

GRADUATED CONSENT IN CONTRACT AND TORT LAW: TOWARD A THEORY OF JUSTIFICATION

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ABSTRACT

We often speak of consent in binary terms, boiling it down to “yes” or “no.” In truth, however, consent varies by degrees. We tend to afford expressly consensual transactions more respect than transactions backed by only implied consent, for instance, which we in turn regard as more meaningful than transactions justified by merely hypothetical consent. A mirror of that ordinal ranking appears in our judgments about unconsensual transactions, too. Those gradations of consent mark a deep structure of our social world, one especially evident in the contours of contract and tort law. This article draws on those and other sources to outline a theory of graduated consent, one that establishes a standard for measuring the justification of a wide variety of human relationships. Though its basic tenets comfortably agree with everyday common sense, graduated-consent theory offers surprising answers to such old problem as enforcing standardized agreements, justifying political coercion, and discerning the meaning of a constitution. In those and other applications, graduated-consent theory promises to enrich our understanding of contract and tort law, as well as other areas of legal, moral, and economic reasoning.

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CONTENTS

INTRODUCTION

I. WHY VALUE CONSENT?

A. The Legal Value of Consent

B. The Moral Value of Consent

1. *Consequentialist Arguments About Consent*2. *Deontological Arguments About Consent*3. *Aretaic Arguments About Consent*4. *A Transcendental Argument for Consent*

C. The Economic Value of Consent

II. THE SCALE OF CONSENT

A. Gradations of Consent

1. *Express Consent*2. *Implied Consent*3. *Hypothetical Consent*4. *Varieties of Unconsent*5. *Nonconsent*

B. Evaluating the Justificatory Force of Different Types of Consent

1. *Types and Subtypes of Consent*2. *Types and Subtypes of Unconsent*3. *Shades of Justification*

III. GRADUATED-CONSENT THEORY IN PRACTICE

A. Standard Form Agreements

B. The Problem of Justifying Political Coercion

1. *The Difficulties of Justifying the State by Actual Consent*2. *Relativity and Political Justification*

a. Relativity in Degree of Justification

b. Relativity to Subjects

3. *Making the United States More Consent Rich*

a. Easing Exit

b. Amending the Pledge of Allegiance

c. Citizen Courts

C. Toward a Consensualist Theory of Constitutional Law

1. *Questions for Originalists*2. *Questions for Living Constitutionalists*

CONCLUSION

INTRODUCTION

We often speak of consent in binary terms, boiling it down to “yes” or “no.” That reflects one of the most fundamental features of

social life, a phenomenon so widely observed as almost to escape mention: we generally smile on consensual transactions but frown on unconsensual ones. Unsurprisingly, given their common law roots, the principles of contract and tort law reflect that same, deep structure of our world. Thus does contract law enforce express agreements, whereas tort law remedies unconsensual exchanges. Viewed in this low-resolution snapshot, consent exhibits a strictly binary, on-or-off nature.

When we study it in more detail, however, examining how consent works in actual practice, we see that it ebbs and flows by degrees.¹ We tend to afford expressly consensual transactions more respect than those backed by only implied consent, for instance, which we in turn regard as more worthy of enforcement than transactions justified by mere hypothetical consent. A similar ordinal ranking—a mirror of our judgments about consensual transactions—surfaces in our judgments about *unconsensual* ones. In those, the characteristic concerns of contract and tort law, we see proof that consent varies by degrees and measures the justification of human relationships. Drawing on examples from the common law and other sources, we can frame a theory of graduated consent, one that offers a useful tool for legal, ethical, and economic reasoning.

How does graduated consent work? Consider how it can explain the case of a delivery gone sorely amiss.² Suppose that an expectant mother contracts with a hospital to receive medical care during her childbirth. Her express consent suffices to turn what might otherwise look like a case of battery—the impliedly unconsensual poking and prodding administered by nurses and doctors—into justifiable aid. About that basic sort of transaction, the common law and graduated-consent theory agree. Let us complicate matters, though, by further supposing that this particular patient emphatically objects in advance to receiving an episiotomy, going so far as to cross out the procedure on the hospital's paperwork, but that the physician attending the birth, calculating that only an episiotomy can save the patient from a life-threatening complication, performs the procedure. When the patient later sues for battery, the doctor responds that any reasonable person would have agreed to receive an episiotomy under such circumstances

¹ That gap between how we speak and how we act probably reflects the still relatively under-theorized nature of consent. As Scott Anderson has observed, "coercion is a matter of longstanding political and ethical concern. Nonetheless, there has been little sustained scholarly attention to its nature until recently; historically, many seem to have been willing to accept the concept of coercion as a primitive." Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA OF PHIL (Feb. 10, 2006), <http://plato.stanford.edu/entries/coercion>.

² The basic facts and outcome—but not all the terminology and reasoning—come from *Curtis v. Jaskey*, 759 N.E.2d 962 (Ill. App. Ct. 2001).

and that doctors such as himself customarily have authority to render emergency medical care.

Should the physician thereby escape liability? Almost certainly not. The patient's express nonconsent to the episiotomy would presumptively (absent a showing of insanity or some other incapacitating factor) trump the merely hypothetical and implied consent on other side of the equation. As a common-law court would put it, "[I]n the face of a clear refusal to submit to a medical procedure, the emergency exception is inapplicable."³ Graduated-consent theory concurs, explaining that the case demonstrates how express unconsent outweighs hypothetical and implied consent, thereby rendering the transaction unjustified. By carefully defining those and related terms, and by describing how they interact to afford assessments of the justifiability of a wide range of social transactions, graduated-consent theory can both explain common-law precedents and extend their underlying reasoning to other contexts.

This Article explains and demonstrates graduated-consent theory in three basic steps: first, it establishes consent's value; second, its qualities; and third, its utility as a means for evaluating and improving social life. Part I reviews the case for consent, illustrating the important role that consent plays in legal, moral, and economic reasoning. That is not to say that everyone everywhere ranks consent as the supreme good that should be pursued above all else. Nonetheless, we can trace consent's influence on the face of most legal, moral, and economic theories. That interesting discovery alone merits attention. Consent grows still more interesting when we also consider that most legal, moral, and economic theories treat it as a *prima facie* good, one that they subordinate to other, more important goals only in exceptional cases.⁴

Part II describes the many gradations of consent and their order on a scale of justification. In the positive range, the scale runs from express consent, through implied consent, and down to hypothetical consent. Express consent bears more power to justify a transaction

³ *Id.* at 968.

⁴ Thus, for instance, might an economist apologize for government regulation as medicine that, however distasteful, offers our best hope of remedying the shortcomings of civil society. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 389 (7th ed. 2007) ("Monopoly, pollution, fraud, mistake, mismanagement, and other unhappy by-products of the market are conventionally viewed as failures of the market's self-regulatory mechanisms and therefore as appropriate occasions for public regulation."). The market counts as one of many spontaneous and planned nonpolitical orders, albeit a very important one. Others include language, customs, and expressly consensual social cooperatives. Posner likewise includes more than just mere commerce in his description of market failure: "But "[t]his way of looking at the matter is misleading. The failure is ordinarily a failure of the market *and* of the rules of the market prescribed by the common law." *Id.*

than either of those two lesser forms of consent can muster, while implied consent has more power to justify than merely hypothetical consent does. A similar ranking repeats, in reverse order, in justification's negative range. There, *unconsent*⁵ increases in the steps from hypothetical unconsent, through implied unconsent, down to express unconsent. (As discussed later in the article, closer scrutiny reveals even finer gradations in the scale of consent, allowing us to subdivide these types into subtypes.⁶) Each type of consent tends to have a particular power to justify social exchanges—whether it evokes from observers' affirmative support, respectful noninterference, skeptical disapproval, or forceful objection. Consent and justification thus come in degrees and vary in step, one with the other. Figure 1, below, illustrates.

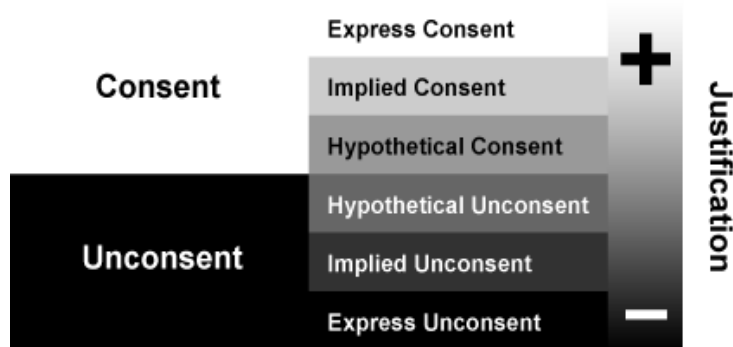


Figure 1: Types of Consent and Their Relationship to Justification

Part III puts this theory of graduated consent to work, applying it to such puzzles as the enforceability of standardized agreements, the justification of political coercion, and the reading of a constitution. That effort generates some interesting results. It explains the weighing process that courts use in deciding whether to enforce a standard form agreement, while supported by proofs of express consent, bears marks of hypothetical, implied, and (after the fact) express *unconsent*. Looking at political justification through the lens of graduated-consent theory reveals some trenchant criticisms of institutionalized coercion as well as some ways to render the United States more justified in taking action, such as increasing our freedom

⁵ Here, “unconsent” means, as the prefix “un-” suggests, the negative of consent. This Article reserves “nonconsent,” in contrast, to describe conditions in which consent may, far from suffering negation, simply play no role. See *infra* Part II.A.5. On that usage, battery would qualify as *unconsensual*, whereas objectionable weather would (absent extraordinary facts) qualify as simply *nonconsensual*.

⁶ See *infra* Figure 3.

to exit certain government programs or instituting citizen courts. Thus might we, as good patriots, improve our country.⁷

Relatedly, in the context of constitutional decision making, a theory of graduated consent suggests that we can maximize the justification of a constitution by reading it to maximize the consent of the governed. Meaning, among other things, that we should enforce a constitution as a court would enforce a standard form agreement drafted and offered on a take-it-or-leave-it basis by one powerful party to many various weak ones. We should try, in other words, to *forget* that it is a constitution we expound,⁸ and instead enforce it (or not) as we would any contract for the provision of governing services.

Those and other conclusions, some of them quite surprising, follow from adopting a graduated view of consent. Though it may seem obvious in retrospect that consent varies by degrees and justifies social relations, that deep structural feature of legal, moral, and economic reasoning has hitherto escaped careful and sustained attention. Graduated-consent theory can thus help us both to understand old truths and to uncover new ones.

I. WHY VALUE CONSENT?

We value consent for many and good reasons. This Part explains the important role that consent plays in legal, moral, and economic reasoning. That is not to say that any field of thought takes consent as the sole or greatest value, however; consent comes in too many shades to submit to so gross a simplification. In law, morality, and economics alike, though, express consent represents a *prima facie* good and a measure of justification. Sections A, B, and C, below, explain consent's role in each discipline, respectively.

A. The Legal Value of Consent

Consent plays a very prominent role in the law—so much so that the point hardly needs elaboration. Various examples, scattered throughout this Article, drawn primarily from contract and tort law but also from the laws of agency and property, illustrate consent's overwhelming importance in common-law jurisprudence. The common law regards consent as a necessary ingredient for creating a binding contractual bargain, for instance.⁹ Thus, too, does tort law

⁷ I speak as a U.S. citizen, of course, but readers from elsewhere should find that my observations about patriotism apply equally well to their relationships with their own countries.

⁸ *But see* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding.”) (emphasis in original).

⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (“[T]he formation of a

require a showing of *un*consent before acting to remedy such wrongs as battery¹⁰ or trespass.¹¹ That is not to say that the law simply treats consent as The Good. Contract and tort law instead treat consent as a *prima facie* good, one that comes with various caveats and in many shades.

