably qualify its last two clauses, "the right of the people to keep and bear Arms, shall not be infringed." The recent decision in *District of Columbia v. Heller*,[20] because it affirmed that the Second Amendment protects an individual's right to keep and bear arms, somewhat eases practical concerns on that front. Because that case relied on an originalist reading of the Constitution, however, it leaves open the worrying possibility that consensualism poses a theoretical challenge to libertarians' preferred policy.

Or perhaps not. Under an argument I first encountered in the writing of Erwin Hass, the Second Amendment ensures the sanctity of an individual's right to keep and bear arms even on a consent-based approach. Hass recognized in the Second Amendment a "gerundive construction" of the sort that classical Latin uses to highlight the tension between two contrasting clauses. With that in mind, Hass read the Second Amendment to say, "Because, on the one hand, the state needs an armed militia, the people, on the other hand, shall retain their own weapons to counteract the state."[21]

That interpretation, by recognizing the reference to militias to serve a cautionary role, comports nicely with the consensualist argument that we should interpret the Constitution's language in conformity with the plain, present, public meaning of its text. Whatever its meaning in statute, case

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20 Dist. of Columbia v. Heller, 554 U.S. 592 (2008).

21 Erwin Hass, *Arms and the Man*, LIBERTY, Sept. 2010, at 12–13, *available at* www.libertyunbound.com/sites/files/printarchive/Liberty_Magazine_September _2010.pdf.

law, and commentary, "Militia," as used elsewhere in the Constitution, evidently refers to a military body subject to tight federal control. Article I, Section 8, Clause 16 includes among the powers of Congress, "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ."[22] Article II, Section 2, Clause 1 begins, "The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . . ."[23] Even if, as the Constitution provides, each of the several states has authority to appoint officers and to train the ranks, they would carry the burden of "training the Militia according to the discipline prescribed by Congress . . . ."[24] (Note well the use of the singular; the Constitution evidently favors to view the Militia as a single body, even if made up of parts from various states.)

A citizen might thus reasonably fear Militias as a potential instrument of federal tyranny. That well-founded apprehension would shape the public understanding of "Militia," as used in the Second Amendment, which would in turn help determine the plain and present meaning of the word. On that reading, the Second Amendment guarantees each subject's right to keep and bear arms in order to pose a credible threat *in extremis*, and thus to discourage in due course, the overweening ambition of tyrants-in-waiting.[25] On that view, consensualism would require libertarians to give up their preferred approach to gun rights—basing them in the need for citizen militias—though it might leave them happy about the policy results—liberal access to arms.

B. Federal Welfare Rights

A consent-based approach to the Constitution threatens to generate another result that libertarians might find hard to welcome: A reading favoring generosity of benefits doled out by the federal government. Libertarians tend to favor a stingy government in any case, and one at all events limited to a few narrowly defined categories of expressly Constitutional expenditures, such as to "establish Post Offices and Post Roads;"[26] to "raise and support Armies,"[27] and to "provide and maintain a Navy . . . ."[28] Arguably, though, a consensualist reading of the Constitution

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22 U.S. CONST. art. I, § 8, cl. 16.

23 U.S. CONST. art. II, § 2, cl. 1.

24 U.S. CONST. art. I, § 8, cl. 16.

25 This is not quite the same reading of "Militia" favored by proponents of what Glenn Reynolds calls the "Standard Model" of the Second Amendment, which instead claims that "the purpose of the Second Amendment is to ensure an armed citizenry, from which can be drawn the kind of militia that is necessary to the survival of a free state." Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 473 (1995). Though Reynolds wrote those lines well before *Heller*, that recent opinion confirms that "the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia." *Heller*, 544 U.S. at 599.

26 U.S. CONST. art. I, § 8, cl. 7.

27 U.S. CONST. art. I, § 8, cl. 12.

28 U.S. CONST. art. I, § 8, cl. 13.

would tell us that the plain, present, public meaning of "general Welfare," first in the Preamble and then again in Article I, Section 8, Clause 1, which grants Congress the power to provide for "the General Welfare of the United States," equates to something very much like a federal dole.

To that, a libertarian might well reply that the plain, present, public meaning of "general Welfare" in the Preamble and Article I, Section 8, far from authorizing special benefits for particular individuals or groups, limits the federal government to providing only such boons as help the United States as a whole. That counterargument probably carries at least enough weight to give "general welfare" a contestable interpretation, making further understanding of its meaning a matter of construction. Problematically for libertarians, however, that move arguably supports a reading of the Constitution that favors those who plead for the receipt of government benefits. Here as with standard form agreements generally, we should construe the terms of the putative agreement against federal power and in favor of individual citizens.

