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THE MISCONCEIVED ASSUMPTION ABOUT CONSTITUTIONAL ASSUMPTIONS

Randy E. Barnett*

INTRODUCTION

Whether or not they are originalists, most constitutional scholars and observers assume that the basic assumptions held at the time the Constitution was enacted or amended are relevant to ascertaining its original meaning. Some originalists use constitutional assumptions to constrain judges in their interpretations of the more abstract passages of the text. Others reject originalism precisely because they object to the outmoded assumptions that prevailed at the time of enactment, and they assume that these assumptions must shape the original meaning of the text.

For example, some claim that because of widespread concern about the continued vitality of the militia, the original meaning of the Second Amendment's right to keep and bear arms is limited to those who are in service to the militia. Others think that because many in the Thirty-Ninth Congress and elsewhere assumed the continued existence of segregated government schools or the inferiority of women, the original meaning of the Fourteenth Amendment must be consistent with segregated schools and the common law rules of coverture. Still others claim that because people assumed at the time the Fourteenth Amendment was adopted that laws regulating private morality were within the police power of the states, such laws must be consistent with its original meaning.

In this Article, I challenge this misconceived assumption about the constitutional status of basic assumptions, which derives from a mistaken conflation of constitutions and contracts. Because the shared background assumptions of the parties *are* relevant to the enforcement of written contracts, it seems natural to treat written constitutions the same way. This equation of contracts and constitutions is further invited by the widespread and often unexamined assumption that, like contracts, constitutions are legitimate if and

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only if they are the product of consent. Because the shared background assumptions shape the scope of the parties' consent to written contracts, so too it is assumed that background assumptions shape the meaning of written constitutions.

But constitutions are not contracts. Contracts are consensual agreements between identifiable persons that provide a private law to govern their relationship. Constitutions inevitably lack the consent that legitimates contracts. Unlike contracts, from the time they are enacted into an indefinite future, constitutions purport to bind countless numbers of persons who do not consent. Or more precisely, statutes enacted pursuant to constitutions purport to bind members of the public who have not themselves consented to be bound. Therefore, if such statutes are binding, it is because of something other than the literal consent of the governed. And, unlike contracts that can "fail" when their basic assumptions turn out to be untrue, with constitutions failure is not an option

Constitutional scholars have yet to systematically examine the lessons that can be learned from a close comparison of the important similarities and equally important differences between written constitutions and contracts. In this Article, I begin to fill this gap. Doing so requires recognizing three fundamental distinctions that are often overlooked in constitutional theory and practice: (1) the difference between express and implied in fact terms, (2) the difference between ambiguous and vague terms, and (3) the difference between constitutional interpretation and constitutional construction.

In Part I, I explain how express and implied-in-fact terms provide the meaning of both written contracts and written constitutions. In Part II, I distinguish the express and implied meaning of the text from the background assumptions that can condition the enforceability of a contract. Although background assumptions cannot vary this meaning, they can be relevant to interpreting the meaning of genuinely ambiguous terms in both contracts and constitutions. Most sustained disputes over constitutional terms concern terms that are vague, rather than ambiguous. Whether background assumptions may also be used to add specificity to vague terms in constitutions, as they can when construing contracts, will depend on one's theory of constitutional construction.

In Part III, I explore how one's approach to constitutional construction will depend on one's theory of constitutional legitimacy. That the legitimacy of constitutions, unlike contracts, is not based on original consent entails that original background assumptions do not affect the construction of constitutions the way they do contracts. Finally, in Part IV, I apply this analysis to three different background assumptions: (1) that there are background unenumerated

natural rights, (2) that there is an unenumerated police power of the states, and (3) that the original meaning of the Constitution includes the interpretive methods that those who approved the Constitution assumed would be used.

I. CONSTITUTIONAL MEANING

A. *The Similarities and Differences Between Contracts and Constitutions*

Constitutions are not contracts. With a contract, all parties must consent to be bound.¹ With a constitution, this is impossible. Constitutions must necessarily lack the unanimous consent of all persons upon whom they are imposed.² Despite this crucial difference in why they are binding, written constitutions nevertheless resemble written contracts in important respects. Most obviously, both involve the use of writings to communicate a discernable meaning that is supposed to remain the same until it is properly changed. In other words, the terms of both contracts and constitutions are put in writing to “lock in” or fix a meaning at the time of formation, one that can in turn be ascertained after formation. The audience for the fixed meaning of a contract is, first and foremost, the parties themselves, but third parties including courts may also need to know

¹See Randy E. Barnett, *A Consent Theory of Contract* 86 COLUM. L. REV. 269 (1986) [hereinafter cited as “A Consent Theory”]. I have developed this normative and descriptive theory of contract in numerous articles over the past twenty years. See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Randy E. Barnett, *How a Consent Theory of Contract Compares with Relational Theory* 3 WASEDA PROCEEDINGS OF COMP. L. 41 (2000); Randy E. Barnett, . . . and *Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421 (1993); Randy E. Barnett, *Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. PUB. POL’Y. 783 (1992); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. POLY. 62 (1992); Randy E. Barnett, *Some Problems With Contract as Promise*, 77 CORN. L. REV. 1022 (1992); Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990); Randy E. Barnett, *Squaring Undisclosed Agency Law With Contract Theory*, 75 CAL. L. REV. 1969 (1987); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. POL’Y. 179 (1986); Randy E. Barnett, *Contract Scholarship and The Reemergence of Legal Philosophy* (book review), 97 HARV. L. REV. 1223 (1984); Randy E. Barnett & Mary Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentation*, 15 HOFSTRA L. REV. 445 (1987).

²See Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003) (critiquing claims of express or tacit assent to the Constitution based on, *inter alia*, voting, residence, and failure to amend).

what a written contract means, especially if a dispute over its performance arises.

Of course, the ability to lock in or fix a meaning by using a writing is limited by the inherent imprecision of language, by the far-from-perfect knowledge and foresight of the drafters, and by the motivations that sometimes exist for the drafters of either contracts or constitutions to obfuscate rather than confront disagreements. For these and other reasons, the meaning of both written contracts and constitutions is inevitably incomplete or “underdeterminate.” But the underdeterminacy of a writing should not be confused with radical indeterminacy.³ Language does communicate—however imperfectly—and some of its imperfections may be anticipated and guarded against. After all, were it impossible to communicate by writing, the journal in which this article appears would not exist, and we would not be inundated by written agreements throughout all aspects of our lives.

Although written constitutions and contracts have at least this much in common, their differences are also significant. Most importantly, unlike contracts to which all parties must manifest their assent, constitutions are not and cannot be founded on unanimous consent.⁴ Whereas contracts are created to provide a “private law” that binds the parties, constitutions are made to provide a “public law” that binds those who govern a nonconsenting population. In other words, unlike contracts that govern the relationship of consenting parties, constitutions are designed to govern those who claim the power to rule others who have not consented to being ruled—at least not in the sense of the actual manifested consent we attribute to contracting parties.⁵ Finally, whereas written contracts are normally—though not always—designed to last for a relatively limited length of time, constitutions are expected to last indefinitely.

B. *Contractual Meaning: Express and Implied-in-Fact Terms*

In this section, I consider an important similarity between the meaning of

³The crucial concept of “underdeterminacy” is explained in Lawrence B. Solum, *On the Indeterminacy Thesis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing between indeterminacy and underdeterminacy).

⁴This is not to say that it is impossible to obtain unanimous consent to governance—as distinct from government. To the contrary, unanimous consent governance regimes are pervasive throughout society. See Barnett, *supra*, note 2, at 137-41.

⁵Elsewhere I have noted the irony of those who deny that contracts can realistically be based on the consent of the parties basing consent to governance on mere residence in the location where one was born. See Barnett, *supra* note 2, at 126-27.

written contracts and constitutions: the reliance on express and implied-in-fact terms. In this regard, contract law theory can illuminate constitutional theory.

Contract law distinguishes expressed from implied-in-fact contracts. As summarized by Murray: “A contract is said to be ‘express’ when it has been stated in oral or written words, as distinguished from an ‘implied-in-fact’ contract in which the undertaking is inferred from conduct other than the speaking or writing of words.”⁶ Murray then proceeds to question the usefulness of the distinction on the ground that “[a]ll true contracts are necessarily express contracts, in that they must arise out of an express intention.”⁷ Murray thinks that using the term “implied-in-fact” to refer to an intention that has been expressed in ways other than through the use of language confuses the real issue “which is in all cases one of determining whether an intention to assume the alleged undertaking has been manifested in some way.”⁸

The source of the alleged confusion to which Murray refers is that the contract law distinction between “express” and “implied-in-fact” is used in two different, but related, contexts. On the one hand, we speak of express or implied-in-fact *contracts*; on the other hand, we speak of express or implied-in-fact *terms* of a contract. The first of these contexts concerns the recognition of the existence of a contract; the second involves ascertaining the terms of a properly recognized contract. While it makes perfect sense to claim, as Murray does, that all contracts require some form of manifestation of intention to be legally bound, whether expressed in words or implied from conduct, it also makes sense to distinguish between those terms of such a manifestation that are expressed in language and those terms that are not expressed in so many words. The meaning of such terms is implied from what has been expressed or from the conduct of the parties. Based as they are on these facts, it is fair to call such terms “implied-in-fact.”

That the distinct issues of the (a) existence of a contract and (b) the meaning of its terms get blurred is illustrated as well by Williston’s summary of the distinction between “express” and “implied” contracts: “*Contracts* may be express or implied. Just as assent may be manifested by words, so *intention to make a promise* may be manifested in language or by implication from other circumstances, including the parties’ course of dealing or course of performance, or a usage of trade.”⁹ From this observation, he defines “an implied-in-fact

⁶JOHN E. MURRAY, MURRAY ON CONTRACTS 34 (3d ed. 2001).

⁷*Id.*

⁸*Id.*

⁹1 Williston on Contracts, 4th ed §1:5 (Richard A. Lord, ed. 2007) (emphases added).

contract” as arising “from mutual agreement and intent to promise, when the *agreement and promise* have simply not been expressed in words.”¹⁰ He then shifts his focus from the express or implied nature of a contract or “agreement” to the express or implied nature of “the terms of” a contract: “An express contract is a contract *the terms of which* are stated by the parties; an implied contract is a contract *the terms of which* are not explicitly stated.”¹¹ He concludes that “[T]he legal effect of the two types of contracts are identical; the distinction is based on the way in which mutual assent is manifested.”¹² But there is a crucial distinction between consent to “the agreement” and consent to the particular terms of a “promise” that get run together in this confusing passage.

The manifestation of intent to enter a binding agreement is often implied rather than being expressed in so many words. Indeed, the existence of bargained-for consideration is a useful indicia of an implied consent to be legally bound.¹³ However, even if Murray is right that all contracts are “express” insofar as they result from a discernable manifestation of “an intention to assume the alleged undertaking,”¹⁴ each and every term of an “express contract” may not be expressed in so many words. There still needs to be a label to describe those terms of a contract that are not expressed in so many words. That label is “implied-in-fact.”

In his book, *Studies in the Ways of Words*,¹⁵ philosopher of language Paul Grice made a similar common-sense distinction between what is “said” and what is “implicated” by what is said. He begins with the following example: In response to a question from *A* about how her friend *C* is doing in his new job, *B* replies, “Oh quite well, I think; he likes his colleagues, and he hasn’t been to prison yet.”¹⁶ *A* might then inquire about what *B* was implying, suggesting, or even meant by her statement that *C* “hasn’t been to prison yet.” Perhaps the answer is that *C* is a rather dishonest fellow in a job that would offer temptation for criminal behavior; or perhaps the others with whom *C* is working are disreputable and *C* may well fall under their influence.

Grice notes that it “is clear that, whatever *B* implied, suggested, meant in

¹⁰*Id.* (emphasis added).

¹¹*Id.* (emphasis added).

¹²*Id.*

¹³See Barnett, Consent Theory, *supra* note 1, at 313-14 (discussing bargaining of evidence of consent to be legally bound).

¹⁴Murray, *supra* note 6, at 34.

¹⁵PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989).