Especially in the law of contracts, consent has a carefully defined meaning. A court will typically look with well-founded skepticism on facial proofs of express consent, taking care that they do not hide transactions tainted with duress,¹² undue influence,¹³ incapacity,¹⁴ fraud,¹⁵ mistake,¹⁶ misunderstanding,¹⁷ unconscionability,¹⁸ or other disqualifying counterproofs. Tort law, in contrast, tends to manage with a more basic, even atavistic, notion of *un*consent; except when *un*consent comes mixed with offsetting evidence of consent,¹⁹ fact finders have little trouble telling when plaintiffs complain of torts.²⁰

The law of contracts and torts tends to regard consent objectively, as something established or negated by observable proofs, such as a

contract requires a bargain in which there is a manifestation of mutual assent . . .”). In rare instances, contract law also enforces nonbargains. Even these, however, require proofs of consent. *See, e.g., id.* § 90(1) (providing for enforcement of some promises that evoke reasonably foreseeable reliance).

¹⁰ *See* RESTATEMENT (SECOND) OF TORTS § 13 & cmt. d (1965) (describing when an actor will be subject to liability to another for battery and explaining that the plaintiff’s consent to the contact prevents the liability).

¹¹ *See id.* § 158 & cmt. c (defining liability for intrusions on land and explaining that the word “intrusion” means that the possessor’s interest in exclusive possession has been invaded by a person or thing without the possessor’s consent).

¹² *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (establishing when duress by threat makes a contract voidable).

¹³ *See id.* § 177 (establishing when undue influence makes a contract voidable).

¹⁴ *See id.* § 14 (infants); *id.* § 15 (mental illness or defect); *id.* § 16 (intoxication).

¹⁵ *See id.* §§ 162–164 (establishing when fraud is material and when fraud prevents the formation of or voids a contract).

¹⁶ *See id.* §§ 151–154 (defining mistake, establishing when mistake makes a contract voidable, and determining when a party bears the risk of a mistake).

¹⁷ *See id.* § 20 (determining the effect of misunderstanding).

¹⁸ *See id.* § 208 (limiting enforceability of unconscionable contracts or terms); *id.* § 211(3) (voiding terms in standard form agreements that one party should know the other party would not assent to). *See also id.* § 77 (disqualifying certain promises from establishing a bargained for exchange).

¹⁹ *Compare* *Peterson v. Sorlien*, 299 N.W.2d 123, 128 (Minn. 1980) (affirming the district court’s finding that those who attempted to forcibly “deprogram” a member of a religious cult were not liable for false imprisonment on the grounds that she apparently and temporarily consented to their efforts) *with* *Eilers v. Coy*, 582 F. Supp. 1093, 1097 (D. Minn. 1984) (finding liability for false imprisonment on similar facts on the grounds that the plaintiff never evinced genuine consent and any observed evidence of consent was feigned).

²⁰ Tort law likewise offers comparatively little guidance for determining when consent obtains, saying simply that “[c]onsent is willingness in fact for conduct to occur.” RESTATEMENT (SECOND) OF TORTS § 892(1) (1979).

party's manifestations.²¹ As such, it shares the justified skepticism that economists evince when they limit themselves to measuring revealed preferences.²² Courts hesitate to base judgments on what parties impliedly *did agree* to or hypothetically *would have agreed* to, relying on such comparatively weak proofs only when express consent fails and salient injustice looms in the alternative.²³ Even then, the common law of contracts and torts tends to stick to such general and objective standards as customary practices²⁴ or reasonable people,²⁵ leaving the judgment of individual souls to metaphysical moralists.

In that, contract and tort law perhaps differ from the criminal law, which at its boldest, almost pretends to judge a suspect's *thoughts*. As Lawrence B. Solum observes, "[I]n the criminal law, 'legal consent' may be a mental state, whereas in torts or contracts 'legal consent' may be . . . performative."²⁶ Ultimately, however, even the most powerful prosecutor can make no pretense of reading minds, but instead must rely on the observable, external manifestations of mental states. Then, too, criminal law arguably lies outside the bounds of the common law proper; it certainly does not lie close to the trinity at common law's core, springing out of civil customs: property, contracts, and torts. Those three intertwined areas of law tout a

²¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 17(1) ("[F]ormation of a contract requires . . . a manifestation of mutual assent . . ."); *id.* § 24 ("An offer is the manifestation of willingness to enter into a bargain . . ."); *id.* § 38(2) ("A manifestation of intention not to accept an offer is a rejection . . ."); RESTATEMENT (SECOND) OF TORTS § 892(2) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."); *id.* § 892 reporter's note cmt. b (1982) ("No cases have been found bearing upon consent not in any way manifested but proved to have existed.").

²² See DAVID D. FRIEDMAN, PRICE THEORY: AN INTERMEDIATE TEXT 25 (2d ed. 1990) ("[Y]our preferences are revealed by your actions."). But see Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 665–71 (2007) (explaining why purchasing decisions may fail to wholly measure market demand for public goods).

²³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (limiting enforceability of unconscionable contracts or terms). Due to the sometimes sudden and fatal transactions it must adjudge, tort law sometimes operates without proofs of express consent. See, e.g., *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502 (1871) (holding railroad liable for death of man struck by train when, forced to make sudden decision, he leapt on the tracks to save a child). In such cases, tort law looks for proofs of what like parties customarily do not agree to—implied consent—or what a like party would not have agreed to—hypothetical consent.

²⁴ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (listing express terms, course of performance, course of dealing, and usage in trade as respectively weaker proofs of meaning of an agreement).

²⁵ See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (1965) (defining negligence with regard to the conduct of a reasonable person in like circumstances).

²⁶ Lawrence B. Solum, *Legal Theory Lexicon 042: Consent*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/11/legal_theory_le.html (last updated Dec. 27, 2009).

consent-based justification notably different from, and considerably stronger than, any justification that criminal law can claim. We recognize the principles of property, contract, and tort law by mutual consent, day by day, throughout our social existence. In contrast to our implied and, often, express consent to those civil rules, criminal law, as an exercise of State power, can generally claim no better than hypothetical consent. It may lack even that, if the State attempts to enforce unjust laws.

B. The Moral Value of Consent

Consent plays a prominent role in moral reasoning.²⁷ Each of the three major types of moral theory—consequentialist, deontological, and aretaic—recognize consent as at least a *prima facie* good. Subsections 1, 2, and 3 discuss consent's role in each theory, respectively. That discussion drops no bombshells; most of us already recognize consent as an important factor in moral reasoning. To those, the salient virtues of consent, subsection 4 adds a new, transcendental argument: because an attempted justification aims, by definition, to obtain its audience's consent, justifications presume the moral significance of consent.²⁸

1. Consequentialist Arguments About Consent

Consequentialist moral reasoning aims to maximize some good, such as pleasure,²⁹ happiness,³⁰ conformity with rules,³¹ or social wealth.³² Consent plays an important role, if not a central one, in each

²⁷ See *id.* (“[C]onsent works moral magic. . . . [C]onsent has a transformative moral power: consent can transform a wrongful action into a rightful action.”). For contrasting views of consent's impact on moral and legal reasoning, compare Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 122 (1996) (arguing that to consent means to intend the other's action), with Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 166 (1996) (disagreeing with Hurd about the mental state that represents consent, arguing that to consent means, rather, to forego moral objection). As regards the mirror image of consent, *unconsent*, see Anderson, *supra* note 1, for his conclusion that the view “that coercion is *prima facie* or *pro tanto* immoral, is probably the most commonly held view.”

²⁸ You might call this approach “justice as consent,” with a nod to John Rawls's theory of “justice as fairness.” See generally JOHN RAWLS, A THEORY OF JUSTICE 3–45 (rev. ed. 1999) (explaining his theory of justice as fairness).

²⁹ See, e.g., George K. Strodach, THE PHILOSOPHY OF EPICURUS 72–85 (George K. Strodach trans., 1963) (describing and analyzing the Epicurean hedonism). See also, JOHN STUART MILL, UTILITARIANISM 7–8 (George Sher ed., Hackett Publ'g Co. 1979) (1861) (defending Epicureans from the claim that they promote the pursuit of base pleasures).

³⁰ See, e.g., MILL, *supra* note 29, at 7 (“[A]ctions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.”).

³¹ See, e.g., J. J. C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 3, 9–10 (J. J. C. Smart & Bernard Williams eds., 1973) (describing rule utilitarianism and contrasting it, unfavorably, with act utilitarianism).

³² See, e.g., POSNER, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 15 (3rd ed.

of those sorts of consequentialism. John Stewart Mill, for instance, praises freedom as the best guarantee of happiness,³³ while those who would maximize social wealth generally prefer mutually consensual market exchanges over government-imposed redistribution.³⁴ That is not to say that consequentialists favor consent over all else, of course.³⁵ Only someone who treated consent itself—rather than pleasure, happiness, or so forth—as the ultimate good would treat it with such reverence.³⁶ Other, more traditional consequentialists limit themselves to celebrating consent as a useful mechanism for promoting some other, higher good.³⁷

2. Deontological Arguments About Consent

Deontological arguments establish moral side constraints on action—“rights,” in other words—that mark some human interactions as at least *prima facie* wrong.³⁸ As Robert Nozick explains, rights uphold “the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent.”³⁹ That last clause

1986) (“[W]ealth maximization is an important—conceivably the only effective—social instrument of utility maximization.”).

³³ See MILL, *supra* note 29, at 58 (“The moral rules which forbid mankind to hurt one another (in which we must never forget to include a wrongful interference with each other’s freedom) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs.”). See also JOHN STUART MILL, ON LIBERTY 12 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859) (“Mankind are the greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.”).

³⁴ See *infra* Part I.C (discussing consent in economic reasoning).

³⁵ Nor is it to say that every form of consequentialism would value consent as even a *prima facie* good. It seems that every popular sort of consequentialism would, but we can imagine a consequentialist theory—say, one that posits biodiversity as the supreme good—that regards consent with indifference or even hostility.

³⁶ So far as I know, no one has advocated that sort of consensualist consequentialism. The prospect of trying to maximize social harmony certainly has its charms, however. For one thing, it automatically solves the distributional arguments that plague wealth-maximization theories by treating each moral agent’s consent as equally weighty. For another, because we can measure enforceable agreements and actionable torts, it offers a better prospect of meaningful calculation than theories aiming to maximize happiness or social utility. Although I would hesitate to call myself a consequentialist, I do advocate social policies designed to maximize consent. See *infra* Part III.B.3 (discussing ways to make the United States more consent rich).

³⁷ See Solum, *supra* note 26 (“[F]or at least some utilitarians, consent would be presumptive evidence that the consented-to action would maximize utility and hence be the morally best action.”).

³⁸ E.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 29 (1974) (“In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don’t violate constraints C. The rights of others determine the constraints upon your actions.”).

³⁹ *Id.* at 30–31.

bears emphasis. Consent has the power to excuse acts that deontological moral theory would otherwise condemn.⁴⁰ Consent offers more than mere apologies, however. Its negative, *unconsent*, directs human action into rights-respecting channels.⁴¹ Mere objections do not suffice to establish wrong, of course; the target of justified self-defense may cry out in protest.⁴² We discount the wrongdoer's expression of *unconsent*, however, out of respect for his victim's rights.

Rights and consent thus have a close relationship in deontological moral theory. Which comes first? As a matter of day-to-day practical reasoning, we assume the existence of certain rights. We take rights to persons, property, and promises as given and focus our deliberations on determining whether and to what extent those rights suffer unconsensual violations. In practice, then, rights precede consent.

