THE MISCONCEIVED ASSUMPTION ABOUT CONSTITUTIONAL ASSUMPTIONS

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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 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 the background assumptions shape the meaning of written constitutions.

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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, constitutions from the time they are enacted into an indefinite future purport to bind countless numbers of persons who do not consent. Or more precisely, the laws enacted pursuant to constitutions purport to bind members of the public who have not themselves consented to be bound. Therefore, if such laws 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.

A close comparison of contracts and constitutions yields three important contributions to constitutional theory. First, appreciating the difference between contracts and constitutions will avoid back-sliding from original public meaning to the misconceived quest for framers intent or ratifiers understanding that has rightly been rejected by most originalists. Second, the impractical quest for constitutional assumptions, resulting from the mistaken conflation of contracts and constitutions, provides another reason to reject a consent theory of constitutional legitimacy in favor of a justice-based theory of legitimacy. Finally, appreciating why background constitutional assumptions do not shape the original public meaning of the text should make the "new originalism"[1] based on original public meaning—rather than on framers' intent or ratifiers' understanding—far more appealing to nonoriginalists.

Constitutional scholars have yet to systematically examine the lessons for constitutional theory and practice 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 fill this gap. In Part I, I begin by explaining how express and implied-in-fact terms provide the meaning of both written contracts and written constitutions. In Part II, I distinguish between the express and implied meaning of the text from the background assumptions that can condition the enforceability of a contract. In Part III, I explain why, because constitutions are not based on consent as are contracts, background assumptions do not condition the enforceability of written constitutions or affect their meaning. Finally, in Part IV, I apply this analysis to three different 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.

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[1] *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599 (2004).

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.[2] With a constitution, this is impossible. Constitutions must necessarily lack the unanimous consent of all persons upon whom they are imposed.[3] 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 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 motivation that sometimes exists 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 are inevitably incomplete or "underdeterminate." But the underdeterminacy of a

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

[3]*See* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003).

writing should not be confused with radical indeterminacy.[4] However imperfectly, language does communicate 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 paper will eventually appear would not exist and we 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. 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 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:

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[4]The 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).

[5]Elsewhere 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 3, at 126-27.

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

> [T]his classification is, at its best, of no practical value and may even mislead. All true contracts are necessarily express contracts, in that they must arise out of an express intention. . . . To speak of [an intention] as "implied-in-fact" when it has been expressed in ways other than through the use of language, is simply to confuse 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.[7]

The source of the alleged confusion to which Murray refers is that the 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 from those terms that are not expressed in so many words, but are implied. 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 gets 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. Thus an implied-in-fact *contract* arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. 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. The legal effect of the two types of contracts are identical; the distinction is based on the way in which mutual assent is manifested.[8]

Notice how this definition shifts from the express or implied nature of a "contract" to the express or implied nature of "the terms of" a contract.

While Murray is clearly right to affirm that all contracts are "express" insofar

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[7] *Id.*

[8] 1 Williston on Contracts, 4th ed §1:5 (Richard A. Lord, ed. 2007) (emphases added).

as they result from a discernable manifestation of "an intention to assume the alleged undertaking," each and every term of an "express contract" may not be expressed in so many words. Even if all valid contracts must somehow be manifested or expressed, there still needs to be a label to describe those terms of a contract that are not expressed in so many words, and that term is "implied-in-fact."

In his book, *Studies in the Ways of Words*,[9] 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."[10] *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 this example, is distinct from what *B* said, which is simply that *C* had not been to prison yet."[11] 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*)."[12] Grice uses the term "said" to refer to the "conventional meaning of the words (the sentence)" uttered by a speaker. 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

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[9] PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989).

[10] *Id.* at 24.