Libertarians can and should reply that "*general* Welfare" precludes special legislation, that the Constitution's express terms sharply limit the ways in which the federal government can collect revenue for redistribution, and that powers enumerated in Article I do not include anything so far reaching as the sort of federal welfare state we now witness. Still, it seems at least possible that a consensualist reading of the Constitution authorizes the distribution of certain benefits to which any given citizen might qualify. That will make libertarians uneasy, given their well-placed worry that bread and circuses beget declines and falls. Even if some system of "general welfare" qualifies as Constitutional, however, that does not make it mandatory or even prudent. Wise—and constrained—lawmakers might realize that they cannot afford to buy the consent of the governed, but instead must earn it by modest restraint and effective action.

C. The Privileges or Immunities Clause of the Fourteenth Amendment

The Fourteenth Amendment says, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[29] What would a consent-based understanding of that clause entail? That somewhat confounding and obscure phrasing of the Privileges or Immunities Clause makes it easier to say how a consensualist would approach the problem than to say exactly what answer would result. It looks far from certain, however, that the interpretation favored by such libertarian stalwarts as Roger Pilon[30] and

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29 U.S. CONST. amend. XIV, § 1.

30 *See, e.g.*, Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, CATO POLICY ANALYSIS (Nov. 23, 1998), *available at* http://www.cato.org/publications/policy-analysis/reviving-privileges-or-immunities-clause-redress-balance-among-states-individuals-federal-government.

Tim Sandefur,[31] in which the Privileges or Immunities Clause protects fundamental natural rights against state interference, would necessarily follow from a consequentialist approach.

Although the plain, present, and public meaning of the Privileges or Immunities Clause hardly leaps from the Constitution's text, applying to the clause the same sort of interpretative tools that courts routinely apply to standard form agreements brings out several salient features. Note first that "privileges or immunities" do not evidently mean the same thing as "rights or liberties," but instead generally refer to special exemptions from generally applicable limits or obligations. Thus does Black's define "privilege" as "[t]hat which releases one from the performance of a duty or obligation,"[32] and immunity as "exemption from penalty, burden, or duty."[33] Presumably then, the Privileges or Immunities Clause does not apply to fundamental natural or constitutional rights or liberties.

Further evidence that "privileges and immunities" means something special appears in the Constitution's frequent use elsewhere of "right,"[34] "liberty,"[35] and "freedom"[36]—different words that presumably have different meanings. Indeed, in the text immediately following the Privileges or Immunities Clause, the Due Process Clause shifts to speaking of "life, liberty, or property."[37] The plain, present, public meaning of "privileges and immunities" thus points to special statutory or constitutional dispensations rather than to fundamental and universal rights or freedoms—to such things as the "Privilege of the Writ of Habeas Corpus"[38] or the privilege against self-incrimination[39] rather than to "freedom of speech"[40] or "the right of the people to keep and bear Arms."[41]

Alas for clarity, though, still other provisions of the Constitution cloud the matter. Prior to ratification of the Fourteenth Amendment, the Constitution already provided, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[42] Any narrow reading of the Privileges or Immunities Clause thus faces the trenchant critique of Justice Stephen J. Field, dissenting in the Slaughter-House Cases, who complained that if the clause refers only

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31 *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (Cato Inst. 2010).

32 BLACK'S LAW DICTIONARY 1197 (6th ed. 1990).

33 *Id.* at 751.

34 *See, e.g.*, U.S. CONST. amends. I, IV, VI, VII, & IX.

35 *See, e.g.*, U.S. CONST. amends. V, XIV.

36 *See, e.g.*, U.S. CONST. amend. I.

37 U.S. CONST. amend. XIV, § 1.

38 U.S. CONST. art. I, § 9, cl. 2.

39 U.S. CONST. amend. V.

40 U.S. CONST. amend. I.

41 U.S. CONST. amend. II.

42 U.S. CONST. art. IV, § 2, cl. 1.

> to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character.[43]

Suffice it to say for now that the meaning of the Privileges or Immunities Clause defies easy interpretation and that its mysteries have persisted despite long arguments over the question. Respect for the consent of the governed suggests that we should follow the model adopted by contract law, which generally construes doubtful terms in favor of a consumer allegedly bound by a standard form agreement. Here, though, we construct uncertain Constitutional terms so as to safeguard the consent of consumers of governing services. The result: A broad reading of the Privileges or Immunities Clause.