In theory, though—or at least in *some* theories—rights rely on consent. From a deductive point of view, we might determine the optimal set of rights by asking what sort of arrangement would best respect individual choice. We might look, in other words, for the set of rights that maximizes consent, subject to some distribution function. We might aim to afford like liberty to all, giving the freest possible range to human action, for instance.⁴³ Alternatively, we might try to calculate which system of rights will maximize overall human welfare—a good that everyone presumably values. In any case, we would choose our goal with an eye to what we suppose people in general—expressly, impliedly, and hypothetically—want.

Alternatively, from an empirical point of view, we might look to custom for evidence of what rights best suit human social life. A subtle, unpredictable, and unplanned process of natural selection generates forms of society that survive and thrive.⁴⁴ What drives that process? Mutual consent. Social institutions take shape only under the

⁴⁰ See Solum, *supra* note 26 (“[C]onsented-to rights violations seem perfectly consistent with the idea that rights protect a sphere of individual choice.”).

⁴¹ As Randy E. Barnett puts it, “[T]he moral requirement of consent mandates that others take the interests of the rights holder into account when seeking to obtain the rights she possesses.” Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 298 (1986) (footnote omitted).

⁴² See MALCOM MURRAY, *THE MORAL WAGER: EVOLUTION AND CONTRACT* 153 (2007) (“Securing consent . . . is a sufficient condition of treating individuals with respect. It is not a necessary condition however: one may be bound by duties irrespective on one’s occurrent consent.”).

⁴³ See Solum, *supra* note 26 (“[M]oral rights and duties . . . create for each individual a sphere of autonomous action, in which each individual can direct her own life without interfering with the like freedom of others to do the same.”).

⁴⁴ It generates forms that wither away too, of course, but few of those will exist in any sample of cultures winnowed by time and experience.

influence of many various individual choices.⁴⁵ The forces of consent and its negative, unconsent, thus flow through human life, forming patterns of human action, and evolving into forms that promote human progress.⁴⁶ In those forms, we can find rights worth respecting.

We might, in sum, conclude that rights and consent advance together, evolving through a symbiotic relationship. They rely on each other, mutually and crucially. Rights define the sort of consent we care about, whereas consent helps us discover the right sorts of rights. Consent thus plays a necessary, though not sufficient, role in shaping deontological moral theory.⁴⁷

3. *Aretaic Arguments About Consent*

Aretaic moral theories value virtue.⁴⁸ A good person, in that view, evinces habits of right action, such as: moderation, industry, civility, and generosity.⁴⁹ Only through the exercise of those and other virtues can humans live together in peace and prosperity, flourishing in the pursuit of happiness.

Thanks to their regard for virtue, aretaic moral theories also value consent. The virtue of justice, for instance, constrains us from violating others' rights without their consent.⁵⁰ More generally, consent plays a vital role in cultivating habits of right action, so much so that virtue would entirely wither away in a world without consent. Just as a weightlifter grows strong only through effort, moral strength

⁴⁵ They evolve under the influence of *nonconsensual* forces too, of course, such as forces of nature. Deliberations over rights can have little impact on those, however.

⁴⁶ See generally 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973) (constructing a framework necessary for a critical analysis of prevailing theories of justice and of the conditions which a constitution securing personal liberty would have to satisfy).

⁴⁷ But see MURRAY, *supra* note 42, at 153 ("In order to respect autonomous agents' interests, one must seek their consent in any interaction that involves them. Failure to get their consent creates an obligation to refrain from interfering with them. Securing consent, in this sense, is a sufficient condition of treating individuals with respect. It is not a necessary condition however: one may be bound by duties irrespective of one's occurrent consent. It is important to see, therefore, that the concept of consent does no justificatory work in this picture. Moral action is not determined by consent.") (footnote omitted). That conclusion does not follow logically from the premise, however. It remains possible that consent proves necessary to establish the sorts of relationships we regard as most justified, for instance, or rights prove necessary but insufficient for a complete justification.

⁴⁸ See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* (c. 384 B.C.E.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., W. D. Ross & J. O. Urmson trans., 1984) (highlighting the use of virtue to construct a moral theory).

⁴⁹ See, e.g., *id.* at 1746 (explaining that for an agent to evince virtue "in the first place he must have knowledge, secondly he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character").

⁵⁰ See Solum, *supra* note 26 ("One of the virtues is justice, and humans with this virtue will not violate the rights of others without their consent.").

grows only out of moral struggle. Moral struggle requires moral choice and choice presumes consent.⁵¹

Because they focus on forms of action and virtues, rather than on moral conditions, such as happiness, injustice, or fairness—*aretaic* philosophers do not value consent above all else.⁵² Consent plays more than just a helpful ancillary role in virtue theory, however. Although he speaks in terms of autonomy rather than of consent, Professor Lawrence B. Solum, a leading advocate of virtue theory, notes:

Yankah's conclusion that virtue ethics is inconsistent with a theory that views autonomy as the highest (and perhaps only noninstrumental) value is, in my view, correct. But it does not follow that virtue ethics must relegate autonomy to the role of an instrumental good—there are other possibilities. For example, it could be that some form of autonomy is constitutive of human flourishing. Certainly, an Aristotelian virtue ethics could (and in my view should) adopt this view of the relationship between autonomy and flourishing.⁵³

On that view, *aretaic* moral philosophies should value consent as a necessary constituent of human flourishing.

4. A Transcendental Argument for Consent

Students of philosophy tend to associate transcendentalism with Immanuel Kant, who argued against metaphysical skepticism on grounds that reason necessarily presumes both time and substance.⁵⁴ Kant had no monopoly on the transcendental form of argument, however; Epicurus reportedly used it thousands of years earlier,⁵⁵ and it has seen other, less prominent uses since.⁵⁶ Regardless of its particular application, a transcendental argument begins with an uncontroversial fact, adds a proposition that necessarily follows from

⁵¹ See, e.g., ARISTOTLE, *supra* note 48, at 1729, 1752 (distinguishing voluntary from nonvoluntary and involuntary actions).

⁵² See generally Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167 (2009) (outlining virtue ethics as a position in moral philosophy).

⁵³ Lawrence Solum, *Yankah on Virtue Jurisprudence*, LEGAL THEORY BLOG (Sept. 16, 2008, 6:45 AM), <http://lsolum.typepad.com/legaltheory/2008/09/yankah-on-virtu.html>.

⁵⁴ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 120–28 (Norman Kemp Smith trans., Macmillan & Co. 2d ed. 1953) (1781) (describing principles of transcendental deduction).

⁵⁵ Adrian Bardon, *Transcendental Arguments*, INTERNET ENCYCLOPEDIA PHIL. (July 13, 2006), <http://www.iep.utm.edu/trans-ar>.

⁵⁶ See, e.g., HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 1–21 (1981) (arguing against metaphysical skepticism on grounds that it would be impossible for a being existing only as, say, a brain in a vat to conceive of brains, vats, or kindred material objects).

that fact, and concludes in support of the proposition. In other words, a transcendental argument takes the form:

1. P.
2. If P, then Q.
3. Therefore, Q.⁵⁷

Following that form, the transcendental argument for consent's moral relevance runs as follows:

1. A justification aims to win the consent of its intended audience.
2. If a justification aims to win the consent of its intended audience, then the argument's efficacy varies with the consent of that audience.
3. Therefore, justification presumes the value of consent.⁵⁸

This argument for consent's moral relevance begins with a (supposed) truism about the nature of justification. Readers who regard step one as an obvious truth can skip to step two. Some might doubt step one, however. In particular, a skeptic might counter that justifications sometimes aim to mislead their intended audiences, as when political leaders conspire to mislead gullible citizens about the causes of social unrest, blaming foreign provocateurs rather than homegrown disaffection. In such a case, we cannot properly say that the justification aims to win the consent of the governed; rather, it aims to win their ignorant acquiescence. Though false propaganda might in practice win obedience, it does not give rise to any obligation to obey.⁵⁹ To frame the matter differently, we might also say that political rhetoric wins the consent of those who agree to deploy it to their advantage—the politicians who conspire to mislead the public. In that event, however, the *politicians* would constitute the “intended audience” referenced by the transcendental argument for consent. The argument would thus serve to justify the propaganda

⁵⁷ Kant's argument, for instance, took the following form: “(1) I make judgments about the temporal order of my own mental states. (2) I could not make judgments about the temporal order of my own mental states without having experienced enduring substances independent of me undergoing alteration. (3) Hence independent, enduring substances exist.” Bardon, *supra* note 55; see also KANT, *supra* note 54, at 74–82.

⁵⁸ Alert readers have directed me to a similar argument by Hans-Hermann Hoppe, positing that self-ownership “is implied in the concept of justification as argumentative justification. Justifying *means* justifying without having to rely on coercion.” HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS 133 (1989). But Hoppe argues toward a different end—establishing self-ownership—than the aim of the argument here—establishing the relationship between justification and consent.

⁵⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 162–164 (1981) (defining conditions under which fraudulent misrepresentations negate the formation and enforceability of a contract).

program only *with regard to the politicians who knowingly adopt it*; it would not justify the program's supposed persuasiveness with regard to the victimized public.

The claim made in step two of the transcendental argument for consent's role in justification might, like the claim made in step one, strike many readers as obvious.⁶⁰ As long ago as Aristotle, philosophers have regarded the end, or *teleos*, of a thing as the measure of its proper function.⁶¹ On that reasoning, if a justification (or, more properly, the person offering the justification) aims to win the consent of a particular audience, we can judge whether or not the argument succeeds by measuring the consent that the argument rouses.⁶² An aesthete might counter that other factors should enter into our evaluation of a justification, such as grace or popular acclaim. But step two modestly disclaims any say over those matters, instead focusing solely on a justification's efficacy. And on that count, as step one established, we rightly ask whether a justification has won the consent of its intended audience.

The third step of the argument for the moral relevance of consent follows as a matter of logic from the first two steps. Even hardcore skeptics do not trouble themselves challenging *modus ponens*, so perhaps we could stop here. As a safeguard against sophistry, however, let us double-check whether the argument's conclusion—that justification presumes the value of consent—conforms with common sense.

Note, first, that an argument that *nobody* accepts *cannot* work as a justification. We thus laugh off the arguments, no matter how internally consistent or ardently pressed, that a madman makes when he claims the right to rule all the Earth. Because his argument wins nobody's consent, nobody regards it as sufficient justification for his coronation. Note, next, that we commonly regard informed consent as adequate justification for imposing far-ranging conditions on those who accept them; we hesitate to second-guess another's pursuit of happiness. Lastly, note that we tend to recognize exceptions to that rule only in defense of consent itself, as when we refuse to enforce an

⁶⁰ Although the language of step two carefully leaves open the possibility that consent, and thus justification, may obtain in degrees, that is not, strictly speaking, necessary to the form of the argument; one could just as well flatly claim that a justification succeeds if and only if it wins the consent of its intended audience, and that it fails if the audience does not assent. This Article elsewhere claims, however, that consent does, in fact, come in degrees. See *infra* Part II.

⁶¹ ARISTOTLE, *supra* note 48, 1729, at 1729 ("Every art and every inquiry, and similarly every action and choice, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim.").

⁶² Alternatively, because it functionally amounts to a mirror image of the same thing, we might instead measure the *dissent* that the argument rouses.

agreement to submit to slavery, when we deny the power of fraud to justify a transaction, or when, far from praising a mugger for successfully inducing his victim to give up her purse in exchange for not giving up her life, we condemn his acts as coercive and unjustified. Logic and experience alike thus suggest that we judge an attempted justification in terms of whether or not it wins the consent of its intended audience. Unsurprisingly, the plain meaning of “justify” conforms to that meaning.⁶³

C. The Economic Value of Consent

The supply/demand charts so often seen in economic texts portray expressly consensual transactions. Those charts typically presume that sales happen without coercion, that each of the utility-maximizing parties to an exchange walks away from it relatively more happy than before. Only rarely do economists make a similar effort to portray unconsensual transactions, such as battery or theft.⁶⁴ That somewhat monomaniacal focus might well puzzle someone trained in the law, a discipline that stretches from contracts between fully informed equals to criminal battery. Why does consent matter so much in economics?