[11] *Id.*

[12] *Id.*

> supposition is tenable only if he thinks Mr. *X* is no good at philosophy. This, then, is what he is implicating.[13]

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 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 either undermine or transcend common sense. His aim is to provide "a defense of the rights of the ordinary man or common sense vis-á-vis the professional philosopher. . . ."[14] By this he means that "the ordinary man has a right to more respect from the professional philosopher than a word of thanks for having gotten him started."[15] All philosophers of language "agree that specialist theory has to start from some basis in ordinary thought of an informal character."[16] 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

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[13]*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"—whose meaning 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.

[14]*Id.* at 340.

[15]*Id.*

[16]*Id.* at 345.

going."[17]

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."[18] 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 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.

Next, let us consider the Ninth Amendment that says "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."[19] 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

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[17] *Id.*

[18] U.S. CONST. AMEND. V.

[19] U.S. CONST. AMEND. IX.

natural rights.[20] 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 when serving on 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."[21] Although Sherman's 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.

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

[21] *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 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.

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 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."[22] The same argument was made by Charles Pinckney in the South Carolina House of Representatives:

> [W]e had no bill of rights inserted in our Constitution: for, 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.[23]

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[22] 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).

[23] 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 316 (Jonathan Elliot, ed. 1859) (Statement of Charles Pinckney, Friday, Jan. 18, 1788).

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?"[24] 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. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and 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. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.[25]

Hamilton's concern is based directly on the phenomenon of constitutional implicature. Although an express protection of freedom of the press would not expressly grant Congress any additional authority, such authority could, rightly or wrongly, potentially be implied.

With my next example, whether or not a constitutional implication exists 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."[26] 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

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[24]THE FEDERALIST, NO. 84, 513-514 (Hamilton).

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

[26]U.S. CONST. AMEND. II.

proposition can take place only in the context of the well-regulated militia 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. If so, it is part of the Amendment's original meaning. If not, these additional propositions could still be unexpressed assumptions that were held by some or all of the people at the time of the Constitution's adoption. If such unexpressed assumptions were held when the Second Amendment was adopted, this raises the issue of what, if any, relevance such assumptions may have 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.[27]

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 that, 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 facts, frustration of purposes, 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

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[27]LON L. FULLER, BASIC CONTRACT LAW 666-67 (1947).

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.

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.*" As Andrew Kull has explained:

> Common sense sets limits to a promise, even where contractual language does not. 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. 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*. . . . The 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.[28]

This limitation on one's promise is claimed notwithstanding that the agreement contained no expressed or implied-in-fact condition on the obligation to perform should this particular event occur. Fuller offers the following example:

> One who contracts to deliver goods a year from now at a price now fixed 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 price variations would occur within the "normal" range, and that this expectation was "the foundation of the agreement."[29]

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."[30] In other

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

[29]FULLER, *supra* note 27.

[30]E. ALLAN FARNSWORTH, CONTRACTS 629 (4th ed. 2004).

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.

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 meaning of what was expressed, 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 nonenforcement 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 the existence of a contractual obligation, it does not change the meaning of what was expressed in the contract.

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. However, if a constitution is not based on consent, 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. With constitutions, however, 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 more time that passes the more vulnerable become even very widespread assumptions.

In his book, *Dred Scott and the Problem of Constitutional Evil*,[31] Mark Graber discusses an assumption made by numerous slave-holding founders that the population would expand in the temperate South at a greater rate than in the colder North.[32] As a result, they assumed that slavery would be protected by the various electoral mechanisms incorporated into the Constitution without any need for an express textual protection of slavery. 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.

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 thrown into turmoil when the smaller states obtained equal representation in the Senate.[33] 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

[31] MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

[32] *See id.* at 102 ("constitutional framers from all regions of the country assumed that population increases would be greatest in the South and Southwest.").

[33] *See* 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).

the national government no longer functioned "as originally intended"?[34] At the level of meaning, the answer seems clearly to be no. 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. 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 somehow to take this change in basic assumptions into account. How one evaluates either of these claims will depend mainly on one's theory of constitutional legitimacy.