That may look like a standard libertarian result, but it comes from a consensualist approach rather than an originalist one. It also relies on some contestable assumptions; perhaps the plain, present, public meaning of the Privileges or Immunities Clause is not so hard to discern, after all. We should not look to academic musings to settle the question, however; we should see how objective courts would cope with the problem of interpreting the Privileges or Immunities Clause. I have elsewhere described how citizen courts could help remediate the problem of judicial bias in favor of state power over individual rights. Here, it suffices to say that the deliberations of citizen courts could tell us a lot about what the Privileges or Immunities Clause should mean.

V. OBJECTIONS AND ANSWERS

A. What if the plain public meaning of the Constitution's words changes between the time of its ratification and the time of its interpretation?

Linguistic drift sounds troubling in theory, but would not likely have much impact in practice. The plain public meaning of most of the Constitution's terms has changed little over recent centuries. "We the People," still means those who "ordain and establish" the Constitution; "no law" remains "no law." *Judicial* drift—far more than *linguistic* drift—poses a much worse threat to textual fidelity. Witness such absurdities as holding that "commerce" covers eating the fruits of your own labor,[44] or that "for public use" allows private gifts.[45]

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43 Slaughter-House Cases, 86 U.S. 36, 96 (1873) (Field, J., dissenting).
44 Wickard v. Filburn, 317 U.S. 111 (1942).
45 Kelo v. New London, 545 U.S. 469 (2005).

Linguistic drift—or more accurately, linguistic *expansion*—does happen, though. Witness "domestic violence," a term now heard more often in reference to spousal abuse and related, intensely local, disruptions. The Founders evidently used the phrase in Article IV, Section 4 to mean something quite different: homegrown violent insurrection. Does it follow that a consensualist, applying one of the more recent and arguably the more common meanings of "domestic violence" would read Article IV, Section 4 very differently today from the way the Founders read it over 200 years ago? No.

As throughout legal interpretation, we must put the phrase in context; in this case, the tail end of Article IV, Section 4. Any contemporary reader of the words surrounding "domestic Violence" (to recur to the original capitalization) would understand immediately that the sentence refers to duties owed by the federal government to every state of the union. It does not make much sense to read the sentence as, "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against *violence in a household and between household members*." Does the Constitution really guarantee that, say, if Idaho's legislature but asks, the federal government will protect the state from family squabbles? It beggars belief—especially when a much more sensible interpretation appears on the face of the text.

But what if semantics have drifted so far over centuries as to completely obscure the original meaning of the Constitution's text? Suppose, for instance, that in the fashion of some dystopic novel "freedom" had come to mean "restriction." Our unfortunate future counterparts would then find that, to put it in present terms, the First Amendment says, "Congress shall make no law . . . prohibiting the *restricted* exercise [of religion]; or abridging the *restriction* of speech, or of the press, or the right of the people peaceably to assemble . . . ." That nightmarish perversion of the First Amendment renders it nearly senseless; indeed, the words arguably embody a self-destructing contradiction. Suppose they actually made some sort of sense to future folks, though. What then?

In such a hypothetical world of upside-down semantics, a well-intentioned originalist would presumably impose on the surprised and puzzled People a meaning exactly opposite to the one that they find in the text. Violating the plain, present, public meaning of a dystopic anti-Constitution would in that case protect freedoms of expression, granted. That happy result should not blind us, however, to the risks inherent in empowering judges to run roughshod over what subjects *now* bound by the Constitution naturally understand its words to mean. Indeed, thanks to cultural and moral progress, the originalist approach to semantic drift looks more likely to generate unseemly results than welcome ones. Compare, for

instance, the current meaning of "cruel and unusual punishment" with the meaning prevalent in late eighteenth century America.

A consensualist can thus respond to the puzzle of semantic drift by saying, "The People get the Constitution as *they* read it now—not necessarily as the Founders read it centuries ago." Because the public (as opposed to judicial) meaning of the Constitution's text has not changed much over hundreds of years, linguistic drift does not look very worrying in practice. But if everyday people start using "freedom" for what the Founding generation condemned, in the Declaration of Independence, as "Despotism," they will have no grounds to complain that the Constitution has been misinterpreted 180 degrees off. Indeed, those poor souls would not even notice the semantic flip-flop that hypothetically worries us. They would, however, notice the results of that sort of anti-Constitution, a document that attacks rather than defends the rights of the People, and would probably end up writing a "Declaration of Submission" overthrowing the "Republic" and instituting a "restriction-loving Despotism." Were we to watch that drama with the sound turned off, those odd-speaking revolutionaries would look just like American patriots fighting to protect their liberties from tyranny.