From its origin, as the study of household management,⁶⁵ economics has concerned choice—specifically, how to choose the most efficient allocation of scarce resources. But good choices require good information.⁶⁶ Consensual transactions, because they reveal otherwise hidden preferences, draw forth the information necessary for maximizing economic efficiency.⁶⁷ Unconsensual transactions, in contrast, offer only a relatively noisy signal about parties’ preferences, one that tends to ignore the victim’s preferences.⁶⁸

⁶³ To “justify” means “to show to be just, right, or in accord with reason; vindicate.” WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 734 (Victoria E. Neufeldt et al. eds., 3d college ed. 1988).

⁶⁴ See, e.g., Bruce L. Benson, *Property Rights and the Buffalo Economy of the Great Plains*, in SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 29, 58–61 (Terry L. Anderson et al. eds., 2006) (offering an economic model of intertribal relations on the Great Plains that accounts both for the gains from trading and for the gains from raiding).

⁶⁵ See ARISTOTLE, POLITICS bk. I (c. 350 B.C.E.), reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE 1986 (Jonathan Barnes ed., B. Jowett trans., 1984) (studying household management to understand the political community).

⁶⁶ See Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL’Y 867, 895 (1990) (“Information is the lifeblood of the economic process.”).

⁶⁷ Barnett, *supra* note 41, at 282 (“[I]n the absence of a consensual demonstration of preferences, we do not really know if the exchange is worthwhile—value enhancing—or not.”).

⁶⁸ That is not to say that unconsensual transactions fail to reveal subjective preferences. Especially when a would-be victim wards off an attempted wrong, as when a lock guards a safe or an armed homeowner stops a burglary, we get a fair measure of what costs each party will

Consent's power to reveal preferences, and thus promote efficiency, would not matter if we could read minds. But we cannot. Instead, each person and association of persons possesses information that others cannot access easily, if at all. Randy E. Barnett categorizes such radically dispersed information as either "personal" or "local."⁶⁹ The former sort of information inheres to individuals; the latter to a particular association of persons. Personal and local information holds a wealth of expertise about how to put scarce resources to their best uses. It will have scant effect, however, unless brought forth and distributed widely in easily digestible form. Their isolation from the sources of personal and local information hinders centralized authorities from performing that function efficiently. Thanks to a myriad of *impliedly* consensual transactions, however, we have developed customary ways of life—such as language, culture, and ethics—that allow us to thrive together. And through the medium of *expressly* consensual exchange, we transform personal and local knowledge into an easily transmitted, readily understood, and universal language: prices.⁷⁰

While we can thus understand why economists study expressly consensual transactions so carefully, we might still question whether they should study consent more broadly. What would happen, for instance, if we traced the supply and demand curves of hypothetically consensual transactions? Preliminary investigation suggests that the exercise would generate some interesting results.⁷¹ Despite the large and important role that it already plays in economic reasoning, therefore, consent has still more to teach us.

incur to avoid a transaction. Successful attempts to perpetrate unconsensual transactions, however, crush the victim's preferences, hiding them under a show of force. We thus can only wonder, for instance, how much a murdered man valued life.

⁶⁹ Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 831–35 (1992). Barnett actually employs "knowledge" rather than "information." I prefer the latter term because epistemological philosophers use "knowledge" as a term of art—and hotly debate its proper meaning.

⁷⁰ See LUDWIG VON MISES, SOCIALISM 137–42 (J. Kahane trans., Yale Univ. Press new ed. 1951) (1922) (discussing why "artificial markets" are not possible); Friedrich A. Hayek, *The Use of Knowledge in Society*, in INDIVIDUALISM AND ECONOMIC ORDER 77, 77–78 (1948) ("The economic problem of society is thus not merely a problem of how to allocate 'given' resources It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know.").

⁷¹ See Tom W. Bell, *Supply and Demand of Government Qua Natural Monopoly*, AGORAPHILIA (May 29, 2007, 10:28 AM), <http://agoraphilia.blogspot.com/2007/05/supply-and-demand-of-government-qua.html> (charting both express and nonexpress demand for government services).

II. THE SCALE OF CONSENT

Whether they realize it or not, judges, moralists, and political philosophers frequently treat consent as a matter of degree. This Part reviews and summarizes their deliberations, mapping consent's features and using them to chart a path to justification. Section A reveals the gradations in and between express consent, implied consent, and hypothetical consent, as well as the distinctions that mark, in mirror form, the differences between various types of *unconsent*. Refinements in that taxonomy show still further distinctions, such as those that contract law recognizes between implied consent established by performances, implied consent established by prior dealings, and implied consent established by usage in trade. Other types of consent likewise reveal various subtypes. Section B demonstrates that the resulting scale, which runs from the most consensual transaction to the least, measures justification.

A. Gradations of Consent

This Section describes three types of consent—express, implied, and hypothetical—in that order. Both of the first two types qualify as *actual* consent; they differ primarily in how that consent is communicated. As subsection 1 explains, a conscious affirmation, such as signature, a statement such as “I agree,” or some other communicative act,⁷² can convey express consent. In the case of implied consent, in contrast, a person may show acceptance of a default term by declining to expressly object to it.⁷³ Subsection 2 described the characteristics of implied consent in further detail. Hypothetical consent, covered in subsection 3, differs from its express and implied counterparts in that it ignores facts about what any given party does or does not want, instead relying on a counterfactual supposition about what the party *would have* wanted. Subsection 4 finds a similar pattern, in mirror form, among the varieties of *unconsent*. Each type of consent and *unconsent* includes various subtypes, as Figure 2, below, illustrates. Subsection 5 discusses *nonconsent*, a category distinct from both consent and *unconsent*.

⁷² Such as shipping conforming goods. See, e.g., U.C.C. § 2-206(1)(b) (2004) (prior) (providing that shipment of conforming goods in response to an order or offer to buy goods constitutes acceptance).

⁷³ See generally Barnett, *supra* note 69 (discussing default rules for terms implied in contracts).

Consent	Express	To Negotiated Exchange
	Implied	To Standardized Exchange
		Per Acts Under the Agreement
		Per Past Agreements
Unconsent	Hypothetical	Per Custom
		Individuated
	Hypothetical	Universal
		Universal
	Implied	Individuated
		Per Custom
Express	Implied	Per Past Disputes
		Per Acts Under the Dispute
	Express	To Collective Wrongdoing
		To Targeted Wrongdoing

Figure 2: Types and Subtypes of Consent and Unconsent

1. Express Consent

Express consent plays a vital role in both the law of contracts and the law of torts, though it serves different functions, and operates at different levels of sophistication, in each. Contract law devotes a fair amount of jurisprudential machinery to determining whether a contested agreement has won the express consent of all the parties.⁷⁴ Tort law, in contrast, asks simply whether there is “willingness in fact” for some presumptive rights violation to take place.⁷⁵ Absent an expression to the contrary,⁷⁶ tort law typically assumes that the violation of a right—such as battery of a person or conversion of goods—evokes the victim’s unconsent.⁷⁷

⁷⁴ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 3–109, 129, 139, 148–177, 200–230, 250–251, 273–287, 322–323, and 327–330 (1981) (discussing the situations where parties are contractually bound and thus consent to be bound).

⁷⁵ See RESTATEMENT (SECOND) OF TORTS § 10A (1965) (“The word ‘consent’ . . . denote[s] willingness in fact that an act or invasion of an interest shall take place.”); *id.* § 892(1) (1979) (“Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.”).

⁷⁶ Or even with one, if it comes tainted with mistake, misrepresentation, or duress. See *id.* § 892B(2) (“If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other’s misrepresentation, the consent is not effective for the unexpected invasion or harm.”).

⁷⁷ Unconsent marks a necessary condition of a tort claim, if for no other reason than that some plaintiff must complain. More substantively, because consent operates as a defense, tort claims typically arise out of unconsensual transactions. Unconsent cannot represent a sufficient condition of a tort claim, however, since many things about which people complain—the weather, a competitor, bad luck—do not give rise to legal causes of action.

At root, contract law embodies a set of rules defining when express consent justifies the invocation of judicial remedies. Approximately fifty percent of the sections in the *Restatement (Second) of Contracts* grapple with consent—how to define it, what effect it has, and how to patch up its absence.⁷⁸ Article 2 of the Uniform Commercial Code (U.C.C.) devotes one of its most powerful, subtle, and controversial sections to implicitly define consent.⁷⁹ In general, contract law will enforce only an agreement established by the express consent of all parties in privity.⁸⁰ It also remedies the breach of some mere promises—notably, those marked by strong proofs of express consent.⁸¹ In addition, contract law recognizes a distinction between dickered and form agreements, treating negotiated exchanges with more respect than standardized ones.⁸² Express consent thus includes two subtypes: consent to negotiated exchanges and consent to standardized exchanges.

Tort law, because it aims primarily to remedy unconsensual acts, treats express consent almost as an afterthought. Only about six percent of the sections in the *Restatement (Second) of Torts* grapple with defining the scope or effect of consent.⁸³ Express consent nonetheless supports a powerful defense in tort law, one tending to negate a claim for judicial redress.⁸⁴ Thus, for instance, the court in *McAdams v. Windham*⁸⁵ affirmed the denial of an assault-and-battery claim on the grounds that the plaintiff's decedent had expressly

⁷⁸ The *Restatement (Second) of Contracts* has 385 sections. Given the extent to which questions of consent pervade contract law, it can prove difficult to separate out those that define consent's meaning and legal function. I count 193 such sections. RESTATEMENT (SECOND) OF CONTRACTS §§ 3–109, 129, 139, 148–177, 200–230, 250–251, 273–287, 322–323, 327–330 (1981).

⁷⁹ See U.C.C. § 2-207 (2004) (prior).

⁸⁰ It may enforce such an agreement to the benefit of parties not in privity, however. See RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (defining when a party not in privity to a contract can enforce it).

⁸¹ See, e.g., *id.* § 90(1) (explaining the proposition that one who has led another to rely on a promise ought to compensate the other for any damage caused by reliance). Plainly, the promisor consents to making the sort of promise at issue in section 90(1). The promisee expresses consent to the promisor's offer not by acceptance, and thus not by agreement, but by substantial reliance on the promise. The promisor must reasonably foresee that reliance, however, and injustice must threaten to follow, before the law affords a remedy. See *id.* § 87(2) (defining effect of reasonably foreseeable detrimental reliance on offer).

⁸² See, e.g., *id.* § 211 (affording special defenses against standard form agreements).

⁸³ The *Restatement (Second) of Torts* has 900 active sections, of which some fifty define the scope or effect of consent. RESTATEMENT (SECOND) OF TORTS §§ 10A, 49–53, 55–62, 69, 167–175, 252–256, 496A–496G, 523, 583–84, 687, 694, 702, 704, 840C, 892–892D (1965, 1977, 1979).

⁸⁴ See *id.* § 892A(1) (1979) (“One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”).