III. THE INESCAPABILITY OF CONSTITUTIONAL LEGITIMACY

Because they do not rest on constitutional meaning, the status of constitutional assumptions depends not on constitutional interpretation, but instead on one's approach to constitutional construction, which in turn rests on one's theory of constitutional legitimacy. By constitutional legitimacy I mean why a constitution is or could be binding. The status of constitutional assumptions greatly magnifies the deficiencies of consent theories of constitutional legitimacy that purport to rest on the consent of the governed. Conversely, a justice-based theory of constitutional legitimacy helps distinguish those assumptions that matter from those that do not.

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

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 that the Constitution "fails" when one of its basic assumptions does not turn out as expected, or that it should be construed so as to preserve the intentions of those who consented to the Constitution notwithstanding the change in circumstances. 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.

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[34] GRABER, *supra* note 31, 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.

More likely, those who hold a consent theory of constitutional legitimacy would approach the Constitution as some favor handling so-called "relational" or long-term contracts. These relational theorists favor construing the contract so as to preserve the ongoing relations of the parties.[35] But while relational theory has shed much light on contract law, the judicial preservation of long term contractual relations after marked changes in circumstances is highly controversial among contracts scholars,[36] and largely shunned by the courts.[37] Whatever its difficulties may be in contract, these difficulties are exponentially magnified with constitutions.

With a contract, one can at least identify the relevant consenting parties, and there will likely be very few. Because of this, it seems 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 (though in practice this has proven to be remarkably difficult). Who are the relevant "parties" to the Constitution and how are their assumptions to be identified? What sort of constructions counts 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?

I begin my book, *Restoring the Lost Constitution*, with a strong critique of consent theories of legitimacy.[38] There, I argue that, for consent to legitimate

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[35]*See, e.g.,* Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW, U. L. REV. 737 (2000); *cf.* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992).

[36]*See, 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 (1966) (discussing relation-preserving vs. end-game norms).

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

[38]*See* BARNETT, *supra* note 33, at 11-31.

governance, it must be actual or real, not hypothetical or metaphorical.[39] That is simply how consent works as a moral principle. One is justified in treating persons 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.

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 (an assumption that is almost certainly false), 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.[40]

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

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. 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

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[39] *Id.* at 32-52.

[40] *See id.* at 11-31.

majoritarian consent to governance. But, just as the consent of the majority does not bind a dissenting minority (who did not actually consent to majority rule), nor do the assumptions held by a majority 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, 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 however widespread. Unstated assumptions are simply no part of the consent that legitimates the Constitution. 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 pubic 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 and, when they do, 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. Furthermore, consent theorists who abandon any reliance on constitutional assumptions 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. While some consent theorists may have no problems articulating a nonconsensual approach to constitutional construction, this

may prove difficult for those who wish to limit the "discretion" of judges. (I am thinking here of those who would use the "intentions of the framers" to fill gaps in the original public meaning of the text.) 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? The answer I have given elsewhere is 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 other. 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. Or so goes the argument.[41]

This justice-based theory of legitimacy also addresses the vexatious problem of constitutional assumptions. To see how, consider the way this theory was advanced by its earliest proponent, radical abolitionist and legal theorist Lysander Spooner. Spooner developed a justice-based theory of constitutional legitimacy as part if his influential critique of the constitutionality of slavery, and refined it during his debate with abolitionist Wendell Phillips.[42] Whereas Spooner contended that the Constitution did not sanction slavery, Phillips contended that it did. The challenge

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[41] *See* BARNETT, *supra* note 33, at 32-52.

[42] *See* LEWIS PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT (1973) (describing how Phillips was "[g]oaded by charges that he was afraid to tackle the most famous antislavery analysis of the Constitution—Lysander Spooner's *The Unconstitutionality of Slavery*.").

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.[43] 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."[44]

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."[45] 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?"[46]

With respect to the consent of the people to the Constitution, Spooner argued, 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:

> We 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. The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an

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

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

[45]*Id.* at 117.