The People—not judges or academic commentators—ordain and establish the Constitution. We should thus take seriously the People's understanding of the Constitution's text. If semantic drift has in effect given them a new Constitution, then it should stand or fall on its own merits.

B. Suppose that the Constitution's subjects wrongly believe something about it not consistent with the plain, present, public meaning of the text. Should the legal meaning of the Constitution—its application under threat of force—then accord with what the public expects politicians to do, or instead, with how, if presented with the Constitution, the public would understand that text?

It bears noting that this hypothetical concern will not likely arise under a consensualist approach because, insofar as we can discern the public meaning of the Constitution's words, it will almost always accord with public belief about the proper application of the Constitution. The public has ready access to the Constitution's text and, while they might not know its contents in detail, the public understands—indeed, reveres—the fact that the Constitution exists in a physical document that has legal effect. If we take seriously the notion that "We the People . . . do ordain and establish" the Constitution, we must take the words following that preamble seriously, too. If some portion of the public expects from the political process something that the rest of us, having read the Constitution, understand it not to say, we can quickly and easily disabuse our fellow subjects of their ignorance by quoting the text. No gap between public expectations and public understandings would likely stretch wide or last long.

For the sake of the hypothetical, though, let us suppose that some member of the public zealously but erroneously believes that the Constitution guarantees something in fact not in the text—that fluffy puppies will never want for chew toys, say—or something expressly contradicted by it—that Congress can establish a national church, for instance. What then?

Holding all else equal, we should want the legal meaning of the Constitution—its effective, nuts-and-bolts, coercively-backed implementation—to accord with public expectations. With regard to legal meaning, after all, the Constitution gains in justification the more it conforms to the consent of the governed. In cases where the public expectation about how the Constitution will be applied varies from the public understanding of the Constitution's text, however, we have to choose between two different measures of consent. Apart from recurring to the ballot box—itself a method fraught with epistemological peril—we have no reliable way to measure unfounded and uninformed hunches among members of the public about what they expect from constitutional government.

The consensualist approach thus favors borrowing from contract and tort law time-tested tools of interpretation and construction—tools well designed to measure and maximize consent. Those tools teach us to look first to the objective public meaning of a text, turning to such ancillary proofs as course of performance, past dealings, or (the closest analog to the sort of public expectations as issue here) parol evidence only secondarily. Such back-up proofs cannot trump plain meaning; they can at best only sharpen fuzzy meanings. If, then, some fool thinks that the Constitution guarantees chew toys for puppies and authorizes a U.S. Government Church, we rightly set aside that expectation as not consistent with the Constitution's plain, present, public meaning.

C. Does the consensualist approach err by bringing normative considerations to bear in deciding the meaning of the Constitution's text?

The supposed problem, here—tying meaning to normative considerations—merits some explanation. "When we make assertions about what an utterance means, we are making factual assertions about the world," Professor Lawrence Solum cautions.[46] "What words mean is one thing; what we should do about their meaning is another."[47] The objection thus arises: Consensualism breaches the fact/value firewall, letting normative considerations taint what should be a purely factual inquiry into meaning.

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46 Lawrence Solum, *Semantic Originalism*, ILL. PUB. L. AND LEGAL RES. SERIES NO. 07-24, Nov. 2008, at 1, 28.

47 *Id.* at 30.

The reply: Consensualism at most merely offers good reasons to interpret the Constitution in a manner likely to maximize the consent of the governed; it does not mandate any particular meaning. While normative considerations guide consensualism's choice of interpretive strategies, in other words, the strategy, once chosen, determines the Constitution's meaning in a value-neutral manner. In that, consensualism relies on normative considerations to the same degree as any other theory of constitutional meaning. We cannot avoid choosing when it comes to the difficult and contested problem of how to understand the Constitution. Most choose living constitutionalism or originalism, evidently because they think it best to do so. Consensualism offers a different option, one supported by different reasons.