¹⁶*Id.* at 24.

this example, is distinct from what *B* said, which is simply that *C* had not been to prison yet.”¹⁷ He then offers, “as terms of art, the verb *implicate* and the related nouns *implicature* (c.f. *implying*) and *implacatum* (c.f. *what is implied*).”¹⁸ Grice uses the term “said” to refer to the “conventional meaning of the words (the sentence)” uttered by a speaker.¹⁹ To appreciate the difference between what is said and what is implied, consider Grice’s example of professor *A* responding to a request for a recommendation of one of his students for a teaching job in philosophy. Suppose the professor writes, “Dear Sir, Mr. *X*’s command of English is excellent, and his attendance at tutorials has been regular. Yours, etc.” Grice assesses the implicature of this statement as follows:

A cannot be opting out, since if he wished to be uncooperative, why write at all? He cannot be unable, through ignorance, to say more, since the man is his pupil; moreover, he knows that more information than this is wanted. He must, therefore, be wishing to impart information that he is reluctant to write down. This supposition is tenable only if he thinks Mr. *X* is no good at philosophy. This, then, is what he is implicating.²⁰

In short, Professor *A* has *said* only that his pupil was an excellent speaker of English and a regular attendee at tutorial, but in the context of the conversation he

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 25.

²⁰*Id.* at 33. Grice offers this example as part of a lengthy examination of the difference between conventional implicature—that follows from the conventional meaning of the words that are said—and nonconventional conversational implicature—that follows from the context of the conversational game to which the speaker and listener are jointly committed. As Grice puts it, “a conversational implicatum will be a condition that is not included in the original specification of the expression’s conventional force. . . . So, initially at least, conversational implicata are not part of the meaning of the expressions to the employment of which they attach.” *Id.* at 39. In contrast, a conventional implicatum is included in the expression’s conventional force—and conversational implicata can evolve over time into conventional implicata by repeated usage. For immediate purposes, this distinction is not important, though it is relevant to the enterprise of constitutional interpretation that the implicata of the original public meaning of words can only derive from the conventional meaning of words, as distinct from the intentions of those who happen to utter them. An exception to this are phrases that would be recognized as “terms of art”—e.g., “Letters of marque and reprisal”—the meaning of which would be determined by referring to the relevant experts. It will sometimes matter greatly to the ascertainment of original public meaning, then, whether a particular term was or was not a term of art at the time of its enactment.

has necessarily *implied* or implicated that his pupil is unqualified for the teaching position in philosophy.

That Grice's distinction between what is said and what is implicated mirrors contract law's distinction between express and implied terms is no coincidence. Grice's project is to explain, rather than undermine or transcend, common sense. His aim is to provide "a defense of the rights of the ordinary man or common sense vis-à-vis the professional philosopher" ²¹ As he puts it, "the ordinary man has a right to more respect from the professional philosopher than a word of thanks for having gotten him started." ²² All philosophers of language "agree that specialist theory has to start from some basis in ordinary thought of an informal character." ²³ Grice rejects the approach of those philosophers who, after starting with common practice, then proceed as though "the contribution of ordinary thought and speech can be ignored, like a ladder to be kicked away once the specialist has got going." ²⁴

Given that it results from a constant confrontation with the practice of making, interpreting, and enforcing private agreements among countless persons, contract law doctrine is a product of, and in turn a source of, common sense with respect to the interpretation of writings.

C. *Constitutional Meaning: Expressed and Implied*

The parallel between expressed and implied-in-fact terms of written contracts and the meaning of a written constitution is reasonably straightforward. A provision of a constitution may expressly "say" one thing while, at the same time, implicating some further proposition. Let us consider some examples, beginning with the Takings Clause of the Fifth Amendment that reads, "nor shall private property be taken for public use without just compensation." ²⁵ This provision clearly implies, though it does not expressly say, that Congress has the power to take private property for public use. If such a power of eminent domain exists, it is not expressed anywhere else in the original Constitution. But a conventional implication of what the Fifth Amendment says is that such a power does exist, and therefore a law that took property for public use would be "proper" under the Necessary and Proper Clause, provided that just compensation

²¹*Id.* at 340.

²²*Id.*

²³*Id.* at 345.

²⁴*Id.*

²⁵ U.S. CONST. amend. V.

is made. A bit more controversially, the Takings Clause also implies, without saying expressly, that Congress has no power to take for private use whether or not just compensation is provided. If either or both of these propositions are truly constitutional implications, then they are part of the public meaning of the Constitution as enacted even though they were not expressed in so many words.

Next, let us consider the Ninth Amendment: “The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.”²⁶ This provision expressly enjoins one, and only one, particular constitutional construction: any claim that, because some rights have been enumerated, another unenumerated right may be denied or disparaged. Or, to put it another way, a right that is not enumerated may not be denied or disparaged on the grounds that other rights were enumerated. The historical evidence of original meaning strongly supports the conclusion that a “retained” right was a reference to natural rights.²⁷ If this historical claim is true, then it is also part of what the Amendment says: the fact that some rights were enumerated cannot be used to justify denying or disparaging *the natural rights* of the people.

The original meaning of the Ninth Amendment also implies more than what it expressly says. In particular, it implies (1) that there *are* natural rights that are retained by the people and (2) that these rights should not be denied or disparaged. Taken together, these two implied propositions enjoin the denial or disparagement of natural rights, even where such a denial is not being justified on the grounds that other rights were enumerated.

Of course, such a meaning might have been communicated expressly rather than by implication. To see how, consider the following provision that was proposed by Representative Roger Sherman as a member of the House Select Committee tasked with drafting amendments that became what we now call the Bill of Rights: “The people have certain natural rights which are retained by them when they enter into Society. . . . Of these rights therefore they Shall not be deprived by the Government of the united States.”²⁸ Although Sherman’s

²⁶ U.S. CONST. amend. IX.

²⁷ See Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006).

²⁸ *Roger Sherman’s Draft of the Bill of Rights*, in RANDY E. BARNETT, 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 351 (1989). The omitted portion of Sherman’s proposal (indicated by the ellipses) gave a nonexclusive list of examples of these natural rights:

Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing and publishing their

proposal is not what the Ninth Amendment eventually said, what the Amendment does say implies to a normal speaker of English both the existence of natural rights that are retained by the people and an injunction against the deprivation of these rights. In other words, Sherman's proposal is part of the original—implied-in-fact—meaning of the Ninth Amendment.

Remember also that for two years, the Constitution existed without either the Fifth or Ninth Amendments. During this period, a claim that the federal government lacked any power of eminent domain was consistent with the meaning of the unamended text of the Constitution. So too was the claim that there were no such things as natural retained rights that the government was obligated to respect. Equally consistent with the text, however, were the contrary propositions that there existed both a power of eminent domain and individual natural rights. Deciding which of these alternative propositions to adopt would have been a matter of constitutional construction, rather than interpretation. While most everyone probably assumed that takings for public use must be compensated and that unenumerated natural rights could not properly be infringed by the federal government, neither proposition was communicated by the unamended text of the Constitution.

The enactment of the Fifth and Ninth Amendments changed this situation. Both of these qualifications of federal power altered the meaning of the text in ways that went beyond what they said. The wording of the now express requirement of just compensation also implied the existence of a power of eminent domain for public use, but not for private use. The express bar on any construction of the Constitution that violated an unenumerated right simply because the right was not included in the enumeration also implied the existence of natural rights and an injunction against their deprivation by the federal government.

That express limitations on powers might have further—and potentially dangerous—implications was well known to the Founders. Indeed, during the ratification process, Federalists attempted to justify the lack of a bill of rights in the original Constitution on the grounds that the enumeration of certain rights could imply the existence of additional federal powers beyond those that were enumerated. For example, at the Pennsylvania ratification convention, James

Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.

Id.

Wilson observed: “If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.”²⁹ The same argument was made by Charles Pinckney in the South Carolina House of Representatives who justified the absence of a bill of rights on the ground that “as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated.”³⁰

In *The Federalist*, Alexander Hamilton famously expressed his fear of constitutional implicature. “Why, for instance,” asked Hamilton, “should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”³¹ Although Hamilton denied that “such a provision would confer a regulating power,” he nevertheless thought that “it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.”³² The problem arose from the phenomenon of constitutional implicature: “that the provision against restraining the liberty of the press afforded a *clear implication*, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.”³³ Although an express protection of freedom of the press would not expressly grant Congress any additional authority, such authority or “constructive powers”³⁴ could, rightly or wrongly, potentially be implied.

As is now well known among scholars of the Ninth Amendment, James Madison devised the Amendment precisely to negate this implication. Here is the entirety of his explanation to Congress of the rationale for his proposed precursor of the Ninth Amendment:

It has been objected also against a Bill of Rights, that, by enumerating particular exceptions to the grant of power, it would

²⁹ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (Merrill Jensen, ed., 1976) (statement of James Wilson to the Pennsylvania Ratifying Convention, Nov. 28, 1787).

³⁰ 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 316 (Jonathan Elliot, ed. 1859) (Statement of Charles Pinckney, Friday, Jan. 18, 1788).

³¹ THE FEDERALIST NO. 84, at 524 (Alexander Hamilton) (Wills, ed. 1982).

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ *Id.* at 525.

disparage those rights which were not placed in that enumeration; and it might follow *by implication*, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.³⁵

The analysis presented here adds to the debate over the meaning of the Ninth Amendment by explaining why its rule of construction not only negates a misconstruction of enumerated rights, which is what it says expressly; it also implicates both the existence of natural “rights . . . retained by the people”³⁶ and an injunction that these rights “shall not be . . . disparage[d]”³⁷ or denied altogether.

Whether or not a constitutional implication exists in the next example is controversial. The Second Amendment reads, “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”³⁸ This provision expressly affirms two distinct propositions. The first is that a well regulated militia is necessary to the security of a free state; the second is that the right of the people to keep and bear arms shall not be infringed. The distinction between constitutional expression and constitutional implicature helps clarify the conflicting claims made about the meaning of the Second Amendment.

Some contend that the combination of these two propositions in a single passage adds an additional implication to what these two provisions say: either (a) the implication that the right affirmed in the second half is somehow conditioned on the continued existence of the militia, whose importance is affirmed in the first proposition; or (b) the implication that the exercise of the right affirmed in the second proposition can take place only in the context of the well-regulated militia

³⁵ James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON, WRITINGS 443 (Jack N. Rakove ed., 1999) (emphasis added) (referring to a precursor of the Ninth Amendment). Notice that, while Madison here refers only to the “disparagement” of the “rights which were not placed in the enumeration,” the enacted version of the Ninth Amendment also enjoins their denial.

³⁶ U.S. CONST. amend. IX.

³⁷ *Id.*

³⁸ U.S. CONST. amend. II.

to which the first proposition refers. Because the amendment says neither proposition expressly, in the realm of constitutional interpretation, the real debate is over whether either (a) or (b) is implied by what was said. Whichever proposition is implicated is part of the Amendment's original meaning.

On the other hand, if neither proposition is implicated by what the text says, they could still be unexpressed assumptions that were held by some or all of the people when the Bill of Rights was adopted. Suppose this can be shown. Of what relevance would the existence of such unexpressed assumptions be to constitutional theory or practice?

II. CONSTITUTIONAL ASSUMPTIONS

To this point, I have claimed that the meaning of the Constitution—that is, the content of the message that is conveyed by its text—includes both the meaning that is expressed and the meaning that is implicated by what it says. To interpret the Constitution is to identify its meaning, whether expressed or implied. The original meaning of the Constitution and its amendments is the expressed and implied meaning of its text when enacted; an originalist method of interpretation limits interpretation to this meaning, rather than a meaning of the text that arises at some later time.

Those who wrote and adopted the Constitution, along with everyone else who lived at the time, also held additional assumptions that might have influenced how they expected the government established by the Constitution to operate. Some may also have held certain assumptions or expectations about how it would be interpreted or applied in future cases. The question we must now address is what, if anything, is the proper role of these assumptions in constitutional theory and practice? As we did with meaning, let us start with what contract law has to teach us about basic assumptions. In this case, however, the important difference between contracts and constitutions will come to the fore and justify a differential treatment of background assumptions. Indeed, some of the controversy and confusion surrounding constitutional interpretation comes from improperly conflating contracts with constitutions.

A. *Basic Assumptions of a Contract*

The distinction between express and implied-in-fact terms is one contribution of contract law that, as we have seen, is relevant to understanding the enterprise of constitutional interpretation. Another is its treatment of the

background or basic assumptions underlying a contract. These assumptions are not themselves expressed in the agreement. Indeed, most are too basic to merit inclusion in the agreement. When the salesman tells you to take your car around the back of the store to pick up your goods, he does not need to expressly affirm or even imply that the road outside the store that connects the parking lot to the loading dock that existed when he arrived at work is still there. If the express and implied terms to which the parties consented is the exposed portion of the iceberg, the assumptions on which their consent was based constitutes the ice that floats beneath the surface.