⁸⁵ 94 So. 742 (Ala. 1922).

consented to engage the defendant in a boxing match that turned out deadly.⁸⁶ The court explained that “a blow thus inflicted in a friendly, mutual combat—a mere sporting contest—is not unlawfully inflicted, the parties being engaged in the violation of no law.”⁸⁷ Absent the decedent’s express consent, the defendant’s punches would have qualified as intentional torts; excused by consent, they became mere unactionable sport.⁸⁸ In the guise of the affirmative defense of assumption of risk, express consent can also negate a claim of negligence.⁸⁹

We might say that express consent plays a vital role in tort law, albeit in a negative way. Tort law reserves its remedies for those who do not agree to suffer some putative wrongdoing—parties who, in other words, do not face an affirmative defense of express or implied consent. More to the point, though, tort plaintiffs voice the opposite of express consent: express *un*consent. That, tort law’s most overriding concern, receives closer examination below.⁹⁰

2. Implied Consent

The law of contracts imposes many obligations by implication. An expression of acceptance presumptively takes effect when put out of possession of the offeree,⁹¹ for instance, and an agreement’s terms by default hew to usage in the relevant trade.⁹² Those implied terms win only contingent respect, however; express unconsent can negate the imposition of obligations justified only impliedly or by default. A contract’s offeror can thus opt out of the presumed contract rules for defining acceptance and instead require, say, a firm handshake.⁹³ Similarly, terms of art keep their technical meaning “[u]nless a different intention is manifested” by the parties.⁹⁴

Contract law recognizes subtle shadings within implied consent, distinguishing between terms implied by performance under the

⁸⁶ *Id.* at 743.

⁸⁷ *Id.*

⁸⁸ Tort law also recognizes express consent as a defense to unintentional torts, such as those alleging negligent or reckless conduct. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 496B (1965) (“A plaintiff who . . . expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm . . .”).

⁸⁹ *See id.* §§ 496A–496G.

⁹⁰ *See infra* Part II.A.4.

⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1981).

⁹² *See id.* § 202(3)(b) (explaining that technical terms and words of art are given their technical meaning when used in their relevant trade).

⁹³ *See id.* § 30(1) (providing that the offeror may dictate the terms of acceptance); *see also id.* § 63 (prefacing the default provision that an acceptance takes place when put out of the offeree’s possession with the words “[u]nless the offer provides otherwise”).

⁹⁴ *Id.* § 202(3)(b).

agreement,⁹⁵ terms implied by past dealings between the parties, and terms implied by usage in the trade.⁹⁶ Again, those proofs of consent can rouse judicial action only if not trumped by express consent; the parties to a contract can explicitly agree to terms different from those presumed by prior performance, past dealings, or common custom.⁹⁷

Like contract law, tort law respects implied consent. For example, a community's customs establish default presumptions about whether silence or inaction constitutes consent—a presumption that only express *unconsent* can trump.⁹⁸ More generally, given that the defense of assumption of risk can be used even in the absence of express consent,⁹⁹ implied consent has a powerful effect on the scope of tort law. The common-law maxim *volenti non fit injuria*¹⁰⁰ speaks to express and implied consent alike, foreclosing otherwise valid tort claims as freely chosen by the supposed victim.

Tort law treats implied consent with less precision than contract law does. The *Restatement (Second) of Torts* observes, “Courts sometimes speak of implied consent to conduct when the real holding is that the conduct was proper under the circumstances.”¹⁰¹ In other instances, tort cases blur the lines between express and implied consent, asking simply whether an alleged victim actually consented to an invasion of right.¹⁰² That rough-and-ready approach to implied consent should surprise no seasoned student of the common law, though; torts have always primarily concerned unconsensual transactions, leaving detailed treatment of consensual ones to contract law.

⁹⁵ See U.C.C. § 2-208 (2004) (prior) (explaining that course of performance shall be used to interpret the language of the contract); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981) (explaining the hierarchy of interpretation starting with express terms, then course of performance, course of dealing, and usage of trade in descending order); *id.* § 202(4) (explaining that when an agreement involves repeated transactions by either party, course of performance is given great weight).

⁹⁶ See U.C.C. § 1-205 (2004) (prior) (defining course of dealing and usage of trade); RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

⁹⁷ See *supra* notes 95–96.

⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 892 cmt. d (1979) (“In determining whether conduct would be understood by a reasonable person as indicating consent, the customs of the community are to be taken into account. This is true particularly of silence or inaction.”).

⁹⁹ See *id.* § 496 (1965) (specifying when assumption of risk may be implied).

¹⁰⁰ “The principle that a person who knowingly and voluntarily risks danger [is deemed to have assumed the risk and] cannot recover for any resulting injury.” BLACK’S LAW DICTIONARY 1710 (9th ed. 2009).

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 892 reporter’s note cmt. c (1982).

¹⁰² Thus, for instance, the court in *Bradford v. Winter*, 30 Cal. Rptr. 243 (Cal. Dist. Ct. App. 1963), affirmed a finding that, by *expressly* consenting to having his lungs examined, the plaintiff further *impliedly* consented to “the taking of a biopsy, a normal incident of a bronchoscopy.” *Id.* at 246. The defendant physician thereby successfully defended against the patient’s battery claim.

3. Hypothetical Consent

Hypothetical consent plays little role in contract law proper; rather, it tends to mark a transaction as subject to the rules of quasi-contract, an area where courts remedy only salient injustices and offer only limited forms of relief.¹⁰³ Thus, for instance, did the plaintiff doctor in *Cotnam v. Wisdom*¹⁰⁴ win restitution for the medical aid he administered to an unconscious man found lying in the street.¹⁰⁵ Anyone would have agreed to receive—and pay for—medical care in like circumstances. Notably, however, the *Cotnam* court declined to go the further step of allowing the plaintiff to exercise against his unconscious (deceased, and not incidentally, wealthy) patient the same sort of price discrimination that the doctor routinely exercised on his conscious, contracting ones.¹⁰⁶ Universal hypothetical consent proves easier to establish, and weaker in effect, than hypothetical consent premised on what a particular individual would have done.¹⁰⁷

In tort law, physicians rendering emergency care on unconscious victims routinely win a defense against battery on grounds that the alleged victim *would have consented* to treatment *if he or she had been conscious*.¹⁰⁸ That represents a species of hypothetical consent, one that courts have carefully distinguished from express or implied consent. Thus, for instance, the court in *Kritzer v. Citron*¹⁰⁹ observed that “in an emergency situation where a doctor is privileged to proceed with necessary surgery, there is actually no consent whatsoever to an invasion of the patient’s interests. . . . In reality, the person whose right is invaded has not by word or act expressed any

¹⁰³ See, e.g., *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966) (“[Quasi contracts] rest solely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity. Courts employ the fiction of *quasi* or constructive contract with caution.”).

¹⁰⁴ 104 S.W. 164 (Ark. 1907).

¹⁰⁵ *Id.* at 165–66.

¹⁰⁶ *Id.* at 167 (“[T]he unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. . . . [T]here is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered.”).

¹⁰⁷ See RESTATEMENT (FIRST) OF RESTITUTION § 116 cmt. b (1937) (“[R]estitution is not permitted to one who has reason to believe that the person, if fully competent, would not, were he in a position to do so, be willing to accept the services.”).

¹⁰⁸ See RESTATEMENT (SECOND) OF TORTS § 892A cmt. 3, illus. 2 (1979) (explaining that if a surgeon performing exploratory surgery on a patient under anesthesia discovers a critical condition that “requires immediate action to save [the patient’s] life or to prevent serious harm to him,” consent for that action may obtain).

¹⁰⁹ 224 P.2d 808 (Cal. Ct. App. 1950).

actual or apparent assent.”¹¹⁰ But, as is generally the case, express unconsent can trump hypothetical consent. An emergency patient who wakes up in the care of volunteers can thus rightfully command that they cease rendering aid, for instance, and someone who clearly forbids a life-saving procedure can bring suit for battery against any doctor—even a well-meaning one—who provides unconsensual care.¹¹¹

4. Varieties of Unconsent

All forms of consent detailed above¹¹² repeat again in unconsensual form. Thus, for instance, a party might *expressly* refuse to accept some proposition or transaction, testifying, “I do not consent!” So, too, we might describe an exchange as *impliedly* unconsensual because it does not conform to established practices. We thus condemn conversion as a matter of course and afford legal remedies even to victims who have never announced, “I object to all conversion of my property, now and hereafter.” Lastly, when we postulate that a person would not have agreed to something, we mark it as *hypothetically* unconsensual. Just as consent comes in express, implied, and hypothetical forms, in other words, so does *unconsent*.

Consent’s subtypes also repeat in the negative range. We distinguish transactions that would hypothetically evoke protest *generally* from transactions that would evoke the objections of a *particular individual*. Even though both refer to hypothetically unconsensual transactions, “Most people like peanut butter,” influences our judgment differently from, “I would never eat a peanut-butter sandwich; it would trigger my allergy.” The former speaks universally, and can only weakly justify a social transaction. The latter speaks more individually and, when considered as a basis for judging what food suits the speaker, more convincingly.¹¹³

Just as implied consent divides into three subtypes—per acts under the agreement, per past agreements, and per custom—implied unconsent comprises the subtypes per custom, per past disputes, and per acts under the dispute. Here as generally, unconsent mirrors consent. That should not surprise, given that tort law defines

¹¹⁰ *Id.* at 811.

¹¹¹ See, e.g., *Curtis v. Jaskey*, 759 N.E.2d 962 (Ill. App. Ct. 2001) (involving a patient who brought an action for battery against her physician for performing an emergency episiotomy despite her denial of consent).

¹¹² See *supra* Parts II.A.1–3.

¹¹³ The latter speaks more powerfully, too. As discussed *infra*, at Part II.B, universal hypothetical unconsent has more justificatory force—or perhaps more clearly, *less anti-justificatory force*—than individuated hypothetical unconsent does).

actionable wrongs with an eye to the defense of consent. Observing that “contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit,” the *Mohr v. Williams*¹¹⁴ court concluded that, in the tort suit before it, “[n]o reason occurs to us why the same rule should not apply between physician and patient.”¹¹⁵

We can thus distinguish between implied contract terms contrary to the parties’ performances, contrary to their past dealings, and contrary to usage in trade. Each of those three subtypes of implied unconsent corresponds to a different level of enforceability,¹¹⁶ marking each type of unconsent as unique and worthy of particularized consideration. Tort courts seldom have occasion to delve into such subtleties, granted; happily, we live in a world where consensual exchanges far exceed unconsensual ones, providing a larger canvas for detailed portraiture. Still, courts sketched the outlines, in tort law, of implied unconsent, suggesting that it includes some fine distinctions.¹¹⁷

Like express consent, express *un*consent contains subtle shadings. Tort law reserves its strongest remedy—punitive damages—for maliciously personal, intentional wrongs.¹¹⁸ Protests to impersonal and unintentional wrongs, in contrast, tend to evoke mere remedies for negligence.¹¹⁹ Though each of those and other forms of express

¹¹⁴ 104 N.W. 12 (Minn. 1905).

¹¹⁵ *Id.* at 15.

¹¹⁶ As discussed *infra*, at Part II.B., those distinctions order those three types of unconsent along a scale of justification.

¹¹⁷ For instance, the court in *Curtis* held that “under usual circumstances, the emergency exception may not be used to override the express wishes of a patient who withholds consent to a medical procedure.” *Curtis v. Jaskey*, 759 N.E.2d 962, 967 (Ill. App. Ct. 2001). The court also allowed, however, that “it is possible to imply consent despite an earlier refusal to assent to a particular procedure. The key consideration here is whether the patient intended the refusal to apply in the circumstances under which the treatment was rendered. If the circumstances under which the procedure was performed were known to the patient, it is likely that the patient intended the refusal to apply.” *Id.* at 968. In effect, the court held that the plaintiff’s express unconsent to an episiotomy would trump the consent implied under the doctrine of medical emergency, but left room for facts showing that, in context, her refusal did not extend to the treatment given.

¹¹⁸ See RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (“Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”).