[46]*Id.*

> instrument that had no meaning *of its own*, would only be agreeing to nothing.[47]

Suppose a written contract means only what its drafter intended, but did not objectively manifest to 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. 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.

Spooner also anticipated the indeterminacy problem with discerning the original intentions of the framers or ratifiers, if what is meant is their actual—as distinct from their presumed—intentions:

> Men's *presumed* intentions are all uniform, all certainly right, and all valid, because they correspond precisely with what they said by the instrument itself; whereas their actual intentions were almost infinitely various, conflicting with each other, conflicting with what they said by the instrument, and therefore of no legal consequence or validity whatever.[48]

Spooner did not posit some free-floating "plain-meaning" wholly independent of the intentions of the people who ratified it. Instead, he merely presupposed the Gricean view that language has an objective or "conventional" meaning within a particular community of discourse that can be discerned independently of individual opinions and usages.

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 meaning which its words, interpreted by sound legal rules of interpretation, express. That and that alone is the meaning of the constitution. And whether 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

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[47] *Id*. at 222; *see also id.* at 220 ("if 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.").

[48] *Id*.

> therefore one with which we have now nothing to do.[49]

But Spooner's theory does not end here. With respect to consent itself, he made a very modern move. Although he accepted the proposition that the "government can have no powers except as individuals may *rightfully* delegate to it,"[50] he shifts the theory from actual consent to what philosophers call "hypothetical" consent:

> Our constitutions purport to be established by "the people," and, *in theory*, "all the people" *consent* to such government as the constitutions authorize. But 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.[51]

From the lack of actual consent, Spooner posits a presumption based on what today might be called rational choice.

> All governments . . . that profess to be founded on the consent of the governed, and yet have authority to violate natural laws, are necessarily frauds. It is not a supposable case, that all or even a very large part of the governed, can have agreed to them. Justice is evidently the only principle that *everybody* can be presumed to

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[49]*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.

[50]*Id*. at 14.

[51]*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.").

> agree to, in the formation of government.[52]

In other words, because the consent on which the Constitution purports to be based is only "theoretical" or "presumed," we cannot presume 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 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 consistent with principles of justice, principles to which everybody could presumably agree.

Building on these steps, Spooner formulated a principle of construction he 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*:[53] "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."[54] 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.[55]

In short, "all language must be construed '*strictly*' in favor of natural right."[56] Conversely, this rule of construction is not symmetrical.

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[52]*Id*. at 143.

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

[54]SPOONER, *supra* note 44, at 18-19 (quoting *United States v. Fisher*) (emphasis added by Spooner).

[55]*Id*. at 58-59.

[56]*Id*. at 17-18.

> 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. The latter may be sanctioned by natural implication and inference; the former 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.

Notice Spooner's use of the concept of "implication." Any protection of rights that are a "natural implication" of the text should be respected. No violations of natural rights should be construed unless such be the "inevitable implication" of what the Constitution says.

In response to Phillips's reliance on evidence of framers intentions, Spooner contended that, even if the overwhelming majority shared the intention to sanction slavery, if a single honest person would have relied on the innocent public meaning of the text—assuming it had an innocent public meaning, which he labored long and hard to show—that innocent meaning, not the nefarious intentions, is what is binding.

> If there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution, 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.[57]

Then again, Spooner denied the existence of any unanimous agreement to sanction slavery:

> 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.[58]

Assuming the framers of the Constitution intended to sanction slavery, Spooner offers this as the reason why they chose not to include any explicit reference to 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

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[57] *Id*. at 123.

[58] *Id*. at 119.

instrument no legal sanction of slavery."[59] Ultimately, it does not matter why the framers refused to expressly sanction slavery or if Spooner's account of their intentions is correct; for Spooner's theory, it is enough that they declined to do so.