Lon Fuller called these “tacit assumptions.” How he described them is worth quoting at length:

Words like “intention” “assumption,” “expectation” and “understanding” all seem to imply a *conscious* state involving an awareness of alternatives and a deliberate choice among them. It is, however, plain that there is a psychological state which can be described as a “tacit assumption” that does not involve a consciousness of alternatives. The absent-minded professor stepping from his office into the hall as he reads a book “assumes” that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not “occur” to him, that is, is not present in his mental processes.³⁹

Although not a part of one’s consciousness, these background tacit assumptions are quite real. If you are reading these words away from your residence, you are tacitly assuming that your home or apartment has not been destroyed since you were last there. You certainly were not consciously thinking about it but, now that you are, it is no fiction to say, “Yes, that was indeed what you were assuming.”

Most of the time, our tacit assumptions turn out to be true or, at least, it does not matter if they are mistaken. But sometimes when our consent to enter into a contract is premised on such an assumption and it “fails,” this could be grounds for relieving one party from what appears to have been an unqualified commitment. Contract law has a number of defenses to enforcement that are based on this intuition, such as mistake of present existing fact, frustration of

³⁹ LON L. FULLER, BASIC CONTRACT LAW 666–67 (1947).

purpose, and impracticability.

With mistake, a fact that was tacitly assumed by both parties to be true at the time of formation, and that was material to the assent of the party seeking to avoid the enforcement of the agreement, turns out to be false. With frustration, the value of receiving performance has unexpectedly been greatly reduced to the person seeking to avoid the contract, due to developments that neither party anticipated. With impracticability, an unexpected change in circumstances led to a great increase in one party's cost of performance.⁴⁰ In each of these circumstances, when one party seeks to enforce the agreement, the other party is saying, in effect, "Well, I did not agree to *that*."

"Common sense," writes Andrew Kull, "sets limits to a promise, *even where contractual language does not*."⁴¹ Such limits are not to be found in either the expressed or implied meaning of the terms. "Though a promise is expressed in unqualified terms, a person does not normally mean to bind himself to do the impossible, or to persevere when performance proves to be materially different from what both parties anticipated at the time of formation."⁴²

These qualifications are not implied by what was said, but rest on the background assumptions of the parties. "Faced with the adverse consequences of such a disparity, even a person who has previously regarded his promise as unconditional is likely to protest that he never promised to do *that*."⁴³ As Kull explains, "[t]he force of the implicit claim is hard to deny: I did not mean my promise to extend to this circumstance; nor did you so understand it; to give it that effect would therefore be to enforce a contract different from the one we actually made."⁴⁴

Such limitations on the enforceability of an unqualified promise exist despite the absence of any expressed or implied-in-fact condition on the obligation to perform. Fuller offers the example of a person "who contracts to deliver goods a year from now at a price now fixed"⁴⁵ Such a person "certainly 'takes into account' the possibility of some fluctuation in price levels, but may feel that a ten-fold inflation was contrary to an 'assumption' or 'expectation' that

⁴⁰See E. ALLAN FARNSWORTH, *CONTRACTS* 599-647 (4th ed. 2004) (explaining doctrines of mistake, impracticability and frustration of purposes).

⁴¹ Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 *HASTINGS L.J.* 1, 38-39 (1991) (emphasis added).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ FULLER, *supra* note 39.

price variations would occur within the ‘normal’ range, and that this expectation was ‘the foundation of the agreement.’”⁴⁶

Defenses to enforcing contracts based on a failure of basic assumptions have another pertinent component: these assumptions must be shared by both parties. “The assumption may be tacit But the assumption must have been shared by both parties; no account is taken of one party’s purely private assumption.”⁴⁷ In other words, the contract cannot be said to have been based on a basic assumption unless it was the sort of assumption shared by both parties. If it was not held in common, then we say that a party who is unilaterally mistaken has born the risk of her mistake and the contract can be enforced against her. Another way to understand the requirement of mutuality is that only an assumption shared by both parties is deemed to be so basic as to go without saying. Any assumption held by just one of the parties is simply not fundamental enough to justify concluding that the contract has failed.

To sum up, in contract law, a failure of an assumption that is so fundamental that it was shared by both parties provides a reason to deny the enforcement of a written contract that expresses no such condition on performance. In other words, while these assumptions do not change the literal meaning of what was expressed or implied, they do provide a normative reason to release a party from her commitment notwithstanding the unqualified meaning of her manifested consent. Why background assumptions are relevant to contractual obligation immediately calls into question any comparable role for background assumptions in constitutional theory and practice.

B. *The Basic Assumptions of the Constitution*

We might begin by asking why the failure of a basic assumption can result in the non-enforcement of a contract. The reason suggested above is that, if the justice of enforcing contracts is based on the consent of the parties, then the truth of a basic assumption is an *unstated* condition of that consent. This is what was meant by saying that, while a party may have agreed to perform without express condition, nevertheless she did not agree to *that*—that is, to perform ‘come hell or high water.’ But while the existence and failure of a background assumption conditions or qualifies a contractual obligation, it does not change the literal meaning of what was expressed or implied in the contract.

⁴⁶ *Id.*

⁴⁷ FARNSWORTH, *supra* note 44, at 629.

Here is where the potential difference between contracts and constitutions comes to the fore. If one thinks that constitutions are based on consent, then it would be natural to see them premised on the tacit assumptions of those whose consent makes a constitution binding. If a constitution is not based on consent, however, the imperative to condition its application on the tacit assumptions of some person or group becomes much less compelling. In the absence of consent, it still makes sense to say the members of a polity can today be bound by the original public meaning of a written constitution that was adopted by others at some time in the past. Without a consensual basis of constitutional legitimacy, however, it makes far less sense to say that members of a polity are bound by the tacit assumptions of some particular group.

Moreover, the result of a failure of basic assumption in contract is the failure of the contract itself. This too results from the consensual basis of a contract. Where consent runs out, so too does the “private law” to which the parties consented. The contract is then at an end. But with constitutions, failure is not an option. Or perhaps, while constitutional failure can occur, failure does not result simply because the assumptions held by some persons at the time of a constitution’s enactment have turned out not to be true. Constitutions are built to last for a very long time, and the longer they are in effect the more vulnerable become the assumptions that were held at the time they were enacted.

In his book, *Dred Scott and the Problem of Constitutional Evil*, Mark Graber discusses an assumption made by numerous slave-holding founders and others that the population would expand in the temperate South at a greater rate than in the colder North.⁴⁸ As a result, they assumed that the express textual protection of slavery would be unnecessary because it would be protected effectively enough by the various electoral mechanisms incorporated into the Constitution.⁴⁹ The politics of slavery markedly changed, however, when population unexpectedly expanded disproportionately in the North, thereby increasing its representation in the House as well as in the Electoral College.⁵⁰

When this occurred, the balance of slave and free states in the equally apportioned Senate unexpectedly became the sole remaining political protection of slavery. Ironically, the Virginia Plan for the Constitution had called for proportional representation in both the House and Senate, and the Convention was

⁴⁸ See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 102 (2006) (“[C]onstitutional framers from all regions of the country assumed that population increases would be greatest in the South and Southwest.”).

⁴⁹ See *id.* at 101-06.

⁵⁰ See *id.* at 126-28.

thrown into turmoil when the smaller states obtained equal representation in the Senate.⁵¹ Later, some Virginians could be quite happy their plan was modified in this respect.

If this historical claim about expected population growth is accurate, it would seem to have been a pretty basic assumption. But should it matter? Is the meaning of the Constitution affected by this alleged failure of a basic assumption, such that the national government no longer functioned “as originally intended”?⁵² The answer to this question requires distinguishing both between the activities of constitutional interpretation and constitutional construction, and between the problems of ambiguity and vagueness of constitutional language.

C. *Interpretation vs. Construction—Ambiguity vs. Vagueness*

The existence of a writing gives rise to two distinct activities: (1) ascertaining the meaning of the words that are conveyed by the text considered in context; and (2) applying the meaning of these words, properly ascertained, to the facts and circumstances of particular cases. Following Keith Whittington,⁵³ I use

⁵¹See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 275 (2004) (describing the shift by Virginia and other Southern states to enumerate the powers of Congress immediately after the Convention approved equal representation in the Senate).

⁵²GRABER, *supra* note **Error! Bookmark not defined.**, at 106.

When the national government was functioning as originally intended, national policy would be approved by a Southern-tilting House of Representatives, and a Northern-tilting Senate. In firm control of the presidency, the federal judiciary, and the House of Representatives, a united South would veto any legislation too hostile to Southern interests.

Id.

⁵³See KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 7 (1999):

Although the clauses and structures that make up the text cannot be simply empty of meaning, for they are clearly recognizable as language, the meaning that they do convey may be so broad and underdetermined as to be incapable of faithful reduction to legal rules. . . . Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning.

the term “interpretation” to refer to the ascertainment of the meaning of the language, and “construction” to refer to the application of this meaning, properly interpreted, to particular circumstances. But whatever labels one adopts, these are two distinct activities.

I do not mean to suggest that, in practice, it is always clear whether a particular issue is one of meaning/interpretation or application/construction. But it is still useful to separate these as different activities if for no other reason is that it puts originalism in its proper place. If original meaning originalism is considered a method of interpretation, then applying the original public meaning of the text to particular cases will often still require other constructive methods to supplement the meaning of the text. Such methods are, by assumption, “noninterpretivist” but would nevertheless be consistent with originalist interpretation provided the constructions being used do not violate or contradict what the text says or implicates. The interpretation-construction distinction also reveals that those who advocate filling the gaps in original public meaning by appealing to the original intentions of the Framers are proposing a noninterpretive exercise in construction, since the semantic meaning of text itself does not present this narrower meaning even when context is taken into account.

The language of a text may not communicate a unique solution to particular cases and controversies because that text may be either ambiguous or vague. Contracts scholar Allan Farnsworth offered the following useful distinction between these two problems of ascertaining linguistic meaning:

Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word “light” may be when applied to dark feathers. Such a word is ambiguous.⁵⁴

In other words, language is ambiguous when it has *more than one sense*; it is vague when its meaning admits of *borderline cases* that cannot definitively be

I would reserve the word “meaning” to that which is the product of interpretation, rightly understood, whereas Whittington would extend it to embrace the product of construction as well. But this is merely a terminological or semantic difference rather than a substantive one.

⁵⁴E. Allan Farnsworth, *Meaning in the Law of Contracts*, 76 YALE L.J. 939, 953 (1967).

ruled in or out of its meaning.

The distinction between ambiguity and vagueness generally, but not entirely, parallels the distinction between interpretation and construction. We are engaged in interpretation when resolving the ambiguity of particular terms in the Constitution by examining the context to determine which of several connotations would be attributed to a particular usage. When interpreting potential ambiguity, we must make a choice among alternative connotations of a term to identify the message that the text communicated to the public in context. In contrast, we must go beyond interpretation when the meaning of a vague term does not itself convey enough information to include or exclude a particular object. Deciding whether or not to include that object within its scope is an act of construction, not interpretation.

Put another way, resolving potential ambiguity of a written text involves interpretation because it is the meaning of the term itself that is being ascertained. In contrast, questions about the vagueness of a particular term in the text are resolved by combining the meaning of the text with considerations extrinsic to this meaning. Precisely because that meaning of the text is vague or incomplete, the application of its meaning to particular objects cannot be answered definitively by interpretation, and must be addressed by methods of construction.

However, if there is no unique sense of an ambiguous term to be discovered, the problem of ambiguity may also need to be handled by construction rather than interpretation. Such irresolvable ambiguity could arise in at least three situations. In these three situations, a term is irresolvably ambiguous because there is no historical truth of the matter concerning which alternative meaning was the unique public meaning of the text in context. In such a situation, the meaning of the text has run out and we must move to the activity of constitutional construction.

First is what Lawrence Solum calls “epistemic ambiguity” that arises when a provision of the Constitution was originally unambiguous but the information necessary to resolve the semantic content is no longer available.⁵⁵ Second, the Drafters may have deliberately chosen ambiguous language to paper over irreconcilable differences among them. Solum calls this “compromise ambiguity.”⁵⁶ It is alleged, for example, that the language of the Necessary and Proper Clause was left deliberately ambiguous to allow both sides of the debate

⁵⁵See Lawrence B. Solum, *Semantic Originalism*, Illinois Public Law Research Paper No. 07-24, available at <http://ssrn.com/abstract=1120244>.