¹¹⁹ See *id.* § 901 (describing the general purposes of tort law damages). Torts such as innocent trespass or nuisance may also evoke injunctive relief, of course. See *id.* ch. 48, intro. note (discussing the remedy of injunction). But that also proves true of such intentional torts as “assault and battery; false imprisonment; wrongful arrest; . . . [and] malicious prosecution and abuse of process,” which though “less frequently the subject of suit for injunction,” prove especially apt to merit injunctive relief where otherwise the wrong would threaten to recur. *Id.*; see also *id.* § 936(1) (including among the primary factors to be considered in determining the appropriateness of injunctive relief “the nature of the interest to be protected” and “the relative adequacy to the plaintiff of injunction and of other remedies”).

unconsent rouse our righteous indignation, our reactions vary subtly from case to case. Most of us would ordinarily object more strongly to suffering a gunshot aimed and fired by a vicious criminal than we would to suffering the same wound accidentally and purely caused by a freak meteorite. Despite suffering the same amount of pain after the fact, we would complain more vehemently about the former than the latter, condemning the criminal but stoically shrugging off the vagaries of the uncaring cosmos. Even before the fact, most of us would, if forced, choose the latter fate over the former. Holding all else equal, who would not prefer to avoid suffering ill-will in addition to bloodshed? Express unconsent thus mirrors express consent, copying its structure in negative form.¹²⁰

Unconsent here stands for something distinct from nonconsent.¹²¹ For much of what we observe, the labels “consent” and “unconsent” simply do not apply. Someone who describes an unwelcome rain shower as “unconsensual” (excepting, of course, someone taking poetic license) commits a category error. We do best to think of all such phenomena as “nonconsensual,” reserving consent talk for descriptions of social exchanges.¹²² Only a person can consent, after all. And only that power to consent makes it worthwhile to consider what it means when a person *unconsents*.

5. *Nonconsent*

“Nonconsent” marks a category distinct from “unconsent.”¹²³ The latter concerns transactions that generate anti-consensual reactions in at least one party, ranging from hypothetical suppositions to violent and vocal disagreement. Nonconsent arises when a party neither agrees nor disagrees to some condition, whether because consent has no role to play at all or because it has been willfully suspended. *Unconsensual* transactions include assaults and trespasses. *Nonconsensual* transactions include such things as rambling at will through a public forest or wavering on whether to buy a TV, answering the seller’s pitch with, “I still haven’t decided. Will you throw in a wall mount?” Such transactions do not trigger any legal remedy; they neither trespass on any right nor create new obligations. Nonconsensual transactions rely on an extant structure of rights,

¹²⁰ Like hypothetical and implied unconsent, the subtypes of express consent also range along a scale of justification. See *infra* Part II.B.

¹²¹ For a discussion of nonconsent, see *infra* Part II.A.5.

¹²² I recognize that not everyone hews to that suggested usage. I explain and use it here, though, hoping that more will.

¹²³ I thank Kurt Eggert for convincing me that nonconsent deserves discussion as something interestingly distinct from unconsent.

granted, which provide the background on which free people paint their life projects. To a great extent, and happily, we live in a world largely replete with nonconsensual transactions, such as the many small and peaceful moments that fill everyday life. Truly, that subject merits study. Here, though, I focus on the dyad of consent and unconsent, the opposing forces that drive much legal, moral, and economic reasoning.

B. Evaluating the Justificatory Force of Different Types of Consent

As Part I demonstrates, the language of legal, ethical, and economic reasoning evidently recognizes many different types of consent. How the literature relates those different sorts of consent to one another proves a bit more difficult to discern, however. Here, merely quoting the authorities will not suffice. Rather, we must seek out a hidden order, a ranking of consent implicit in practice and confirmed by theory. This Section takes up that project, and posits a scale running from express consent, through implicit consent, and down to hypothetical consent. The scale continues into the negative range—"below the x-axis," one might say—running from hypothetical unconsent, through implied unconsent, down to express unconsent. Figure 3, below, illustrates.

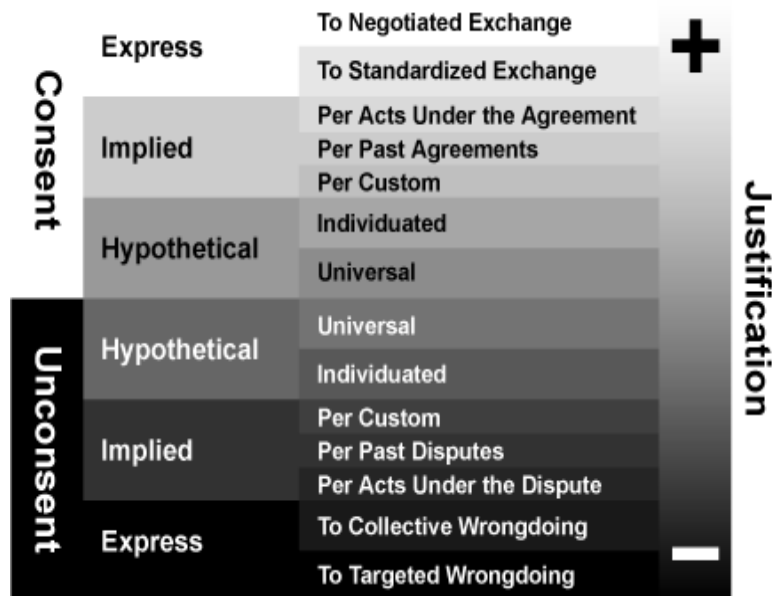


Figure 3: The Scale of Consent

What does the scale in Figure 3 measure? To put it most simply, it measures not simply different *types* of consent but their *amounts*. An expressly consensual transaction claims the backing of more consent than a hypothetically consensual one can claim, for instance, though both rest on more consent than a transaction that, because someone would have objected or did object to it, falls into the negative range. To describe consent in those terms perhaps suggests that we can measure it in precise units. In fact, however, consent proves too complicated and context-dependent to submit to reliable quantification.¹²⁴ In fuzzier but more practical terms, the scale of consent affords a rough measure of how justified we regard a particular transaction. For instance, we typically treat an expressly consensual transaction as justified, not only respecting its terms, as when tort law treats consent as a defense to battery, but often even helping to enforce them, as when contract law imposes expectation damages for breach. Other types of consent and unconsent follow in succession, each corresponding to less justificatory power than the one before. Subsections 1 and 2 describe the justificatory power of the types and subtypes of consent and unconsent, respectively. As that study shows, the scale of consent measures degrees of justification.

1. Types and Subtypes of Consent

Courts and commentators distinguish between different levels of justification even within the bounds of express consent. In contract law, for instance, an agreement between fully informed parties having equal bargaining power—as when a shopper strikes a bargain at an open-air market, for instance, or when a corporation signs a negotiated commercial lease—establishes the ideal for express consent.¹²⁵ We afford those sorts of transactions the greatest respect. In comparison, a party's express consent to a standard form agreement strikes us as more susceptible to second-guessing.¹²⁶ Thus, for instance, might a court decline to enforce such an agreement if convinced that a more knowledgeable party *would not have agreed* to

¹²⁴ The economic justification for valuing consent does suggest, however, that we might move toward more exact measures of consent by applying information theory to it. See *supra* Part I.C; see generally CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (paperback ed. 1963) (arguing that Shannon's communication theory has important applications to the whole problem of communications in society).

¹²⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining "contract"); *id.* § 71 (describing the requirements of a bargained-for exchange); *id.* § 344 (listing the interests that the judicial enforcement of contracts protect).

¹²⁶ See *id.* § 211(3) (limiting enforceability of standardized agreements where one party "has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term").

it (showing hypothetical unconsent) and that people *customarily do not agree* to it (showing implied unconsent).¹²⁷

Even when circumstances leave it out of reach, express consent continues to set the standard for judging such surrogates as hypothetical and implied consent. The closer those alternatives come to mirroring express consent, the better claim they have to our respect. When interpreting a contract, for instance, courts begin with the language to which the parties have expressly agreed. If vagueness persists, courts try to fill the interpretative gap with evidence of how the same parties have interpreted the same contract on prior occasions. Failing that, courts favor evidence of how the parties have acted in prior dealings under *other* contracts. Should those interpretive tools still prove inadequate, courts fall back on usage in trade—evidence of how similarly situated parties have customarily interpreted the sort of language in question. Because they offer progressively weaker proofs of the parties' agreement, the subtypes of implied consent based on prior performances, prior dealings, and usage in trade give progressively weaker justifications for invoking relief under contract law.¹²⁸

A similar gradation appears in the subtypes of hypothetical consent. A court's interpretation of an agreement might involve consideration of what a particular party would have agreed on, for instance. Where one party to a standard form agreement has reason to believe what the other party would have agreed to, a court may enforce only those terms to which the other party would have hypothetically accepted, letting drop out of the contract terms that would have evoked the other party's disagreement.¹²⁹ Thus, for instance, a court might refuse to enforce an unexpected indemnification clause put in tiny print by the party it favors and understandably overlooked by the other.¹³⁰ Individuated hypothetical

¹²⁷ See *infra* Part III.A (applying graduated-consent theory to standard form agreements).

¹²⁸ See U.C.C. §§ 1-205 (2004) (prior) (defining course of dealing and usage of trade); *id.* § 2-208 (explaining that course of performance shall be used to interpret the language of the contract); RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981) (Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.); *id.* § 203 ("In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable: . . . (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade . . ."); *id.* § 211(3) (explaining that such a "term is not part of the agreement.').

¹²⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (explaining that such a "term is not part of the agreement").

¹³⁰ See, e.g., *Cal. Tanker Co. v. Todd Shipyards Corp.*, 206 F. Supp. 872, 874 (S.D.N.Y.

consent likewise plays a role in validating contracts suspected of relying on one party's intentional failure to disclose facts that would have, had they been known to the other party, discouraged assent.¹³¹

In extreme cases, we might lack recourse to any sort of actual agreement at all. A court might then invent a hypothetical quasi-contract to determine the rights of contesting parties.¹³² Courts do so hesitantly, however—only when no stronger form of consent can resolve the issue¹³³ and to compensate only vital aid.¹³⁴ In so doing, courts distinguish between what *any* reasonable person would have accepted and what the *particular* person in question would have accepted, favoring the latter, individuated hypothetical consent over the former, universal sort.¹³⁵

Contract law thus places the three main types of consent—express, implied, and hypothetical—into an ordered ranking, ranging from most consent rich to the least. Those types include various subtypes, likewise ranged along a scale of justification, as illustrated in Figure 3, *supra*.

Although it understandably treats consent with rather less detail than contract law does, tort law likewise recognizes the different justificatory power of different types of consent. Someone who has expressly agreed to suffer an offensive touching, as in a boxing match, thereby forfeits his battery claim.¹³⁶ Even though by default we do not consent to being struck, express consent outweighs implied or hypothetical *un*consent in such cases.

1962) (granting summary judgment to a shipowner to enforce an indemnity clause in a contract with a shipyard despite the fine print in the contract that modified the clause).

¹³¹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 161(a)–(c), 162, 163 (describing the risks that one party takes when that party makes, or fails to make, an assertion that may affect the other party's willingness to enter into the contract).

¹³² See RESTATEMENT (FIRST) OF RESTITUTION § 116 (1937) (allowing restitution for vital aid rendered to a party unable to give consent).

¹³³ See *id.* § 116(d) (“A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if . . . (d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other's consent would have been immaterial.”).

¹³⁴ See *id.* § 116(b) (allowing restitution only for “things or services . . . necessary to prevent the other from suffering serious bodily harm or pain”).