We have already observed the close affinity of constitutional assumptions to framers intent. Indeed, framers or ratifiers intent may just be another way of referring to the basic assumptions held by those who framed or ratified the constitution. For this reason, to the extent that Spooner's argument is effective against Phillips's use of framers intent, so too would it be effective against today's invocation of constitutional assumptions.

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 assumption 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 issue 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 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

[59] *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.").

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 any constructive doctrine of the police power is constrained by what the Constitution does say that may limit its scope. 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

According to a justice-based theory of constitutional legitimacy, a constitution is legitimate if it provides procedural assurances that the laws it imposes coercively on nonconsenting persons are both necessary to protect the rights of others and are proper insofar as they do not violate the rights of those upon whom they are imposed. To assess its legitimacy, we must evaluate the original meaning of any particular written constitution to see if it has this rights-respecting quality. If it does, and it is followed, then the resultant regime can be legitimate.

Any assessment of the legitimacy of the U.S. Constitution would require a complex inquiry into whether its structure and features are adequately rights protecting. Among its features is the judicial power to nullify laws that violate the rights of the people. In addition to the rights that are enumerated in the Constitution, the Ninth Amendment refers to other rights "retained by the people"[60] that are applicable to the federal government, while the Fourteenth Amendment bars states from abridging the "privileges or immunities of citizens."[61] Elsewhere I have provided evidence that the original meaning of the former is natural rights, which is synonymous with liberty rights; and that the original meaning of the latter 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

[60]U.S. CONST. AMEND. IX.

[61]U.S. CONST. AMEND. XIV, §1.

amendments.[62]

Had these two provisions not been included in the text of the Constitution, the Constitution would be silent about the nature of the rights and the scope of background rights would be entirely a matter of constitutional construction. As it is, however, any constructions of the Constitution must be consistent with what the original meaning of the Constitution says 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.[63]

Assuming the evidence of original meaning concerning the unenumerated rights protected by the Constitution is persuasive, two objections about the legitimacy of the Constitution are likely to arise. First, does the original meaning of the Constitution protect enough rights to render it legitimate? Second, wholly apart from what rights are protected by the original meaning of Constitution, does the existence of fundamental disagreement about the requirements of justice undermine a justice-based theory of legitimacy?

1. The Failure to Provide Welfare Rights. In the previous section, I claimed that the text of the Constitution protects the background natural liberty rights of the people upon whom its governance is imposed. What if the protection of natural liberty rights, along with the other positive "privileges" established by the original meaning of the Constitution is insufficient to justify nonconsensual governance? In particular, what if governance of those who have not consented is illegitimate without a constitutionally-protected welfare right to some minimal level of material support?

If one posits the existence of a background right to welfare, two potential implications follow. First, if the institutions of governance actually provide the allegedly requisite support, then nonconsensual governance may still be legitimate even if there is no positive law right to such support derivable from the meaning of the Constitution itself. This assumes, of course, that such discretionary welfare policies are not forbidden by its original meaning.

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[62]*See* BARNETT, *supra* note 33, at 53-86. *See also* Barnett, *supra* note 20 (adding additional evidence of the original meaning of the Ninth Amendment and critically evaluating rival models of original meaning).

[63]Similarly, the assumption that a "well regulated militia [is] . . . necessary to the security of a free State" is also hard wired into the text itself.

Alternatively, if such support is either not actually provided or is forbidden by original meaning, then those who think the Constitution is therefore illegitimate in the relevant sense can claim that the Constitution—as enacted—is not binding and neither is the governance it imposes on the nonconsenting public. These critics may then advocate ignoring the text or overriding it with something they believe is actually legitimate.

However, before the original meaning of the text of the Constitution can be ignored or overridden on the grounds that the original meaning of the text is insufficient to justify nonconsensual governance, this claim needs to be made explicitly. The allocation of this burden should not be too controversial. After all, many who reject originalism do so because they believe that the original meaning of the Constitution is deficient in important ways. My claim is merely that whatever deficiency is alleged to be serious enough to deprive the original meaning of the text of the Constitution of its legitimacy must be identified and substantiated.