⁵⁶*Id.*

over the scope of federal power to argue later that *theirs* was the meaning enacted in the Constitution.⁵⁷

Finally, it is also possible for the Framers to deliberately employ ambiguous language to accomplish a nefarious purpose, or at least an unpopular one. Solum calls this “deceptive ambiguity.”⁵⁸ Indeed, the Framers could actually employ ordinarily unambiguous language and, if their intentions were widely enough known, this language would *become* ambiguous in context. As we shall see in the next Part, this is what resulted from the Framers’ use of euphemistic language or perfectly “innocent” language to refer obliquely to slavery, an unambiguous term they refused to employ. “Euphemism” has been defined as a “figure of speech which consists in the substitution of a word or expression of comparatively favourable implication or less unpleasant associations, instead of the harsher or more offensive one that would more precisely designate what is intended.”⁵⁹ If the favorable expression being substituted has no previous semantic connection to the offensive words, then the very usage of the euphemism, if widely understood as such, renders these favorable expressions potentially ambiguous.

The difference between interpretation and construction and between ambiguity and vagueness is crucial to identifying the proper role of constitutional assumptions. First, some background assumptions can be relevant to the interpretive act of ascertaining the original meaning of the text, in particular to resolving ambiguity where this is possible. Indeed, the existence of commonly-held background assumptions is why we often do not even realize that the words of the Constitution sometimes have more than one possible meaning. Second, whether and which background assumptions are relevant to addressing problems of vagueness, as well as any residual problems of ambiguity that do not yield to interpretation, will depend upon one’s theory of constitutional construction.

To see how background assumptions resolve potential ambiguity, consider the word “arms” in the Second Amendment. “Arms” is ambiguous insofar as it can refer to weapons, to the limbs to which our hands are attached, or to a component of a chair or sofa. Each of these distinct meanings is mutually

⁵⁷See JOSEPH M. LYNCH NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 25 (1999) (“The ambiguity of the language that the committee proposed and that the convention approved enabled both sides not only to approve its inclusion in the Constitution but also to argue afterwards that their construction was in accord with the framers’ intent.”).

⁵⁸See Solum, *supra* note 55.

⁵⁹OXFORD ENGLISH DICTIONARY (2d ed. 1989)

incompatible with the others; whatever “arms” means in the Second Amendment, it means only one of these. Accurately interpreting the Second Amendment requires a choice among these competing and incompatible meanings of the word “arms.” Unlike vagueness, ambiguity can usually be addressed by historical evidence because the alternatives are few and the choices are mutually exclusive. “Arms” either meant weapons or limbs or a furniture part; there is no in between or grey area between these three meanings. And historical evidence usually establishes with reasonable certainty which of the relatively finite number of discrete meanings was the one conveyed by the language that was used.

Certainly a member of the public would conclude from the context that the word “arms” meant weapons—or some subset of weapons—and not limbs or a furniture component. In part, this conclusion would be based on the full language of the Second Amendment and the Constitution as a whole. But if the ambiguity is not clearly resolved by the document itself, we might move beyond its four corners to consider its publicly-known purposes. Such purposes could be characterized as background assumptions.

This example illustrates how, when a term is ambiguous, its public meaning could be influenced by basic assumptions—especially the publicly known purposes of a provision. This example also shows how the problem of ambiguity is a historical question that can usually be resolved by examining historical evidence to identify the context that determined the “intended” meaning. The same cannot be said about vagueness. A vague term is not rendered any less vague when we examine how some expected it to be applied to particular cases. With ambiguity, the background assumptions of the public can assist us in ascertaining which of a term’s several senses constituted its original meaning. A vague term remains vague even after we examine how some expected it to be applied.

Before appealing to background assumptions, however, we must be careful to take into account the entire context that is conveyed by the text itself. For example, it used to be popular for some law professors and historians to claim that the Second Amendment protected the “collective right” of states to preserve their militias rather than the rights of individuals to their own privately held weapons.⁶⁰ In other words, they claimed that the word “the people” in the Second Amendment was ambiguous as between individuals and states, but that the historical evidence of the background assumptions of the public resolved the

⁶⁰ See, e.g. IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 486-87 (1965)

ambiguity in favor of a “collective right” of states. Before consulting background assumptions, however, a faithful interpreter would need to consider the context provided by the surrounding text. In particular, the individual nature of all the other rights identified in the Bill of Rights that were described as belonging to “the people,” such as Fourth Amendment’s reference to “[t]he right of the people to be secure in their persons, papers, houses and effects,”⁶¹ as well as the express distinction between “the people” and “the states” in the Tenth Amendment.⁶²

As in modern contract law, it is entirely fair to look to shared background assumptions beyond the four corners of the text to establish the existence of, as well as to reconcile, potential ambiguity.⁶³ Before appealing to extratextual or *extrinsic* evidence of meaning, however, other pertinent intratextual or *intrinsic* evidence of meaning that reduces the scope of any potential ambiguity must first be examined. Instead of inquiring whether “the people” in the Second Amendment, considered in isolation, had multiple possible meanings, one would inquire whether historical evidence shows the phrase “the people” conveyed a *different meaning* in the Second Amendment than it did elsewhere in the immediately surrounding text—a much more particular and difficult burden to sustain.

Unlike ambiguity, vagueness cannot be resolved by historical evidence. Examples of vague terms in the Constitution are easy to find. What are “cruel and unusual punishments?” What are “unreasonable searches and seizures?” The term “unreasonable” communicates no bright lines to distinguish whether a particular mode of searching is permissible or impermissible. Deciding whether a particular punishment is “cruel and unusual” or a particular search is “unreasonable” requires more than the original public meaning of the term. To the extent that these terms are vague they inevitably require constitutional construction based on noninterpretive considerations when being applied to a particular practice.

On the other hand, the original meaning of some allegedly vague terms may convey considerably more information than is commonly thought. For example, textual and historical context shows that the original meaning of the “rights . . . retained by the people” referred to natural rights, which were

⁶¹U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

⁶²See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁶³See Farnsworth, *supra* note 541.

conceived as “liberty rights.”⁶⁴ And the “privileges or immunities of citizens”⁶⁵ was a reference to natural rights or “immunities,” in addition to other particular positive rights or “privileges” contained in the Bill of Rights.⁶⁶ Even the “equal protection of the laws” in the Fourteenth Amendment may not be nearly as vague as is commonly asserted, given that “equal” is connected to the “*protection* of the laws”⁶⁷—a largely executive branch function—and “of the laws” seems to refer back to laws that do not violate the Privileges or Immunities Clause in the very same sentence.⁶⁸ Given this intratextual context, even the “due process of the law”⁶⁹ may be significantly less vague or open-textured than is commonly thought. This phrase might well refer to procedures that ensure the accuracy of imposing the three possible legal sanctions for breach of a criminal or civil duty imposed by the law: capital punishment (“life”), imprisonment (“liberty”), and fine or judgment (“property”). Although the phrase “due process” is vague as to which exact procedures provide the requisite accuracy, the range of vagueness is narrowed considerably by the context.

Because whatever vagueness may remain in the original meaning of the text after considering its context cannot, by assumption, be clarified by original meaning, some additional theory of construction is required. Perhaps one’s theory of constitutional construction would authorize a reliance on the original background assumptions held by all or some persons at the time the text was

⁶⁴See BARNETT, *supra* note 58, at 53–60.

⁶⁵U.S. CONST. amend. XIV, § 1.

⁶⁶See BARNETT, *supra* note 58, at 60–68; *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (W.S. Hein & Co. reprint 1992) (1768):

Thus much for the declaration of our rights and liberties. The rights themselves thus defined by [Magna Carta and other foundational] statutes, consist in a number of private *immunities*; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil *privileges*, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. . . . And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property

⁶⁷ U.S. CONST. amend. XIV, § 1 (“nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁶⁸See *id.* (“No state shall make or enforce *any law* which shall abridge the privileges or immunities of citizens of the United States.”) (emphasis added).

⁶⁹See *id.* (“nor shall any state deprive any person of life, liberty, or property, without due process of law.”).

enacted. For example, one could advocate addressing vagueness by appealing to the original intentions of the Framers of the text, or to how they expected a particularly vague provision would be applied to particular cases.

Both original intent and original expected application could be considered background constitutional assumptions. Reliance on these assumptions would require additional normative justification beyond whatever normative justification there is for respecting the original semantic meaning of the text itself. In other words, one's theory of constitutional construction when addressing the problem of vagueness requires justification apart from one's theory of interpretation. As will be discussed in the next Part, one's theory of construction inescapably depends on one's theory of constitutional legitimacy.

We are now in a better position to evaluate the relevance of the widespread mistaken assumption, discussed by Mark Graber, that population would grow faster in the South than in the North to the interpretation of the Constitution. With respect to interpretation, this assumption seems clearly irrelevant. There is not a single word in the Constitution that expressly mentions this assumption; nor can it be implied-in-fact from what the Constitution says; nor is it helpful to resolve any ambiguity in what the Constitution says. Graber's example is an excellent illustration of how some background assumptions, however "fundamental" they may have been, are entirely irrelevant to the meaning of the text.

Moreover, even if background assumptions do play a role in constitutional construction, this particular assumption does not seem to bear on any vagueness in the text. So the claim must be either that the Constitution "fails" because the assumption on which it is based has turned out unexpectedly, or that the Constitution should be construed in a manner as to somehow take into account this change in basic assumptions, notwithstanding its irrelevance to any issue of ambiguity or vagueness. How one evaluates either of these claims will depend mainly on one's theory of constitutional legitimacy.

III. THE INESCAPABILITY OF CONSTITUTIONAL LEGITIMACY

In the previous Part, I contended that constitutional interpretation is the activity of ascertaining the meaning of the words in the text of the Constitution, and that background assumptions may sometimes be relevant to resolving ambiguity. All originalist theories of interpretation maintain that judges and other government officials should obey the meaning of the text *at the time it was enacted*—though they may differ on how this original meaning is to be

ascertained. While ascertaining the original meaning of the text is a descriptive endeavor, whether or not government officials should be held to the meaning of the text of the Constitution at the time it was enacted is a normative question I address elsewhere.⁷⁰ The normative thesis I present there is that a written constitution is the means by which law is imposed on those who would impose law on the general public, and that such an objective would be undermined if those individuals and institutions who are supposed to be governed by this “public law” can alter its meaning at their own discretion.

In contrast with interpretation, constitutional construction is the application of the meaning of the text to particular facts and circumstances when the meaning revealed by interpretation is vague or irresolvably ambiguous. Whether and how background assumptions may be relevant to constitutional construction is a question that is distinct from the proper role of background assumptions when interpreting the meaning of the text. The answer to this question will depend on one’s theory of constitutional legitimacy. By constitutional legitimacy I mean why a constitution is or could be binding. A law-making system is legitimate if creates commands that citizens have a duty to obey. A constitution is legitimate if it creates this type of legal system. What then is it about a constitution that makes it legitimate in this sense? Why do citizens have a duty to obey the commands of those who are designated by a constitution as lawmakers and enforcers?

If pressed for an answer to this question, some would rely on “the consent of the governed” or what is sometimes called “popular sovereignty.”⁷¹ Characteristic is the following statement: “The people’s representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves”⁷² The claim is that lawful commands of the people’s representatives bind the individual because the people committed themselves to be bound by their representatives’ commands. In sum, individuals are bound to obey laws enacted by a legislature whose authority can be traced to the consent of those who are

⁷⁰ See Barnett, *supra* note 58, at 89–117.

⁷¹ Elsewhere I examine a more individualistic conception of popular sovereignty based, not on the collective consent of the people, but on the individual rights they possess in common. See Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1179 (2007); Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty*, 60 STAN. L. REV. 937, 954–60 (2008).

⁷² Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution*, 65 FORDHAM L. REV. 1291 (1997).

subject to the laws. In short, those who advocate a consent theory of constitutional legitimacy view constitutions as very similar, if not identical to, contracts.

In this Part, I explain why consent theories of constitutional legitimacy invite the use of constitutional assumptions when engaged in constitutional construction. The impracticality of doing so greatly exacerbates the problems with basing constitutional legitimacy on the consent of the governed. Conversely, a justice-based theory of constitutional legitimacy ameliorates the difficulties of relying upon background assumptions by keeping them in their proper place.

A. *More Problems for the Consent Theory of Constitutional Legitimacy*

I begin my book, *Restoring the Lost Constitution*, with a repudiation of consent theories of legitimacy.⁷³ I argue that, for consent to legitimate governance, it must be actual or real, not hypothetical or metaphorical.⁷⁴ That is simply how consent works as a moral principle. One is justified in treating persons in certain ways when they have consented that are impermissible in the absence of their consent. But, for this permission to exist, the person who is affected must have actually manifested or communicated their consent. Although an individual can consent to have sexual relations with another person, imagine a group of three persons in which two vote that the third may be subjected to a sexual assault. No one would suggest that the two can “consent” for the third.