¹³⁵ See RESTATEMENT (SECOND) OF TORTS § 49 cmt. a, illus. 2 (1965) (explaining that a doctor suffers no liability for performing a tonsillectomy on an unconscious patient without that patient's permission—a nonemergency procedure that generic, universal hypothetical consent cannot excuse—if the patient “has had trouble with his tonsils and desires that [the doctor] remove them,” because even though the patient “has not assented to the tonsillectomy, his actual willingness to submit to that operation constitutes consent to it”).

¹³⁶ See *Hart v. Geysel*, 294 P. 570, 572 (Wash. 1930) (holding that the executor of a prizefighter's estate could not recover for wrongful death when the prizefighter's mortal injury resulted from his consent).

2. Types and Subtypes of Unconsent

Tort law, more than contract law, illuminates the dark territory of unconsent, showing how its various types and subtypes range along a scale of justification. Express unconsent—such as the cry “Stop hitting me!”—evokes tort remedies more readily than does mere implied or hypothetical unconsent. The latter two types of unconsent might, after all, face countervailing defenses based in express consent.¹³⁷ Similarly, despite the fact that most people would object to suffering bodily injury, courts sometimes excuse hypothetically unconsensual harms as impliedly assumed risks.¹³⁸ Tort law thus ranks express unconsent as less justifiable than implied unconsent, and implied unconsent as less justifiable than hypothetical unconsent.

Though tort law does not portray unconsent with as much detail as contract law devotes to consent, leaving the exact contours of unconsent’s subtypes less distinct, each feature of consent necessarily casts a unique shadow in unconsent. Just as hypothetical consent based on the particular preferences of an unconscious patient can excuse an elective operation,¹³⁹ for instance, so too can the individuated hypothetical unconsent of an unconscious patient known to disfavor a particular doctor bar that doctor from rendering the sort of emergency care that universal hypothetical consent would ordinarily excuse.¹⁴⁰ Parallels likewise appear when we compare the details of implied consent with those of implied unconsent. Since they accord less respect to consent implied by customarily agreed-on terms than they do to consent implied to past agreements, for instance, courts of necessity regard implied unconsent to customarily objectionable terms as less objectionable than the sort of unconsent implied by past disagreements between the parties.¹⁴¹ In express

¹³⁷ See RESTATEMENT (SECOND) OF TORTS § 496B (1965) (explaining that a plaintiff cannot recover for an injury resulting from negligent or reckless conduct when that plaintiff expressly agrees to accept the risk of harm, unless the agreement is invalid or contrary to public policy).

¹³⁸ See *id.* § 496C (explaining that a plaintiff who understands the risk of harm to himself cannot recover for an injury as a result of the defendant’s conduct if that plaintiff voluntarily chooses not to remove himself from the area of risk).

¹³⁹ See *id.* § 49 cmt. a, illus. 2 (“Upon the recommendation of A, his doctor, B assents to an operation for the removal of a septum from his nose. Nothing whatever is said about performing a tonsillectomy. Actually B has had trouble with his tonsils and desires that A remove them too, but he forgets to mention it. A removes the septum and the tonsils while B is under a general anesthetic. Although B has not assented to the tonsillectomy, his actual willingness to submit to that operation constitutes consent to it and A is not liable to B.”).

¹⁴⁰ See RESTATEMENT (FIRST) OF RESTITUTION § 116 cmt. b (1937) (“[A] physician who has been summoned to attend an unconscious sick person and who, from his knowledge of the patient, knows that his own services or the services of any physician would not be acceptable, cannot recover for his services.”).

¹⁴¹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 892D(b) (1979) (affording an actor a

unconsent, too, we see echoes of consent's subtypes. Rights violations inflicted bureaucratically rouse less indignation—indeed, in some cases carry a legal imprimatur—than wrongs inflicted with malicious regard to a particular individual. As Joseph Stalin, a master of unconsent, allegedly observed, “A single death is a tragedy, a million deaths is a statistic.”¹⁴²

3. *Shades of Justification*

Though they naturally tend to address the issue in theoretical terms, moral and political philosophy join the law in ranging various types of consent along a spectrum of justification. Thus, for instance, did Locke offer implied consent (“tacit consent,” in his usage) to government only as a second-best alternative to express consent, which “[n]o body doubts” creates very strong obligations.¹⁴³ Almost everyone—including Locke—discounts the possibility that governments can claim to rule by the express consent of their subjects.¹⁴⁴ Those who would justify the State thus face a trade-off between the sort of consent that can be had and the sort of consent that matters.¹⁴⁵ That sort of calculation impliedly recognizes that express consent matters more than implied consent does.

defense for injuring another in an emergency situation, but only if there is no opportunity to obtain consent and “the actor has no reason to believe that the other, if he had the opportunity to consent, would decline”). Past disagreements can provide sufficient “reason to believe” another would unconsent, but so can other proofs. *See id.* § 892D cmt. a (“[T]he [excused] conduct must be so clearly and manifestly to the other’s advantage that there is no reason to believe that the consent would not be given. If the actor knows or has reason to know, because of past refusals or other circumstances, that the consent would not be given, he is not privileged to act.”).

¹⁴² JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 686 (Justin Kaplan ed., Little, Brown & Co. 17th ed. 2002) (1855).

¹⁴³ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 365 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

¹⁴⁴ That Locke harbors such doubts appears evident from the effort he expends addressing the “difficulty” of determining “how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it at all.” *Id.* at 365–66. That would hardly be necessary if express consent were obtained. *Cf.* DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT* 13 (1991) (“[W]e do not observe this sort of consent on a scale large enough to justify the state.”). Even Hobbes, despite claiming that the State arises “when a *multitude* of men do agree” to form it, recognizes the impossibility of universal express consent when he argues that implied consent binds dissenters. THOMAS HOBBS, *LEVIATHAN* (1651), *reprinted in* 3 *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY*, 1, 159, 162–63 (Sir William Molesworth ed., John Bohn 1839).

¹⁴⁵ *See, e.g.,* DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 185 (1989) (“Consent theorists face an imposing structural dilemma [T]hey need a conception of consent that is descriptively plausible But that description also needs to be normatively robust These two requirements pull in two different directions.”).

Despite their appealing clarity, therefore, attempts to cast justification in black-and-white terms run the risk of obscuring important distinctions.¹⁴⁶ Setting up express consent as a necessary and sufficient condition for justification would naively gloss over the complexity of the real world. In borderline cases, express consent proves hard to define. How should we interpret an agreement, such as the one that Ulysses made with his crew before they braved the sirens, that purports to limit a party's freedom of revocation?¹⁴⁷ Can a *child* give express consent? How about someone desperately seeking protection from a murderous assailant in hot pursuit? In still other cases, express consent cannot be had. A dispute over an ambiguous contract might require a judgment based on the parties' implied consent to default terms, for instance,¹⁴⁸ while protecting an unconscious patient's rights may call for the invocation of hypothetical consent.¹⁴⁹

In these and other cases, using express consent as an either/or test of justification would leave us unable to choose between a wide spectrum of less-than-perfect circumstances. But no adequate theory of justification can turn a blind eye to the messiness of the real world. Express consent still has a role to play, but not as a threshold test. Rather, it should serve as an ideal standard for ranking surrogates such as implied and hypothetical consent. The nearer these substitutes come to obtaining a person's express consent, the better they justify the obligations that they allegedly create.

III. GRADUATED-CONSENT THEORY IN PRACTICE

This Part puts graduated-consent theory to work, applying it to such longstanding problems as the legal enforceability of standard form agreements, the justification of political coercion, and the meaning of a constitution. Section A explains judicial skepticism

¹⁴⁶ Perhaps that explains why Barnett has argued for viewing the inconsistent application of a State's laws, as when, in particular, the State asserts a monopoly on the initiation of coercion, as no more than one of many factors that should go into determining whether or not a State is justified. See generally Randy E. Barnett, *The Virtues of Redundancy in Legal Thought* 38 CLEV. ST. L. REV. 153 (1990). The approach here, in contrast, treats unconsensual exchanges, such as those marred by coercion, presumptively unjustified.

¹⁴⁷ As that example alone suggests, we should generally take such agreements seriously. For a more detailed examination of the question, from a legal point of view, see generally Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693 (2003).

¹⁴⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981).

¹⁴⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 892D (1979) (protecting the actor from liability where an emergency makes it necessary for him to act before there is opportunity to obtain the other's consent and the actor has no reason to believe that the other would decline to consent if given the opportunity).

about the enforceability of standard form agreements as a reflection of their reliance on a second-rate species of consent. Section B analyzes the justification of political coercion as relative both to alternative social arrangements and to individual parties. It does not suffice, on that view, to simply call a State “justified” or “unjustified”; we should instead describe it as more or less justified than an alternative institution with respect to a particular, would-be subject. Section B concludes with number of specific suggestions about how to render the United States more justified. Consistent with that patriotic theme, Section C outlines a consensualist theory of constitutional meaning, one that, in contrast to originalist and “living constitution” theories, would read a constitution—in particular, *the* Constitution—so as to maximize the consent of those whom it claims to govern.

A. Standard Form Agreements

Many scholars question whether courts should enforce a contract against someone who failed to have complete information about the contract’s terms and who lacked a range of attractive alternatives to agreeing to it.¹⁵⁰ To the contrary, other authorities, including most courts, regard even take-it-or-leave-it, standard form agreements, formed between powerful legal entities and relatively powerless natural persons, as not only *prima facie* valid, but moreover as boons for social utility.¹⁵¹ What does a theory of graduated consent say about that debate?

Both negotiated agreements between equals and standard form agreements between *unequals* can tout the justificatory power of express consent. In either case, of course, an invalidating doctrine like fraud¹⁵² or duress¹⁵³ might lead us to second-guess facial proofs of

¹⁵⁰ See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 642 (1943) (“[F]reedom of contract must mean different things for different types of contracts.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983) (“[Q]uite contrary to ‘ordinary’ contract law, the form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable.”).

¹⁵¹ See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593–94 (1991) (describing the benefits to both parties of enforcing a forum-selection clause in a standard form agreement); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (“Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general”); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (“Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution.”).

¹⁵² See RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (defining a fraudulent misrepresentation); *id.* § 164 (defining when fraud makes a contract voidable).

¹⁵³ See *id.* § 175 (defining when duress by threat makes a contract voidable).

consent, regard the transaction as unjustified, and decline to enforce the supposed agreement. But those problems afflict all contracts, whether dickered between equals or offered only on a take-it-or-leave-it basis to isolated and weak individuals. On that front, at least, standard form agreements get as much legal respect as any other expressly consensual agreement.¹⁵⁴

In other respects, however, the law regards standard form agreements with suspicion. They alone can suffer partial or complete invalidation if a party fails to reveal a particular contract term to which the other party, had he or she been put on notice, would have disagreed.¹⁵⁵ More particularly, the U.C.C. calls for enforcing only "conspicuous" exclusions or modifications of implied warranties,¹⁵⁶ a mechanism evidently designed to protect individual consumers from the boilerplate of large, cunning retailers. The U.C.C. also offers consumers special protections in their dealings with merchants, such as by preventing the common law's "last-shot rule"¹⁵⁷ from imposing contract terms on consumers,¹⁵⁸ ensuring that consumers continue to enjoy the common law's standards for option contracts,¹⁵⁹ and protecting consumers from unwittingly agreeing to merchant

¹⁵⁴ Whether or not they evoke the same moral weight remains less clear. To speak frankly, but not disparagingly, practical philosophers have not had as much, as long, and as carefully documented experience dealing with questions surrounding the justification of contracts as courts and legal commentators have. Even folk wisdom remains a bit shaky on this front, given that standard form agreements have become part of everyday life only relatively recently, and in only a few cultures. For what it is worth, however, it bears noting that folktales typically treat deals with the devil as presumptively binding. Only by satisfying the devil's terms—often by way of equally devilish cleverness—can the hero win freedom. *See, e.g.,* STEPHEN VINCENT BENÉT, *THE DEVIL AND DANIEL WEBSTER* (1936), reprinted in *FAVORITE TRIAL STORIES* 204 (A. K. Adams ed. 1966).