Why choose consensualism over alternative theories of constitutional meaning? Note first that the normative aspects of consensualism operate only hypothetically, on the assumption that we value consent. I have offered a transcendental argument why no moral agent can deny that claim, but even short of an undeniable proof, consent qualifies as at least a *prima facie* good in every leading moral theory.[48] In that approach, I follow Randy Barnett, who carefully explains that his theory of liberty assumes certain preferences with regard to social ordering.[49] Normative considerations in that approach operate not as mandates, all too likely to rouse objections from those who like to think for themselves, but rather as dry if-then explanations, offered solely as guides to those who share certain commonplace goals.

Second, note that even if the choice between semantic theories does not ordinarily come freighted with moral considerations (itself a considerable assumption), the same does not evidently hold true for the choice between theories of constitutional meaning. Because our approach to constitutional meaning has coercive effects, our choice bears normative burdens not at risk when we wonder over how to understand such things as poems or news reports. A man might risk his fortune, life, and good name on what "Treason against the United States" means in the Constitution's usage.[50] I will not pretend to instruct linguists and literary theorists as to how they should determine the meaning of novels, songs, or the like, but neither should they claim that we must remain indifferent to the coercive impact of the choice between different theories of constitutional meaning.

Third, even accepting the dryly positivist view that meaning is determined solely by patterns of usage, rather than by heartfelt normative preferences, we still face the question: Which pattern of usage counts for Constitutional meaning? What data set, in other words, should the

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48 Bell, *supra* note 3.

49 BARNETT, *supra* note 10.

50 U.S. CONST. art. III, § 3, cl. 1. I argue for the narrowest plausible reading of those words in my article, *Treason, Technology, and Freedom of Expression,* 37 ARIZ. ST. L. J. 999 (2005).

linguistically-minded jurisprude draw upon when interpreting the Constitution? An originalist will call for reviewing public speech patterns during ratification, whereas a "living" constitutionalist will call for charting usage in the opinions written by black-robed judges. The tyrant demands that we hew to the way he uses the Constitution's words, narrowing the data set down to a single source. Consensualism adds yet another option to the mix: Interpret the Constitution according to prevailing usage among contemporary citizens and subjects of the United States.

Even if any given semantic theory should operate free of normative influences, we still face a choice between various theories. Linguistics stand ready to help us discern meaning from the data set we feed into it, from Founding era texts (for originalism) to court opinions (for living constitutionalism) to a dictator's ranting (for totalitarianism) to contemporary public usage (for consensualism). *It remains for us, however, to decide which data set matters*. Although we could decide the question by casting lots, that would represent an abdication of responsibility in instances, such as with regard to legal texts generally or to the Constitution in particular, where our choice will influence the application of coercive force. Normative considerations thus can and should come into play when it comes to choosing between various semantic theories, even if the theory we finally choose runs, machine-like, in a value-free manner.

D. Doesn't "meaning" mean something other than what consensualism suggests?

The response to the prior objection explained why we face a choice between several theories of constitutional meaning. That opens the door to a follow-up objection: "meaning" has only one meaning—specifically, it refers to the way in which a word or statement fits into the linguistic behavior of a particular community. Which community wins the privilege of defining the Constitution? A living constitutionalist might claim, "the Constitution means what the Supreme Court says it means."[51] An originalist might favor the patterns of linguistic usage among those who first ratified the Constitution and its various amendments. A consensualist suggests looking for the Constitution's plain, present, public meaning.

Reasonable people evidently disagree about what "meaning" means. We cannot simply define away these honest differences of opinion. The matter calls for persuasive argument, not mere stipulation.

Consider, therefore, whether Professor Solum's argument for original meaning works. Solum asserts that "the meaning (or 'semantic content') of a given Constitutional provision was fixed at the time the provision was

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51 The sentiment, offered nowadays as a lawyerly maxim, appears to have originated with Chief Justice Charles Evans Hughes, who said "the Constitution is what judges say it is . . . ." Charles Evan Hughs, *Speech at the Elmira Chamber of Commerce (May 3, 1907)*, *in* ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916 at 179, 185 (2nd ed., G.P. Putnam's Sons 1916).

framed and ratified."[52] He offers that as a non-normative claim, asserting that "it would simply be a linguistic mistake to interpret the" Constitution by light of the usage in any other community of speakers.[53] It is not clear why only the linguistic usage among a text's initial audience qualifies to establish the meaning of "meaning," however. At the very least, that limitation does not appear required by the philosophy of language espoused by Paul Grice, whose "sentence meaning" Solum analogizes to his own public meaning of originalism.[54] To the contrary, Solum himself admits that "texts and speeches can have 'sentence meaning' irrespective of whether the utterance is read or heard in spatial and temporal proximity to the occasion of writing or saying."[55] By analogy, the Constitution can have meaning when read by light of today's usage, even though it was first written long, long ago.