This is not the place to establish whether or not welfare rights are requisite to legitimate nonconsensual governance, whether the Constitution provides for such rights, or whether such rights are inconsistent with what the Constitution says. Assume for the sake of argument, however, that such rights are requisite and that the federal government has no power to provide for them under the original meaning of the Constitution. This may not, however, preclude state governments from providing such support under their general powers to tax and spend. So it could be that, under the original meaning of the Constitution, states may constitutionally establish welfare rights that the federal government has no power to provide. 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 anyway.

2. Disagreement About What Justice Requires. In view of the previous objection based on the alleged existence of welfare rights, some are likely to wonder whether the existence of disagreement about the requirements of justice undermines a justice-based theory of constitutional legitimacy? Is not the uncertainty inevitably surrounding claims of justice an insurmountable obstacle for such an approach?

There are a number of responses to this question. First, this criticism would apply to any theory of constitutional legitimacy, even consent theories. A consent theory must identify whose consent counts, how consent is to be identified, and the scope of constitutional assumptions upon which consent is conditioned. Any answers given to these questions can be controverted.

Theories of constitutional legitimacy simply provide normative evaluations of an existing regime. Any such normative analysis is subject to disagreement, whether based on justice, consent, or naked power. The existence of disagreement simply does not refute the normative enterprise. If anything, by channeling the normative debate, contested theories of legitimacy potentially reduce the scope of disagreement.

Second, to the extent that consensus matters, there is less disagreement about justice than meets the eye. Everyone agrees, for example, that murder, rape, robbery, and theft are rights violations; and that the rights of the murderer, rapist, robber, and thief are not violated when these actions are coercively prohibited. For that matter, very few would dissent from the justice of protecting rightly acquired private property. The rights of person and property that define liberty, as distinct from license, are generally noncontroversial and universally respected.

What is controversial is adding additional rights — like welfare rights — to these liberty rights, such that the former qualifies or limits the latter. If the existence of disagreement is legitimate grounds for failing to protect coercively an alleged right, then liberty rights about which a consensus largely exists should stand and welfare rights which are quite controversial should fall. But I deny that a lack of consensus is a legitimate objection to a normative rights claim. So I would not make this argument against the enforcement of welfare rights.

None of this is to claim that the contours and exact shape of liberty rights are perfectly determinate and deducible from first principles. Elsewhere I have explained how these fundamental rights are underdeterminate and that a legal system is required to formulate conventional rules and principles to draw the line between rightful and wrongful conduct.[64] In my view an evolutionary common law system is the best discovery process for establishing a rule of law.

Nor am I claiming that liberty must be free of all regulation. To the contrary, given the underdeterminacy of justice, a rule of law is needed to inform persons of when they are acting rightfully, as well as informing others of when a rights violation has taken place.[65] The regulation of liberty is built into the justice-based conception of legitimacy, which allows the regulation of actions that are necessary to protect the rights of others. Such ex ante or preventative regulations may be necessary and therefore justified when the ex post protection of rights by the torts system after a

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[64]*See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 84-131 (1998).

[65]*See id.*

violation has occurred is not alone sufficient. Once again, the need to draw such lines requires a legal system that is capable of developing conventional rules of law in the absence of deduction from first principles.

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, perhaps 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."[66]

Given that it is neither expressed nor implied in the text, what is now called the "police power" of states is entirely a constitutional construction. That the existence of state police powers was a background assumption of the original Constitution is clear. The exact contours of this assumption at the founding is hazy, however, 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 the police powers of states. Not coincidentally, 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*.[67] 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

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[66]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.")