It is incumbent on those who adhere to some version of a consent theory of constitutional legitimacy to explain just how and when an actual consent of the governed initially did and still does occur. Assuming the Constitution was supported by a majority of the people on whom it was imposed at the time it was enacted, how did the dissenting minority become bound to it? How did future generations? Elsewhere, I have examined in considerable detail the difficulty with every story ever told about popular consent to governance, and I shall not repeat this critique here.⁷⁵

As with contracts, the identification of the basic assumptions on which consent to a constitution rests would seem to be requisite to a consent theory of constitutionalism. Yet this exponentially increases the difficulties of ascertaining the existence and substance of consent. When the problematic status of

⁷³See BARNETT, *supra* note , at 11–52.

⁷⁴*Id.* at 32–52.

⁷⁵See *id.* at 11–31.

constitutional assumptions in constitutional construction is added to the problem of ascertaining genuine consent to governance, the theoretical and practical challenge for a consent theory of constitutional legitimacy is well nigh insurmountable.

If, as with contracts, one views the legitimacy of the Constitution as resting on the consent of the governed, then one is inevitably drawn to the conclusion either (a) that the Constitution “fails” when one of its basic assumptions does not turn out as expected, as would a contract; or (b) that the Constitution should be construed so as to preserve the intentions of those who consented to the Constitution notwithstanding the change in circumstances, as some would favor handling so-called “relational” contracts. Either option is highly problematic.

Finding constitutional failure undermines the ongoing nature of constitutionalism. What would happen if such a failure occurs? Could states secede? Could individuals or groups? How would failure be assessed, and by whom? No obvious answers suggest themselves. More likely, those who hold a consent theory of constitutional legitimacy would approach the Constitution as some would handle so-called “relational” or long-term contracts.⁷⁶ These relational theorists favor construing the contract so as to preserve the ongoing relations of the parties.⁷⁷ While relational theory has shed much light on contract law, judicially preserving long term contractual relations after marked changes in circumstances is highly controversial among contracts scholars⁷⁸ and is largely shunned by the courts.⁷⁹ However difficult this approach may be in contract, these difficulties are exponentially magnified with constitutions.

With a contract, one can at least identify the relevant consenting parties,

⁷⁶Referring to long-term contracts as “relational” reflects early usage by Ian Macneil. Although many, perhaps most, contracts scholars still use the term this way, Macneil himself eventually changed his terminology. In his later writings, he contended that, whereas all (or nearly all) contracts were “relational,” some relational contracts were “discrete” and others “intertwined.” Long-term relational contracts fall into the latter category. See Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 VA. L. REV. 1175, 1178 n.16 (1992).

⁷⁷See, e.g., Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000).

⁷⁸See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (discussing relation-preserving vs. end-game norms).

⁷⁹See Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. L. REV. 805 (2000).

and there likely will be very few. Because of this, it appears to be feasible to identify the basic assumptions of these parties as well as their intentions, so as to preserve them rather than let the contract fail. Who are the relevant “parties” to the Constitution, and how are their assumptions to be identified? What sort of constructions count as preserving the intentions of these “parties,” given that future events were not as anticipated?

To reconsider an earlier example, how should the Constitution have been construed to compensate for the failure of the South’s assumption about population growth? True, one might respond that this assumption was held only by some and not by everyone, and so should not affect the construction of the Constitution any more than would a failure of basic assumptions by one party to a contract but not the other. Suppose, however, that everyone who thought about it really would have said, “Well yes, I guess the South will grow faster than the North. I don’t much like the political ramifications of this, but I suppose I do assume it will happen.” Should this “consensus” about a tacit assumption matter here the way it might in contract law?

A consent theorist might try to mitigate the problem by limiting the assumptions that can affect constitutional construction to those that were universally shared at the time of the text’s adoption. After all, in contract law, to be considered “basic,” an assumption must be shared by all parties to a contract. So a consent theorist might argue that the only constitutional assumptions that count for purposes of constitutional construction or failure are those that were universally held at the time of formation. Even universally shared assumptions, however, do not change the meaning of the Constitution unless they are expressed or implied-in-fact from what is expressed, or assist in handling problems of ambiguity. And assumptions that are truly universal will be rare. Typically there were contemporary dissenters from any assumption worth arguing about today.

More importantly, universal assumptions are not the sort of assumptions to which consent theorists typically appeal when construing the Constitution beyond its express and implied-in-fact meaning. Rather, they more typically make claims about the assumptions of the majority who adopted the text that parallel their claims about majoritarian consent to governance. But, just as the consent of the majority does not bind a dissenting minority—who did not previously consent to majority rule—the assumptions held by a majority do not bind anyone. Not, at least, without a theoretical justification for majoritarian consent to governance that has yet to be produced.

To salvage the consent theory of legitimacy from myriad difficulties surrounding constitutional assumptions, a consent theorist might deny that such

assumptions are binding. However consent to governance occurs, a consent theory might contend that unstated assumptions are simply no part of the consent that legitimates the Constitution; that the only meaning to which the public consented was the public meaning of the text—whether express or implied-in-fact—not any unstated background assumptions, even if those assumptions were widespread.

Assuming this move is consistent with a consent theory, which I doubt, any consent theorist who makes it is estopped from construing the Constitution today according to any basic assumption that was not expressed in the text or implied-in-fact. For example, even if everyone alive at the time the Fourteenth Amendment was enacted assumed that blacks were inferior to whites and women inferior to men—assumptions certainly not shared by all blacks and women who comprised a portion of the people—this assumption should not be used to construe the Constitution. Neither could unstated assumptions about expected applications of the text to future cases and controversies. For example, suppose that everyone alive assumed that the Fourteenth Amendment would not undermine the constitutionality of segregated schools or the common law of coverture. If the public meaning of the words of the Constitution have this unexpected legal affect, the original expected application would not undermine this conclusion.

Put another way, the original public meaning of the words of the Constitution—both expressed and implied—is what is enacted. And this enacted meaning is distinct from the original assumed or expected application of this meaning to particular cases. True, evidence of original assumptions or expectations might rightly influence a historical inquiry into the public meaning of the chosen language. Draftsmen try to use language the public meaning of which reflects their intentions. But sometimes draftsmen use language to obscure their intentions, as they arguably did with respect to slavery by employing euphemisms instead of the word “slavery” itself.⁸⁰ When they deliberately speak ambiguously or vaguely, they cannot expect their unenacted intentions to carry the force of enacted law.

Bear in mind that, at this point, we are hypothesizing that a consent theorist is abandoning adherence to basic assumptions or expectations in order to salvage the consent theory of legitimacy. If they make this move, however, they must then tell us how the Constitution is to be construed when its meaning runs out, as it frequently does when being applied to particular cases and controversies.

⁸⁰ I discuss this example at greater length *infra* in the text section.

While some consent theorists may have no problem articulating a nonconsensual approach to constitutional construction, this may prove difficult for those who wish to limit the “discretion” of judges by relying, for example, on the “intentions of the Framers” to fill gaps in the original public meaning of the text.⁸¹ If reliance on constitutional assumptions is forgone, then along with it goes any appeal to original intentions. Conversely, invoking original intentions to fill the gaps in the meaning of the text brings back all the difficulties attending to constitutional assumptions: whose nontextual assumptions bind? What nontextual assumptions bind? Why do nontextual assumptions bind?

B. *The Advantages of a Justice-Based Theory of Constitutional Legitimacy*

The first step to addressing the problem of constitutional legitimacy is to acknowledge openly that the laws enacted pursuant to the Constitution will be imposed on those who have never consented to the Constitution. What, if anything, could justify governance of those persons who have not consented? As noted above, a constitutional regime is legitimate when it has this binding quality and illegitimate if it does not.

By “legitimacy,” I am not referring to whether a particular law is “valid” because it was enacted according to the accepted legal process. Nor do I equate the legitimacy of a law with its propriety or “justice”—though these two concepts are closely related—or with the perception that a particular law is proper or just. Rather, the concept of legitimacy employed here refers to whether a validly enacted law merits the benefit of the doubt and a prima facie duty of obedience.

“Legitimacy” is sometimes used to refer to whether a particular legal regime is accepted as binding by the public or some substantial portion thereof. While public acquiescence may be essential to establishing a constitution as positive law, the question of legitimacy with which I am concerned is whether this perception is warranted; or, put another way, whether a constitution or legal regime *ought to be* accepted as binding. The concept of legitimacy I am describing is therefore normative, not descriptive.

According to my usage, a valid law could be illegitimate and a legitimate law could be unjust. A law may be “valid” because it was produced in accordance with all procedures required by a particular lawmaking system, but be “illegitimate” because these procedures were inadequate to provide assurances

⁸¹ See, e.g. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, __ NW. U. L. REV. ____ (2009).

that a law is just. Such a law would not be binding in conscience. A law might be “legitimate” because it was produced according to procedures that assure that it is just, and yet be “unjust” because in this case the procedures, which can never be perfect, have failed. Such a law would be binding in conscience unless its injustice is somehow established.

While actual consent by the governed, where it exists, could make a system of governance legitimate, in the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it imposes on those who have not consented are just. If a lawmaking process provides these assurances, then it is “legitimate” and the commands it issues are entitled to a benefit of the doubt. Although this nonconsensual justice-based concept of constitutional legitimacy is independent of any particular conception of justice, to evaluate the legitimacy of an actual constitution requires one employ a particular conception of justice.

Elsewhere, I have employed a rights-based conception of justice.⁸² I contend that persons cannot complain about a law being applied to them without their consent if such laws are “proper” in that they not violate their rights; and such laws would merit a duty of obedience if they are “necessary” to protect the rights of others. Just as one has a duty to respect the rights of others, one has a duty to obey the rules that are necessary to respect the rights of others. For example, it does not matter if a murderer has consented to the law prohibiting murder. He cannot complain when a murder statute is imposed upon him because the prohibition on murder does not violate his rights; and he has a duty to obey such a law because it is necessary to protect the rights of others, which he has a duty to respect. .

A justice-based alternative to a consent theory of legitimacy also addresses the vexatious problem of constitutional assumptions when engaged in constitutional construction. To see how, consider the way this theory was advanced by its earliest proponent, radical abolitionist and legal theorist Lysander Spooner, who developed it as part of his influential critique of the constitutionality of slavery⁸³ and refined it during his debate with abolitionist

⁸²See BARNETT, *supra* note 58, at 32–52. I greatly elaborate and defend the rights-based conception of justice upon which my writings on constitutional legitimacy is based in RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998). I do not claim to have established that this rights-based alternative to a consent theory of constitutional legitimacy is exclusive. Perhaps other alternatives can also be justified.

⁸³See LEWIS PERRY, *RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT* 195 (1973) (describing Spooner’s essay as “influential” and discussing

Wendell Phillips.⁸⁴ Whereas Spooner contended that the Constitution did not sanction slavery,⁸⁵ Phillips contended that it did.⁸⁶ The challenge for both sides of this debate was dealing with the language of the Constitution that appeared to reference slavery, but that did so euphemistically rather than referring to the practice by its proper name. What, if any, interpretive significance attaches to the refusal to refer expressly to “slavery” as such?

Phillips claimed that the newly released Madison papers established that the Framers of the Constitution intended to protect slavery in various clauses that do not mention slavery by name, so these euphemistic provisions should be given their intended meaning.⁸⁷ Spooner replied that we were not bound by the “secret” intentions of the Framers but only by the “innocent” public meaning of the words they put into the text. “It is not the intentions that men actually had,” Spooner contended, “but the intentions they constitutionally expressed, that make up the constitution.”⁸⁸

The people certainly did not consent to be bound by Madison’s secret notes of the Convention. Spooner refers to these as “meagre [sic] snatches of argument, intent or opinion, uttered by a few only of the members; jotted down by one of them, (Mr. Madison,) merely for his own convenience, or from the suggestions of his own mind; and only reported to us fifty years afterwards by a posthumous publication of his papers.”⁸⁹ He then asks, “Did Mr. Madison, when he took his oath of office, as President of the United States, swear to support these scraps of debate, which he had filed away among his private papers?—Or did he swear to support that written instrument, which the people of the country had agreed to, and which was known to them, and to all the world, as the constitution of the United States?”⁹⁰

How then is the Constitution’s meaning to be determined? “[T]he only answer that can be given,” Spooner concluded, “is, that it can be no other than the

the degree of its influence).