Rather than fixing the Constitution's meaning to the time of its framing and ratification, therefore, it seems more plausible to understand both sentence meaning and Constitutional meaning as variables that depend on the usage of whatever linguistic community we care about. When asked about the Constitution's meaning, in other words, we should seek the clarification, "To whom?" Consensualism replies, "To those currently subjected to the Constitution's legal authority."

Why adopt the plain, present, public meaning of the Constitution? To maximize the consent of those it governs. Common law courts have long struggled with the related problem of trying to respect both the *power to enter into* legally binding agreements *and the right to avoid* unwanted ones, and have wisely chosen to generally read a contract according to the meaning adopted by its parties. Consensualism applies that same general approach to the Constitution, favoring an interpretation that will maximize the consent of those governed by it, here and now, by seeking their understanding of the Constitution's meaning.

With regard to a contract or constitution, we should favor a meaning—more precisely, a *theory of meaning*—that will maximize the consent of those purportedly bound by the document. Making a legal relation more consent-rich increases its justifiability, helping to excuse coercive enforcement of the instrument. Preferring that outcome reflects a normative preference for mutual consent over unjustified bloodletting, granted, but that preference comes naturally to most social creatures.

One might fairly say, then, that normative considerations lead consensualism to look for meaning in the usage patterns of living subjects, a mechanism that *finds* but does not preordain Constitutional meaning. In

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52 Solum, *supra* note 46, at 2.
53 *Id.* at 4.
54 *Id.* at 34–39.
55 *Id.* at 35.

that, consensualism recognizes that nobody can justly claim the privilege of defining the meaning of "meaning."

E. Isn't consensualism just a sort of originalism—one that uses present meanings because they largely concur with the original ones?

As explained in the answer immediately above, consensualism makes a considered judgment in favor of seeking Constitutional meaning in the plain, present, public meaning of the document's text. It thus expressly rejects the alternative, favored by originalists, of seeking the Constitutional meaning in the speech patterns of those who ratified it, centuries ago. Consensualism takes inspiration from the originalist's fidelity to the Constitution. When it comes to understanding that text, however, consensualism stays in the present whereas originalism remains embedded in a particular historical period.

We might thus understand consensualism as something like a livelier version of originalism, though both grow from common roots. Originalism once functioned very well at determining the plain, present, public meaning of the Constitution's text—not just in the 1790s, but for many decades thereafter. In those early days, consensualism and originalism perfectly overlapped; the Founding generation could hardly help but rely on its own usage in interpreting the Constitution. Even today, the public meaning of the Constitution's text remains much as it was two hundred years ago, making originalism and consensualism agreeable neighbors. But whereas originalism's search for meaning remains wedded to the public usage at ratification, consensualism keeps moving forward, constantly updating the data set that determines meaning and always vying for the consent of the governed.

CONCLUSION

This paper has argued that to maximize the consent of those governed by the Constitution, we should read it according to its plain, present, public meaning, and construe vague provisions in favor of individual subjects. By combining the responsiveness of living constitutionalism with the textual fidelity of originalism, a consent-based approach captures the best features of both. At the same time, however, consensualism avoids the public choice pitfalls of vesting agents of the federal government with the sole authority to define the Constitution (a salient flaw of living constitutionalism) as well as the confusion and inequity that would follow from defining the Constitution according to a reconstructed understanding of those who first ratified it (originalism's quixotic goal). We, too, ratify the Constitution; only our mutual consent keeps that grand bargain alive. So, too, then, should our meaning imbue the Constitution with such authority as it can justly claim.

We must choose between various semantic theories of the Constitution. That choice has consequences. Should we empower unelected

federal agents to alone define the Constitution? The question answers itself. Should we instead define the Constitution in terms of how long-dead Ratifiers understood it? That strategy at least offers comparative certainty and some protection against inequity;[56] originalism does have its virtues. It lacks, however, a convincing justification. Why, apart from those instrumentally useful ends, should meanings hidden in historical mist trump the Constitution's plain, present, public meaning? When it comes to justifying contemporary government action, the consent of those who first ratified the Constitution counts for less than the consent of "We the People"[57] who live under it here and now.

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56 *See* McGinnis & Rappaport, *supra* note 14.

57 U.S. CONST. pmbl.