[67]THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATION WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (Little, Brown and Company 1868).

individuals."[68] Cooley's construction of the police power is premised on the need to protect the rights of the citizenry:

> The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which 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.[69]

Cooley's construction of the police power descends from 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."[70] 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."[71] For this reason, "nothing but Confusion and Disorder will follow," and government is needed "to restrain the partiality and violence of Men."[72]

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" (§ 124); second, the want of "a *known and indifferent Judge*, with Authority to determine all differences according to the established Law" (§ 125); and, third, the want of the "Power to back and support the Sentence when right, and to *give* it due *Execution*"

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[68] *Id.* at 572.

[69] *Id.*

[70] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 316 (Peter Laslett ed., 1963).

[71] *Id.*

[72] *Id.*

(§ 126). Therefore, "whoever has the legislative or Supream Power of any Commonwealth, 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. . . .*"[73]

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.

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 natural 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. They belong to man in a state of nature; they are natural rights, rights recognized and existing in the law of reason.[74]

Like Locke and Cooley, 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."[75] 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 power of the government to impose

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[73]*Id* at 399.

[74]CHRISTOPHER 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).

[75]*Id*.

this restraint is called POLICE POWER."[76]

Elsewhere I have discussed the proper scope of the police power at greater length than is necessary here. The question I now wish to address is what theoretical role, if any, constitutional assumptions about the scope of the police power should play. 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.

The Lockean construction of the police power offered by Cooley and Tiedeman seems consistent with, if not compelled 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 that prohibit states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." This last prohibition implicates the existence of an underlying duty of government to provide the "protection" of the laws. In other words, 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 run afoul of these provisions of 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 also 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."[77] 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 fo the purposes of gaming; or forbid altogether the keeping and exhibition of stallions in public places. And the power to provide for the compulsory observance of the first day of the week is also to be referred to the same authority.[78]

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[76] *Id.* at 1-2 (capitals in original).

[77] COOLEY, *supra* note 67, at 596.

[78] *Id.*

In contrast, Tiedeman devoted a full chapter of his treatise to the "Police Control of Morality and Religion."[79] There he distinguished between a crime, which is "a trespass upon some right, public or private,"[80] 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."[81] 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."[82] 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 coscientiae*." 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."[83]

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 "normal" or average sensibilities or persons 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 *arguendo* that such a belief did indeed exist and confine my attention to a single issue: if the power to regulate private morality was assumed to be within

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[79] *See* TIEDEMAN, *supra* note 34, at 148-93.

[80] *Id.* at 149.

[81] *Id.*

[82] *Id.* at 149-50.

[83] *Id.*

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 suggest why the answer to this question is no.

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. Whether it extends to a power to regulate private morality will depend on one's theory of constitutional legitimacy. 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.

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 nonconsenting 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 usefulness locking-in and preserving 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.

The contribution to constitutional legitimacy provided by the writtenness of a constitution is seriously compromised, however, 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 the Constitution is not based on consent as are contracts, it is not qualified or bounded

by the unexpressed assumptions held by those who framed or ratified it.

In a recent paper,[84] 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. 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." 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." Why? Because the benefits yielded from a constitution enacted by supermajoritarian procedures "derives from the consensus support it gained among the enactors." 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. Thus, the meaning of the constitution that a supermajority of enactors approved as beneficial was based on the methods that the enactors expected to apply. The beneficence of that supermajoritarian constitution thereby requires using the original interpretive methods of the enactors.

They conclude, therefore, that "the appropriate mode of constitutional interpretation is 'original methods originalism.'"

The analysis of constitutional assumptions presented above shows that this 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," they are introducing a needless confusion into their analysis. If what

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

they are calling the "philosophic standpoint" is a correct account of the meaning of a public text like a constitution, then this is the actual or true meaning of the text. Nothing is added to the analysis by labeling the public meaning of the text, the "philosophic meaning."