⁸⁴See *id.* at 165 (describing how Phillips was “[g]loaded by charges that he was afraid to tackle the most famous antislavery analysis of the Constitution—Lysander Spooner’s *The Unconstitutionality of Slavery*”).

⁸⁵LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 226 (rev. ed. 1860) in 1 *THE COLLECTED WORKS OF LYSANDER SPOONER* (Charles Shively, ed. 1971).

⁸⁶See WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS* (1844).

⁸⁷See *id.* at 3-7.

⁸⁸Spoooner, *supra* note 92, at 226.

⁸⁹*Id.* at 117.

⁹⁰*Id.*

meaning which its words, interpreted by sound legal rules of interpretation, express. That and that alone is the meaning of the constitution.”⁹¹ In other words, the meaning of the text is limited to its express and implied-in-fact content. “[W]hether the people who adopted the constitution really meant the same things which the constitution means, is a matter which they were bound to settle, each individual with himself, before he agreed to the instrument; and it is therefore one with which we have now nothing to do.”⁹²

Assuming that the Constitution was initially based on the consent of the governed, “[w]e must admit that the constitution, *of itself, independently of the actual intentions of the people*, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intentions by agreeing to it.”⁹³ Unless the text of the Constitution had an objective public meaning independent of the subjective intentions of its authors, there was nothing to which the people could have consented. “The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an instrument that had no meaning *of its own*, would only be agreeing to nothing.”⁹⁴

Consider this claim in the context of contract law. Suppose a written contract means only what its drafter intended but did not objectively manifest to

⁹¹*Id.* at 223. Spooner thought that general rules of interpretation were needed to choose among the various meanings of language:

[T]he same words have such various and opposite meanings in common use, that there would be no certainty as to the meaning of the laws themselves, unless there were some *rules* for determining which one of a word’s various meanings was to be attached to it, when the word was found in a particular connection. . . . Their office is to determine the legal meaning of a word, or, rather, to *select* the legal meaning of [a] word, out of all the various meanings which the word bears in common use.

Id. at 162. But the rules of interpretation must themselves be selected to enhance the fit between constitutional meaning and justice, for “unless the meaning of words were judged of in this manner, words themselves could not be used in writing laws and contracts, without being liable to be perverted to subserve all manner of injustice. . . .” *Id.* at 163. “[T]he rules are but a transcript of a common principle of morality, to wit, the principle which requires us to attribute good motives and good designs to all the words and actions of our fellow-men, that can reasonably bear such a construction.” *Id.* at 164.

⁹²*Id.*

⁹³*Id.* at 222.

⁹⁴*Id.*; *see also id.* at 220 (“[I]f the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written.”).

the other party. How can the other party know to what they are consenting unless they have access to the subjective intentions of the drafter? For this reason, contract law adopts the objective meaning of the text as the operative meaning of a contract unless it can be shown that both parties were in subjective agreement about an idiosyncratic meaning of the text. Assuming that the Constitution was based on the consent of the governed, Spooner's denial that the intentions of the Framers are binding rested on the same considerations that lead contract law to reject enforcing subjective intentions that are not objectively manifested to the other party.

But Spooner then denied the existence of actual consent. Although he accepted the proposition that the "government can have no powers except as individuals may *rightfully* delegate to it,"⁹⁵ he shifts the theory from actual consent to what philosophers call "hypothetical" consent. Although the Constitution purports to be established by "the people," and that "all the people" consent to it, "this consent of 'the people' exists only in theory. It has no existence in fact. Government is in reality established by the few; and these few assume the consent of all the rest, without any such consent being actually given."⁹⁶

From the lack of actual consent, Spooner posits a presumption based on what today might be called rational choice. "Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government."⁹⁷ He then compares these *presumed* intentions of the people, which "are all uniform, all certainly right, and all valid, because they correspond precisely with what they said by the instrument itself,"⁹⁸ with the indeterminacy of ascertaining the actual intentions of dispersed persons, which are "infinitely various, conflicting with each other, conflicting with what they said by the instrument, and therefore of no legal consequence or validity whatever."⁹⁹

In other words, because the consent on which the Constitution purports to be based is only "theoretical" or "presumed," we cannot assume that any of the persons upon whom its governance is imposed coercively would have consented to a text that violated their fundamental rights. While it is true that persons can and do consent to alienate or waive their rights every day, in the absence of actual

⁹⁵*Id.* at 14.

⁹⁶*Id.* at 153. *See also id.* at 225 ("The whole matter of the adoption of the constitution is mainly a matter of assumption and theory, rather than of actual fact.").

⁹⁷*Id.* at 143.

⁹⁸*Id.*

⁹⁹*Id.*

consent—whether expressed or implied-in-fact—no one can be presumed to have done so. Therefore, any government who depends for its legitimacy on the consent of the governed must operate consistently with principles of justice, principles to which everybody could presumably agree.

It bears emphasis that, despite his repeated references to consent, because Spooner’s approach is based on hypothetical rather than actual consent, it is justice-based and not consent-based. Then, as now, hypothetical consent is a device for determining the proper content and scope of justice. It is not to be confused with arguments that justify coercion that are based on actual consent.

Having employed the concept of presumed consent to shift the focus from actual consent to justice, Spooner then presented a principle of construction adopted from the following “clear statement” requirement of statutory construction enunciated by Chief Justice John Marshall in the 1805 case of *United States v. Fisher*:¹⁰⁰ “Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects.”¹⁰¹ In the constitutional sphere, Spooner rendered this clear statement maxim of construction as follows:

1st, that no intention, in violation of natural justice and natural right . . . can be ascribed to the constitution, unless that intention be expressed in terms that are *legally competent* to express such an intention; and 2d, that no terms, except those that are plenary, express, explicit, distinct, unequivocal, *and to which no other meaning can be given, are legally competent* to authorize or sanction anything contrary to natural right.¹⁰²

In short, “all language must be construed ‘*strictly*’ in favor of natural right.”¹⁰³

Given its origins in considerations of justice, this rule of construction is not symmetrical. “The rule of law is materially different as to the terms necessary to legalize and sanction anything contrary to natural right, and those necessary to legalize things that are consistent with natural right.”¹⁰⁴ These two rules of law

¹⁰⁰*United States v. Fisher*, 6 U.S. [2 Cranch] 358, 390 (1805).

¹⁰¹SPOONER, *supra* note 88, at 18–19 (quoting *United States v. Fisher*) (emphasis added by Spooner).

¹⁰²*Id.* at 58–59.

¹⁰³*Id.* at 17–18.

¹⁰⁴*Id.* at 59.

are distinguished by two approaches to constitutional implicature. Laws that are consistent with natural right “may be sanctioned by natural implication and inference.” Laws that are contrary to natural right are sanctioned “only by inevitable implication, or by language that is full, definite, express, explicit, unequivocal, and whose *unavoidable* import is to sanction the *specific wrong* intended.”¹⁰⁵

The bulk of *The Unconstitutionality of Slavery*’s nearly 300 pages is an examination of the innocent public meaning of the clauses that we have come to think of as referring to slavery: the references to “other persons” in Article 1, § 2, the “importation of such Persons” in Article I, § 9, and “No person held to Service or Labour” in Article IV, § 2.¹⁰⁶ Spooner contended that, if you were completely unaware of its prior existence, you would not imagine these passages referred to slavery.

Before concluding that Spooner’s innocent interpretation of each of these passages is “strained,” consider that Phillips contended that two additional clauses of the Constitution were also references to slavery: “Congress shall have Power . . . to suppress Insurrections”;¹⁰⁷ and “The United States . . . shall protect each [state] . . . against domestic Violence.”¹⁰⁸ Phillips argued that these “articles relating to insurrection and domestic violence, perfectly innocent in themselves—yet being made with the fact directly in view that Slavery exists among us, do deliberately pledge the whole national force against the unhappy slave if he imitate our fathers and resist oppression.”¹⁰⁹ Whose interpretation of the text is “strained”?

What light does this debate over slavery between Lysander Spooner and Wendell Phillips shed on constitutional interpretation and construction? In my view, Spooner offers an effective critique of Phillips’ assertion that the general language of the Constitution must be interpreted according to Framers’ intent, and identifies the powerful alternative of original public meaning. But the rest of his theoretical apparatus raise a series of difficult questions. Is not the constitutional language about which he and Phillips are debating ambiguous—as opposed to

¹⁰⁵*Id.*

¹⁰⁶I summarize Spooner’s extensive analysis of each of these clauses in Randy E. Barnett, *Was Slavery Before the Thirteenth Amendment?: Lysander Spooner’s Theory of Interpretation*, 28 PACIFIC L. J. 977, 994–99 (1997).

¹⁰⁷U.S. CONST., ART. I, § 8.

¹⁰⁸U.S. CONST., ART. IV, § 4.

¹⁰⁹WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER’S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 26–27 (1847) (1969).

vague? If so, then are not the background assumptions of the public relevant to determining the original public meaning of the text? And would not a reasonable member of the public realize that these passages refer, however euphemistically, to slavery? If so, was not Phillips ultimately correct to utilize evidence of Framers' intent to resolve the ambiguous text and establish the true public meaning of the text, and was not Spooner wrong to reject such evidence? If all this is correct, then is it not Spooner's clear statement principle of construction, rather than his "strained" interpretations of the text, that is really doing the work in reaching his conclusion that slavery was unconstitutional?

These questions summarize the commonly-held view that, however euphemistically they may have been worded, the public meanings of these passages of the Constitution sanctioned slavery. The Framers' intention to protect slavery was no secret that was unknown to the general public. A reasonable person would have read some or all of these provisions as referring to slavery, notwithstanding their normal innocent meanings. On the other hand, are there no interpretive consequences of the drafters' refusal to use "the name of the thing, alleged to be sanctioned"¹¹⁰ when the term "slavery" was widely known and available? Did their deliberate selection of neutral language, whatever their motive for this choice, have no interpretive consequences?

The analysis of interpretation vs. construction and ambiguity vs. vagueness presented in Part II, however, provides an important argument on behalf of Spooner's position: Because the Framers chose to refer euphemistically to slavery rather than use the word "slavery" itself, they injected an *irreducible* ambiguity into the text of the Constitution. It is not only possible but likely that, while most reasonable people may have assumed that these passages referred to slavery, significant numbers of other reasonable persons did not. As Spooner observed:

If the instrument had contained any tangible sanction of slavery, the people, in some parts of the country certainly, would sooner have it burned by the hand of the common hangman, than they would have adopted it, and thus sold themselves as pimps to slavery, covered as they were with the scars they had received in fighting the battles of freedom.¹¹¹

¹¹⁰SPOONER, *supra* note 88, at 59.

¹¹¹*Id.* at 119.

As much as they wished to mollify the pro-slavery states, so too did the Framers wish to avoid riling those who vehemently opposed slavery. “[T]he members of the convention knew that such was the feeling of a large portion of the people; and for that reason, if for no other, they dared insert in the instrument no legal sanction of slavery.”¹¹² Hence their deliberate use of ambiguity.

Or perhaps more accurately, a reasonable person could have taken the choice to employ ambiguous phraseology in the text as an implicit refusal to sanction slavery in the Constitution while textually accommodating its continued existence for the time being. At minimum, those who opposed slavery could view these irreducibly ambiguous passages as consistent with an anti-slavery construction when political circumstances would allow. At a maximum, given the irreducible ambiguity of these passages, each person was entitled to rely on the innocent reading of the text, even if everyone else “knew” what was really intended.

“If there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution,” wrote Spooner, “it would be unjust and unlawful towards him to change the meaning of the instrument so as to sanction slavery, even though every other man in the nation should testify that, in agreeing to the constitution, he intended that slavery should be sanctioned.”¹¹³ Is this hyperbole? Not if an irreducible ambiguity resulted from the use of euphemisms when the very reason for avoiding the more accurate language was the moral odiousness of what those who wrote the text refused to call by its proper name.

Ultimately, it does not matter why the Framers injected an irreducible ambiguity into the Constitution; it is enough that they did so. Their deliberate use of ambiguous language gives rise to the same need for constitutional construction based on one’s theory of constitutional legitimacy that typically arises when the meaning of a constitutional term is vague. And this is exactly what Spooner’s clear statement rule of construction based on his commitment to natural rights provides: a way to choose among the several senses of the words of the text, the context of which renders them irreducibly ambiguous.

I admit to vacillating over the years about whether Spooner’s argument

¹¹²*Id.*; see also *id.* at 201 (“We have abundant evidence that this fraud was intended by some of the framers of the constitution. They knew that an instrument legalizing slavery could not gain the assent of the north. They therefore agreed upon an instrument honest in its terms, with the intent of misinterpreting it after it was adopted. The fraud of the framers, however, does not of itself, implicate the people.”).

¹¹³*Id.* at 123.

was successful or not.¹¹⁴ Despite its visceral appeal, I leaned against the ultimate correctness of Spooner's conclusion about the public meaning of the apparently pro-slavery provisions of the text—until developing the analysis of the proper role of background constitutional assumptions for this article. For what it is worth, I now lean towards the view that Spooner was insightfully cognizant of the problem of irresolvable ambiguity engendered by the deliberate use of euphemisms in place of the precise term “slavery” that was readily available. If such was the case, constitutional construction is warranted, and the sort of construction proposed by Spooner enhances the legitimacy of the Constitution.

That Spooner's argument seems “strained” to us or worse is a product of what we all think we know to have been the intentions of the Framers of the Constitution, as well as the background assumptions of the vast bulk of the American public, concerning the continuation of slavery. But our knowledge needs to be balanced against what we also know to be true: the Framers had multiple compelling motivations of both principle and political expediency for omitting any express reference to “slavery.” In short, our powerful intuition about what the Framers really *meant* is potentially negated by the deliberate ambiguity of what they really *said*.

IV. THREE EXAMPLES OF CONSTITUTIONAL ASSUMPTIONS

In Part III, I contended that a consent theory of constitutional legitimacy seems to require the identification and enforcement of constitutional assumptions because such assumptions condition the parties' original consent to the Constitution or amendment. This greatly compounds the conceptual and practical problems with a consent theory: identifying whose consent and assumptions matter, ascertaining just what those assumptions might be, and justifying binding those alive today by the conditioned consent of past groups. By contrast, a justice-based conception of legitimacy, while not without its own problems, offers substantial conceptual and practical advantages. Conceptually, by honestly acknowledging that the laws emanating from the constitutional structure are imposed on nonconsenting persons, the real issue that must be confronted is what, if anything, justifies such coercion. Framing the question this way identifies what is really at issue when considering the legitimacy of the Constitution today, or at any time in the past: the justice of imposing governance on the people who have

¹¹⁴ See Barnett, *supra* note 119, at 1013 (asking “[d]oes Spooner's endeavor succeed or is it merely an interesting failure?” without providing an answer).

not consented.

Let me now apply the framework developed here to three issues. The first concerns the protection of unenumerated rights. Such rights were certainly assumed to exist at the time the Constitution was enacted. While this assumption is operative, it is only because it is implicated by what the Constitution says. In other words, the bare fact that it was a background constitutional assumption is irrelevant to why it is a part of the original public meaning of the Constitution. The second is the assumption that states have what is called a police power. Because the Constitution says nothing about the police powers of states, whether this assumption is pertinent to deciding constitutional cases and controversies is entirely a matter of constitutional construction. As such, the scope of any constructive doctrine of the police power may be limited by what the Constitution does say. The third is the recent claim that the original public meaning of the text includes the methods of constitutional interpretation and construction that those who adopted the text might have assumed courts would employ thereafter. This proposal confuses constitutional meaning with assumptions or expectations about methods of constitutional application that are no part of the original meaning of the constitution.

A. Assumptions About the Natural Rights Retained by the People

In addition to the rights that are enumerated in the Constitution, the Ninth Amendment refers to other rights “retained by the people”¹¹⁵ that are applicable to the federal government, while the Fourteenth Amendment bars states from abridging the “privileges or immunities of citizens.”¹¹⁶ In Part I, I explained how the Ninth Amendment implies (a) the existence of other rights retained by the people in addition to those that are enumerated, and (b) a prohibition on their denial or disparagement.

Elsewhere I have provided evidence that the original meaning of the phrase “rights . . . retained by the people” is a reference to natural rights, which is synonymous with liberty rights; and that the original meaning of the Privileges or Immunities Clause combines the “immunities” of natural rights with the additional “privileges” afforded citizens of the United States, in particular the positive rights included in the first eight amendments.¹¹⁷ While this is not the

¹¹⁵U.S. CONST. amend. IX.

¹¹⁶U.S. CONST. amend. XIV, §1.

¹¹⁷See BARNETT, *supra* note 58, at 53–86; *see also* Barnett, *supra* note 29 (adding additional

place to review this evidence, it establishes that the original public meaning of the Ninth Amendment was not as open-ended as is sometimes assumed. It refers to natural rights. And natural rights, in turn, means “liberty rights” —that is, the right to take or refrain from taking action that does not violate the rights of others. The Privileges or Immunities Clause of the Fourteenth Amendment protects these “immunities” along with additional “privileges” created by the Constitution itself.

In this regard, Justice Holmes was wrong to say that “the Constitution does not enact Mr. Herbert Spencer’s *Social Statics*,”¹¹⁸ by which he was obliquely referring to Spencer’s “law of equal freedom.”¹¹⁹ Holmes’s sarcastic reference to a very popular Nineteenth Century English writer was something of a cheap shot, given that Spencer’s views on this issue were indistinguishable from those of John Locke and the Founders, as well as those who wrote the Fourteenth Amendment.¹²⁰ Moreover, it is clear that Spencer was indeed describing natural rights that are retained by the people.¹²¹ And it is also clear that the recognition

evidence of the original meaning of the Ninth Amendment and critically evaluating rival models of original meaning).

¹¹⁸ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹¹⁹ HERBERT SPENCER, *SOCIAL STATICS* 95 (1954) (originally published in 1850). The entire book provides justifications of this “first principle” as well as an examination of its implications for governance. *See, e.g., id.* at 69:

This, however, is not the right of one but of all. All are endowed with faculties. All are bound to fulfil the Divine will by exercising them. All therefore must be free to do those things in which the exercise of them consists. That is, all must have rights to liberty of action.

And hence there necessarily arises a limitation. For if men have like claims to that freedom which is needful for the exercise of their faculties, then must the freedom of each be bounded by the similar freedom of all. When, in the pursuit of their respective ends, two individuals clash, the movements of the one remain free only in so far as they do not interfere with the like movements of the other. This sphere of existence into which we are thrown not affording room for the unrestrained activity of all, and yet all possessing in virtue of their constitutions similar claims to such unrestrained activity, there is no course but to apportion out the unavoidable restraint equally. Wherefore we arrive at the general proposition, that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man.

¹²⁰ Indeed, *Social Statics* was quoted with approval in Congress before the adoption of the Fourteenth Amendment. In 1866, two Congressmen offered its “law of equal freedom” in support of a statute granting universal male suffrage in the District of Columbia without regard to race. *See* CONG. GLOBE, 39th Cong., 1st Sess. 304 (1866)(statement of Rep. Clarke)(quoting *Social Statics*); and CONG. GLOBE, 39th Cong., 2nd Sess. 76 (1867)(statement of Rep. Brown)(same).

¹²¹ When Spencer wrote that “[t]here exists . . . a dominant sect of so-called philosophical

and protection of these liberty rights is consistent with the prohibition of wrongful behavior violating the rights of others, and the regulation of rightful behavior to prevent rights violations from occurring. Indeed, the Bake Shop Act at issue in *Lochner* contained elaborate health and safety regulations of bakeries that were neither challenged by the defendant nor questioned by the Court.

Had the Ninth Amendment and Privileges or Immunities Clause of the Fourteenth Amendment not been included in the text of the Constitution, the Constitution would be silent about the nature of any rights that may have been retained by the people, and the existence and scope of such rights would be entirely a matter of constitutional construction. As it is, however, any construction of the Constitution must be consistent with what the original meaning of the Constitution implies about unenumerated rights: the Constitution may not be construed to deny and disparage these other rights, even to protect rights that others today think are more important. In short, the existence of background natural rights retained by the people is a constitutional assumption that is hard-wired into the meaning of the Constitution itself.¹²² Whether the judicial recognition and protection of these rights is sufficient to render the Constitution legitimate is a separate matter that is beyond the scope of this Article.¹²³

B. Assumptions About the Police Power of States

While the Constitution enumerates the powers of the federal government, it says little about those of the states. Article I, § 10 places restrictions on the power of states to lay imposts or duties on imports and exports,¹²⁴ perhaps

politicians who treat with contempt this belief that men have any claims antecedent to those endorsed by governments” (*id.* at 86) he could well have been referring to judges like Holmes. . .

¹²²Similarly, the assumption that a “well regulated militia [is] . . . necessary to the security of a free State” is also hard wired into the text itself. *See* U.S. Const. Amend. II.

¹²³Suppose a “welfare right” to some minimum level of material support is also requisite to constitutional legitimacy. If so, a regime based on a written constitution that did not recognize such a right expressly or by implication could still be legitimate if that constitution allows the government to exercise a discretionary power to provide such support and the government then does so. So it could be that, when the discretionary powers of the federal and state governments are constitutionally exercised to provide in practice what the text does not mandate, then the resultant regime could be legitimate despite a failure of the Constitution to require what is being provided as a matter of discretion.

¹²⁴*See* U.S. CONST. Art. I, §10 (“No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's

implying the existence of the power to lay duties on purely internal activities. To the express limitations provided by Article I, § 10 can be added the implicit limitation on the powers of states entailed by the Congress's power to regulate commerce among the several states. The Tenth Amendment is entirely noncommittal about whether "[t]he powers not delegated to the United States by the Constitution" are "reserved to the states" or whether they are reserved "to the people," although it certainly implies the continued existence of states in much the same way as the Ninth Amendment implies the existence of natural rights.¹²⁵

That the existence of state police powers was a background assumption of the original Constitution is clear. The concept of a police power can be traced to the same Lockean natural rights theory on which the Ninth Amendment and Privileges or Immunities Clause were based. In the prepolitical "state of nature" people are in possession of all their natural rights, including the right to execute or enforce their rights against other persons. "[I]n the state of Nature," wrote Locke, "every one has the Executive Power of the Law of Nature."¹²⁶ However, in such a state, it can be objected that "it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others."¹²⁷ For this reason, "nothing but Confusion and Disorder will follow," and government is needed "to restrain the partiality and violence of Men."¹²⁸

For Locke, civil government is justified to rectify the three inconveniences in the state of nature that correspond to the legislative, judicial, and executive branches of government: First, "the want of an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them"¹²⁹; second, the want of "a *known and indifferent Judge*, with Authority to determine all differences according to the established Law"¹³⁰; and, third, the want of the "Power to back and support the Sentence when right, and to *give* it due

inspection laws").

¹²⁵U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

¹²⁶JOHN LOCKE, TWO TREATISES OF GOVERNMENT 316 (Peter Laslett ed., 1963).

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.* at 396.

¹³⁰*Id.* (emphasis in original).

Execution.”¹³¹ Therefore, “whoever has the legislative or Supream Power of any Common-wealth, is bound to govern by establish’d Standing Laws, promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the Execution of such Laws.* . . .”¹³²

According to Lockean political theory, then, the people form government to secure their rights of liberty and property more effectively than they can secure them on their own. In this way, Lockean theory provides both a powerful rationale for and an important limit upon the powers of government that is reflected in the police power doctrine. The police power is the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.

While a police power of states is nowhere expressed in the Constitution, its existence may well implicated by what the Constitution says. In particular, the Fourteenth Amendment’s guarantee that no state shall “deny to any person within its jurisdiction the equal protection of the laws”¹³³ may presuppose a state power of “protection.” Whether or not its existence is implied, the *scope* of any state police power is entirely a constitutional construction. The exact contours of whatever power was assumed power at the founding are hazy at least in part because there was no need to address the question when the Constitution was enacted. With a few exceptions, the scope of state powers was a matter of state constitutional law.

With the enactment of the Fourteenth Amendment’s new restrictions on states, there arose an imperative to define the scope of their police powers more clearly. The same year that the Amendment was enacted, Justice Thomas Cooley of the Michigan Supreme Court and a professor of law at the University of Michigan published, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union.*¹³⁴ In this work, he offered a construction of the police power of states to address both the “conflict between national and State authority” and the question of “whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals.”¹³⁵

Cooley’s construction of the police power is premised on the need to

¹³¹*Id.* (emphases in original).

¹³²*Id.* at 399 (emphases in original).

¹³³U.S. CONST. amend. XIV, §1.

¹³⁴THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATION WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (1868).