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 would have expected to be interpreted or applied. Now in one sense, the second of these methods of interpretation can be reduced to the first. By approving a written constitution, those who support it inherently assume it will later be interpreted according to its public meaning. It is after all the public meaning they have chosen to approve. On the other hand, if the so-called "philosophic standpoint" is accurately describing the conventional public meaning of the enacted text, and if someone who approved the text of the constitution assumed that some other method would be used to identify its "meaning," then they are assuming that it will be "interpreted" in such a manner as to *violate* its public meaning.

Furthermore, 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" 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"[85] 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 that (b) this fixed meaning should remain the same until it is properly changed.[86] But the new originalism also differs importantly from the old originalism in two significant respects.

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[85]*See* Whittington, *supra* note 1.

[86]This 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, Originalism's Living Constitutionalism, SSRN #1090282.

First, is the now widely-acknowledged shift from a focus on either the original intentions of the framers or the original understanding of the ratifiers to a focus on the more easily ascertainable original public meaning of the language in the text.[87] Second, is a candid recognition that constitutional *interpretation* based on the original public meaning of the text will not always dictate unique results in particular cases and controversies, and must be supplemented by constitutional *construction*.[88] Such constructions, while consistent with original meaning, are not deducible from that meaning and may well be selected for other normative reasons. But constitutional construction, however necessary to address the underdeterminacy of interpretation, should not be used to undermine or contradict the original meaning of the text as properly interpreted.

Originalists still differ among themselves, however, 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. Although all originalists stress the normative significance of interpreting a written constitution which accounts, in part, for their originalism, some originalists consider a written constitution to be legitimate, and therefore binding, because it was originally consented to by the people. They adopt what might be called a "collective" or majoritarian conception of popular sovereignty, according to which a majority or supermajority of the population can consent to governance, and claim that this majoritarian consent somehow binds the dissenting minority.

Other originalists reject the consent of the governed as a pernicious fiction, and consider a written constitution to be legitimate, and therefore binding, only insofar as it provides procedures to ensure that laws imposed coercively on the nonconsenting public are likely to be just. In particular, I have argued that a constitution can be legitimate if it provides assurances that its laws are "proper" in that they do not violate the rights of those upon whom they are coercively imposed

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[87]See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611, 611-29 (1999) (describing the shift from original framers intention, to original ratifiers understanding, to original public meaning).

[88]The first modern originalist to clearly see the importance of this distinction was Keith Whittington. *See* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999).

and are "necessary" to protect the rights of others.[89] This approach results in an "individualist" conception of popular sovereignty in which each member of the public is considered a joint or co-sovereign whose rights must be protected before governance is legitimate.[90] This was the view of popular sovereignty adopted by a majority of the Supreme Court in its first great constitutional decision: *Chisholm v. Georgia*.[91]

In this paper, I examined how this normative disagreement among originalists leads to a potential divergence in how one interprets and construes a written constitution. In particular, those who base the legitimacy of a written constitution on the consent of the governed are likely to interpret its public meaning in light of prevailing background assumptions at the time of its enactment. Even if they do not qualify the original public meaning in this way, these consent theorists are likely to appeal to these background assumptions when engaged in constitutional construction. Basing constitutional legitimacy on consent leads naturally to methods of constitutional interpretation and construction closely resembling the interpretation and construction of contracts. Such methods of interpretation are both impractical and inappropriate when constitutions are not grounded on consent.

Most objections to the moral odiousness of originalism are based on the misconceived assumption about the relevance of objectionable background assumptions to the original meaning of the text. When this connection is severed, originalism should become far more normatively appealing to those who now consider themselves nonoriginalists. And understanding why background assumptions are not relevant to constitutional meaning underscores the vital and much neglected connection between methods of constitutional interpretation and theories of constitutional legitimacy.

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[89] *See* Barnett, *supra* note 3.

[90] I first identify this individualist conception of popular sovereignty in Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1179 (2007) and expand upon the idea in *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. 937 (2008).

[91] 2 U.S. 419 (1793).