¹³⁵*Id.* at 572.

protect the equal rights of the citizenry. “The police of a State, in a comprehensive sense, embraces its system of internal regulation,”¹³⁶ According to Cooley, the proper end of this internal regulation was two-fold. First, it sought “to preserve the public order and to prevent offences against the State.”¹³⁷ Second, it sought “to establish for the intercourse of citizen with citizen . . . rules of good manners and good neighborhood.”¹³⁸ The latter end was to be achieved in a manner sounding much like Spencer’s law of equal freedom. These rules “are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.”¹³⁹

After Cooley, the leading nineteenth-century theorist of the police power was Professor Christopher Tiedeman. In his 1886 *Treatise on the Limitations of Police Power in the United States*, Tiedeman began his explanation of the police power and its limits with the concept of “private” rights: “The private rights of the individual, apart from a few statutory rights, which when compared with the whole body of private rights are insignificant in number, do not rest upon the mandate of municipal law as a source.”¹⁴⁰ According to Tiedeman, these private rights that are recognized in civil society are none other than natural rights. “They belong to man in a state of nature; they are natural rights, rights recognized and existing in the law of reason”¹⁴¹

Like Locke, Tiedeman then defined the legitimate purpose of government as the protection of these rights. “The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights.”¹⁴² Government protects and develops these rights by preventing people from violating the rights of others: “The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. . . . The

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.*

¹⁴⁰CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT* 1 (St. Louis, F.H. Thomas Law Book Co. 1886).

¹⁴¹*Id.*

¹⁴²*Id.*

power of the government to impose this restraint is called POLICE POWER.”¹⁴³

Elsewhere I have discussed the proper scope of the police power at greater length than is necessary here.¹⁴⁴ The question I now wish to address is what theoretical role, if any, should be played by constitutional assumptions about the scope of the police power. There are two assumptions with which I am concerned. The first is the assumption that the scope of the police power includes the protection of individual rights. The second is that the police power also includes the regulation of private morality.

That the scope of the police power includes the protection of individual rights seems consistent with, if not implicated by, the text of the Constitution. First and foremost, it is consistent with the original meaning of the Ninth Amendment’s implication that there are natural individual liberty rights that shall not be denied or disparaged. Second, it is consistent with the Privileges or Immunities Clause of the Fourteenth Amendment that extends federal jurisdiction to protect these unenumerated natural rights or “immunities” from state laws. In addition, the Fourteenth Amendment’s prohibition against a state “deny[ing] to any person within its jurisdiction the equal protection of the laws”¹⁴⁵ implicates the existence of an underlying duty of government to provide the “protection” of the laws. In other words, either the protection of individual rights is implied by the text of the Constitution, or any construction that allowed a state to deny or disparage the retained rights or immunities of citizens, and that failed to provide the protection of the law to every person within its jurisdiction, would contradict the text.

The historical claim that the police power of states was assumed also to include a power to regulate morality is both far more problematic and much more complex. In his lengthy chapter on the police power, Cooley devoted a single paragraph to the “preservation of the public morals” that “is peculiarly subject to legislative supervision.”¹⁴⁶ In particular, the legislature “may forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized; or prohibit or regulate the places of amusement that may be resorted to for the purposes of gaming; or forbid altogether the keeping and exhibition of stallions in public places.”¹⁴⁷ To this he added, “the power to provide for the

¹⁴³*Id.* at 1–2 (capitals in original).

¹⁴⁴See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004).

¹⁴⁵U.S. CONST. amend. XIV, §1.

¹⁴⁶COOLEY, *supra* note 134, at 596.

¹⁴⁷*Id.*

compulsory observance of the first day of the week is also to be referred to the same authority.”¹⁴⁸

In contrast, Tiedeman devoted a full chapter of his treatise to the “Police Control of Morality and Religion.”¹⁴⁹ There he distinguished between a crime, which is “a trespass upon some right, public or private,”¹⁵⁰ and a vice, which “consists in an inordinate, and hence immoral, gratification of one’s passions and desires. The primary damage is to one’s self.”¹⁵¹ Although Tiedeman observed that persons who are addicted to vices “damage the material interest of society,” the “evils to society, flowing from vices, are indirect and remote and do not involve trespasses upon rights.”¹⁵² Because the police power is “confined to the imposition of burdens and restrictions upon the rights of individuals, in order to prevent injury to others,” the “moral laws can exact obedience only *in foro conscientiae*.”¹⁵³ According to Tiedeman, the “municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the actions of another must exist or be threatened, in order to justify the interference of law.”¹⁵⁴

In addition, the regulation of private morals is analytically distinct from that of public morality—that is, the regulation of conduct that takes place in the public sphere. Here the government is acting as the trustee of public property that the general public has a right to use and enjoy without unduly interfering with the like use and enjoyment by others. If so-called “lewd and lascivious” conduct were permitted in this sphere, adults with typical sensibilities or with children, for example, might be unable to use and enjoy the streets and parks. The regulation of “public morality” in public spaces is akin to the time, place, and manner regulations of speech and assembly to prevent the exercise of the rights from unduly interfering with the rights of other citizens.

In noting these potential complexities, it is not my purpose to evaluate the merits of any of these claims or distinctions. Much as I doubt that a universal assumption existed that states had the power to regulate purely private morality, I want to assume, for purposes of argument, that such a belief did indeed exist and confine my attention to a single issue: if the power to regulate private morality

¹⁴⁸*Id.*

¹⁴⁹See TIEDEMAN, *supra* note **Error! Bookmark not defined.**, at 148–93.

¹⁵⁰*Id.* at 149.

¹⁵¹*Id.*

¹⁵²*Id.* at 149–50.

¹⁵³*Id.* at 150.

¹⁵⁴*Id.*

was assumed to be within the police power of states, does a commitment to original meaning of the Constitution commit one to this construction of the scope of state powers? The above analysis suggests why the answer to this question is no.

To sum up: while the existence of a duty by states to protect individual rights may well be implicated from what the text of the Constitution says, the exact scope of this power of protection is not textually fixed and is open to construction. There is nothing in the text of the Constitution that intimates a power of the states to regulate private morality. Whatever one concludes about the legitimacy of punishing persons for engaging in conduct that cannot be characterized as violating or threatening the rights of others, it cannot be claimed that such a power is part of the original meaning of what the Constitution either says or implies. Therefore, the bare fact that some or all persons alive when the Fourteenth Amendment was enacted would have assumed that morals legislation was consistent with the Privileges or Immunities Clause does not make it so. To reach this conclusion would require the sort of normative reasoning in which Cooley, and especially Tiedeman, engaged. It is not a matter to be settled historically as a matter of original meaning.

C. Assumptions About Interpretive Methods

In the absence of actual consent, I have argued that a constitution could still be legitimate if it provides procedures to assure that the laws it imposes on a non-consenting public are both proper insofar as they do not violate the rights of the persons on whom they are imposed and necessary to protect the rights of others. In the abstract, a written constitution can be considered another structural feature of governance, like separation of powers, judicial review, and federalism, whose value lies in its ability to lock-in and preserve the other rights-protecting features of the governing structure, as well as to define and limit the power that may properly be exercised. In this manner, writtenness contributes to constitutional legitimacy. A particular written constitution should be followed if the substance of what it says is “good enough” to provide, however imperfectly, the procedural assurances that the laws will respect the rights of the persons on whom they are imposed.

But the contribution to constitutional legitimacy provided by the writtenness of a constitution is seriously compromised where the actors it is supposed to bind—namely officials of the federal government, as well as of the states—are able on their own to unilaterally amend its meaning to expand their

powers. Equally important, however, because it is not founded upon actual consent, the meaning of a written constitution is limited to what it says or implies-in-fact. Because, unlike contracts, the Constitution is not based on consent, it is not qualified or bounded by the unexpressed assumptions held by those who framed or ratified it.

John O. McGinnis and Michael B. Rappaport have provided a normative argument for original meaning originalism. They contend that constitutions adopted by supermajoritarian mechanisms tend to yield superior consequences than those that are adopted by other means, and that these consequences are only obtained if the text of such a constitution cannot be changed by anything less than supermajoritarian amendment procedures.¹⁵⁵ An evaluation of their interesting normative defense of supermajoritarian rules and originalism is beyond the scope of this paper.

In addition to defending original meaning originalism, however, McGinnis and Rappaport go on to advocate what they call “original methods originalism.”¹⁵⁶ They contend that a “desirable constitution enacted under supermajority rules should be interpreted according to the methods that the constitution’s enactors expected to be applied.”¹⁵⁷ Why? Because the benefits yielded from a constitution enacted by supermajoritarian procedures “derives from the consensus support it gained among the enactors.”¹⁵⁸ And this consensus is based on how those supporting the text expected it would be applied. “In considering whether to support the constitution, the enactors would have voted for or against the constitution based on how they thought it should be interpreted.”¹⁵⁹ From this they contend that “the meaning of the constitution that a supermajority of enactors approved as beneficial was based on the methods that the enactors expected to apply.”¹⁶⁰ They conclude that because “[t]he beneficence of that supermajoritarian constitution . . . requires using the original interpretive methods of the enactors,” therefore “the appropriate mode of constitutional interpretation is ‘original methods originalism.’”¹⁶¹

The analysis of constitutional assumptions presented above shows that this

¹⁵⁵ See John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*.

¹⁵⁶ *Id.* at ____.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

argument is flawed. When a supermajority “approves” a constitution, they are not adopting as law their own private intentions or assumptions, or those of others. Rather, they are adopting a text that has an objective public meaning. When McGinnis and Rappaport refer to this as “semantic meaning from a philosophic standpoint,”¹⁶² they are introducing a needless confusion into their analysis. If what they call the “philosophic standpoint” is a correct account of the semantic meaning of a public text like a constitution, then this is the actual or empirical meaning of the text. Nothing is added to the analysis by labeling the public meaning of the text, the “philosophic meaning.”¹⁶³

By introducing this label, McGinnis and Rappaport are trying to leave open the door to some *other* method of interpretation: the method by which those who supported a constitution expected or assumed it would be interpreted or applied. Now in one sense, the original methods originalism can be reduced to original public meaning originalism. By approving a written constitution, those who support it can be described as having assumed it will later be interpreted according to its public meaning. It is after all the public meaning they have chosen to approve. If, however, someone who approved the text of the constitution assumed that some other method would be used to identify its “meaning”—for example, original intent or original expected application—then they are assuming that it will be “interpreted” in such a manner as to *violate* its public meaning.

In short, even if a majority of those who approved a constitution had other methods of interpretation in mind, their assumed or expected methods do not thereby become a part of the meaning of the text. So McGinnis and Rappaport’s claim that a constitution “should be interpreted according to the methods that the constitution’s enactors expected to be applied”¹⁶⁴ is needlessly confusing. It is enough to say that those who enact a constitution expect it will be followed or interpreted according to its meaning.

CONCLUSION

For several years, a new and improved originalist approach to constitutional interpretation has been on the rise. This “new originalism”¹⁶⁵

¹⁶²*Id.*

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵See Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004).

shares with the originalism of the 1980s—and all other forms of originalism—the core propositions that (a) the textual meaning of a written constitution is fixed at the time its language is enacted, and (b) this fixed meaning should remain the same until it is properly changed.¹⁶⁶ The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials. There is a “there” there to be discovered by interpreters. In this Article, I have examined when background assumptions are a part of this semantic meaning and when they are not.

Originalists still differ among themselves on the normative basis for originalism. Like most other constitutional theorists, originalists fall into one of two normative camps: those who view constitutional legitimacy as flowing from the consent of the governed, and those who view constitutional legitimacy as founded on considerations of justice. In this Article, I examined how the normative disagreement among originalists leads to a divergence in how they construe a written constitution. Those who base the legitimacy of a written constitution on the consent of the governed are likely to construe it in light of prevailing background assumptions at the time of its enactment.

But this Article is not just for or about originalists. Because many nonoriginalist constitutional scholars share the same misconceived assumption about the relevance of background assumptions to original meaning, and because they view some of these assumptions as seriously objectionable, they reject originalism as morally odious. When the relationship between original meaning and background assumptions is clarified and refined, originalism should become far more normatively appealing to those who now consider themselves nonoriginalists. Properly understood, originalism is a commitment to what a written constitution says and implies—nothing more and nothing less.

¹⁶⁶This distinctive core distinguishes originalist from nonoriginalist theories of constitutional interpretation and undermines the claim that originalism “is a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label.” Thomas Colby & Peter J. Smith, *Living Originalism*, GWU Legal Studies Research Paper No. 393, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282&rec=1&srcabs=1079364