¹⁵⁵ *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

¹⁵⁶ U.C.C. § 2-316(2) (2004) (prior). *See also* § 2-316(3) (giving effect to expressions like "as is" in consumer contracts only if "set forth conspicuously" in the writing).

¹⁵⁷ The last-shot rule risks treating acceptance of goods as acceptance of all terms attached to them, even if those terms differ from those discussed in the party's negotiations and even if the accepting party does not notice the difference. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 59 (specifying that a reply to an offer that contains different or additional terms from those of the offer "is not an acceptance but is a counter-offer"); *id.* § 50(1) (defining acceptance as a manifestation of assent "in a manner invited or required by the offer"); *id.* § 69(1)(a) (providing that receipt of benefits presumably offered conditional on compensation can operate as acceptance).

¹⁵⁸ *See* U.C.C. § 2-207(2) (2004) (prior) (providing that an acceptance or confirmation with additional terms must, unless between merchants, receive express consent to become effective); *see also* *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972) (interpreting the language of section 2-207(1) so as to foreclose mere acceptance of goods from proving acceptance of proposed additional terms).

¹⁵⁹ *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (requiring at least a recitation of purported consideration to support an option contract) *with* U.C.C. § 2-205 (2004) (prior) (providing that option contracts are not revocable for lack of consideration)..

contracts that would otherwise curtail modification or rescission rights.¹⁶⁰ More generally, many courts regard standard form agreements as, by default, *procedurally* unconscionable.¹⁶¹ Upon proof of some accompanying *substantive* unconscionability,¹⁶² such as a price far above market¹⁶³ or an abandonment of vital legal rights,¹⁶⁴ such courts will decline to specifically enforce the contract.¹⁶⁵ A court might even go so far as to declare such a supposed agreement void.¹⁶⁶

The law thus regards the sort of consent that justifies enforcing standard form agreements as distinctly weaker than the sort of consent that justifies enforcing agreements negotiated between equals. Dickered agreements, because they more accurately reflect their parties' interests, generally do better than standard form agreements in achieving all those same ends that make consent so

¹⁶⁰ See U.C.C. § 2-209(2) (2004) (prior). Because the provision requires a separate signature "except as between merchants," it would presumably also give a merchant receiving a form agreement from a consumer like protections. That logical possibility does not matter much in practice, though; section 2-209(2) plainly aims to protect consumers from merchants offering form agreements.

¹⁶¹ See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (observing that the element of procedural unconscionability "is generally satisfied if the agreement constitutes a contract of adhesion"); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981) (explaining that standard form agreements "bear within them the clear danger of oppression and overreaching"). In some courts, qualifying as an adhesion contract does not alone render a contract procedurally unconscionable. See, e.g., *Zuver v. Airtouch Commc'ns*, 103 P.3d 753, 760 (Wash. 2004) ("[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable."). That caution appears, however, to be tied to the view that procedural unconscionability alone—as opposed to procedural and substantive unconscionability together—may render a contract or contract term unenforceable. See *id.* at 760 n.4 ("We have not explicitly addressed whether a party challenging a contract must show both substantive and procedural unconscionability. Our decisions in *Nelson* and *Schroeder*, however, analyze procedural and substantive unconscionability separately without suggesting that courts must find both to render a contract void. . . . In its amicus brief, the Association of Washington Business urges us to join the majority of courts that require proof of both substantive and procedural unconscionability. This court, however, need not consider issues raised only by amicus, and we decline to do so in this case.").

¹⁶² See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (Cal. 2000) ("If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules—legislative or judicial—operate to render it [unenforceable].'" (alteration in original) (quoting *Graham*, 623 P.2d at 173l. 3d at 820) (footnote omitted)).

¹⁶³ See, e.g., *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759 (N.Y. Dist. Ct. 1966) (refusing to enforce standardized form agreement requiring payment of \$1,364.10 for a freezer worth \$348), *rev'd on other grounds*, 281 N.Y.S.2d 964 (N.Y. App. Term 1967).

¹⁶⁴ See, e.g., *Armendariz*, 24 Cal. 4th at 118 ("[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.").

¹⁶⁵ See, e.g., *McKinnon v. Benedict*, 157 N.W.2d 665, 671 (Wis. 1968) ("We find that the inadequacy of consideration is so gross as to be unconscionable and a bar to the plaintiffs' invocation of the extraordinary equitable powers of the court.").

¹⁶⁶ See, e.g., *Armendariz*, 24 Cal. 4th, at 124 ("If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced.").

appealing: promoting the pursuit of happiness, safeguarding individual rights, cultivating virtue, and maximizing social wealth. In other words, standard form agreements embody less consent than agreements negotiated between equals do.

What makes the standard form agreement a weaker proof of consent? The problem is not evidentiary in the usual sense; indeed, a standard form agreement typically touts such administrative virtues as embodiment in a writing,¹⁶⁷ integration,¹⁶⁸ and signatures.¹⁶⁹ The problem instead arises from the very nature of standardization, which necessarily obfuscates the detailed preferences of at least one of the parties—the so-called “adhering” one—to the standard form agreement.¹⁷⁰ That represents a very real cost of standardized form agreements. That is not to say that they impose more net costs than benefits. Plainly, many businesses find it worthwhile to offer standard form agreements and many consumers find it at least bearable to accept them. It is only to say that the efficiency gains afforded by standard form agreements come at the expense of carefully capturing individualized preferences.

Already somewhat weakened by a watered-down variety of express consent, a standard form agreement can completely collapse if confronted with proofs of its *un*consent. Again, some such proofs—such as proof that one party signed under duress—would prove powerful enough to void any facially valid contract.¹⁷¹ Showing a weakness unusual in contract law, however, standard form agreements can fall prey to proofs of implied or hypothetical *un*consent.¹⁷² Thus, for instance, might a court strike from a standard form agreement a term to which one of the parties would not have

¹⁶⁷ See U.C.C. § 2-201 (2004) (prior) (establishing a statute of frauds for the sale of goods).

¹⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981) (making a party's assent to a standardized agreement an adoption of the agreement as integrated).

¹⁶⁹ See *id.* § 131 (describing standards for the enforceability of signed writings).

¹⁷⁰ It might also obfuscate the detailed preferences of the party proposing the standard form agreement, of course, as when a business opts to sell at a flat rate rather than engaging in price discrimination. That sort of ignorance, because the business opts for it, does not engage our moral senses quite so much as does our worry that standard form agreements effectively stifle consumers' voices. From an information-theoretic point of view, though, we might well wonder whether the costs of either type of ignorance—be it of the consumer or of the business—outweigh the efficiency gains of standard form contracting.

¹⁷¹ See RESTATEMENT (SECOND) OF CONTRACTS § 175 (specifying when duress makes a contract voidable).

¹⁷² See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“[W]hen a party . . . signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”); *id.* at 450 (explaining that a court should examine procedurally suspect terms to determine whether they “are ‘so extreme as to appear unconscionable according to the mores and business practices of the time and place’”) (quoting 1 CORBIN, CONTRACTS § 128 (1963)).

agreed, had that party known about the term when manifesting assent, if the other party had had reason to foresee hypothetical consent.¹⁷³ Thus, too, a court might void an agreement to which no reasonable person would have agreed (thus marking the agreement as *hypothetically* unconsensual)¹⁷⁴ and that deviates from customary norms (thus marking the agreement as *impliedly* unconsensual).¹⁷⁵ Typically, the victimized party must also *expressly* unconsent after the fact, as in a legal pleading; courts do not go hunting for standard form agreements to invalidate them against the parties' wishes.¹⁷⁶

To put it in algebraic terms, we might say that whereas prior individualized express consent outweighs all post hoc unconsent, a combination of express, implied, and hypothetical unconsent can together trump earlier standardized express consent. So the general structure of the law of standardized form agreements suggests, at any rate.¹⁷⁷ In this application, the question of enforceability turns on the balance of the forces of consent and unconsent. To say that prior individualized express consent outweighs post hoc unconsent means that legal institutions will enforce the agreement.¹⁷⁸ To say that strong proofs of unconsent trump an earlier standardized agreement means that the law refuses to remedy an alleged breach. Judging from those examples, it evidently takes some fair margin of unconsent to rouse a court into action. Rightly so; legal enforcement generates many private and public costs, and should remain sheathed until faced with salient wrongs.

B. The Problem of Justifying Political Coercion

How, if at all, can those who exercise political coercion justify conspiring against others' rights? This, the problem of justifying the State,¹⁷⁹ has drawn the attention of many political philosophers and

¹⁷³ See RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

¹⁷⁴ See, e.g., *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759 (N.Y. Dist. Ct. 1966) (concluding that the defendants "were handicapped by a lack of knowledge, both as to the commercial situation and the nature and terms of the contract which was submitted in a language foreign to them," and that they would not have agreed to the contract had they been better informed of its terms), *rev'd on other grounds*, 281 N.Y.S.2d 964 (N.Y. App. Term 1967).

¹⁷⁵ See, e.g., *id.* (stressing the difference between the contract and market prices).

¹⁷⁶ It is conceivable that an administrative agency might do so, however.

¹⁷⁷ That formula does not necessarily describe the moral or economic value of standardized form agreements; I here discuss only the law.

¹⁷⁸ In apparent deference to the express unconsent of the breaching party, however, courts typically afford only money damages, rather than specific performance, in such cases.

¹⁷⁹ "State," here and throughout this article, means an administrative body that credibly claims an exclusive right on the initiation of coercion within a particular geographic area. That definition basically follows Max Weber's classic one. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Talcott Parsons ed., A. M. Henderson & Talcott

received many various answers.¹⁸⁰ This Section offers a fresh approach to the problem of justifying political coercion. Subsection 1 describes the consensus view that the State cannot be justified by appeal to express consent, and that it has only a very tenuous claim to the implied consent of its subjects. Subsection 2 contends that we should evaluate any given consent-based justification of the State in a doubly relative manner: as more or less effective than alternative justifications, judging along a scale of consent; and as effective not for every person, but rather only with respect to each particular individual, if at all. Subsection 3 explores what that approach to justifying the State suggests about how we can win a better, more consent-rich world.

1. *The Difficulties of Justifying the State by Actual Consent*

Commentators claim that the State cannot be justified as an institution created by the actual consent—express or implied—of the persons over which the State claims jurisdiction. David Hume, for instance, said that the assertion “that every particular government, which is lawful, and which imposes any duty of allegiance on the subject, was, at first, founded on consent and a voluntary compact[,] . . . is not justified by history or experience, in any age or country of the world.”¹⁸¹ He allowed that early, customary, stateless societies might have enjoyed self-governance thanks to mutual compact, the terms of which “were either expressed, or were so clear and obvious, that it might well be esteemed superfluous to express

Parsons trans., Oxford Univ. Press 1947) (1922) (“A compulsory political association with a continuous organization . . . will be called a ‘state’ if and in so far as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.”).

¹⁸⁰ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 11–86 (2004) (arguing that a constitution must derive its legitimacy from “necessity” and “propriety,” rather than consent, which is impossible in practical terms); HOBBS, *supra* note 144 (setting out a foundation for states based on social contract theories); LOCKE, *supra* note 143, at 365–66 (“[E]very Man, that hath any Possession, or Enjoyment, or any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it”); NOZICK, *supra* note 38 (arguing in favor of a minimal state that is only involved in protection against force, theft, fraud, enforcement of contracts, and the like); PLATO, *THE REPUBLIC* (Richard W. Sterling & William C. Scott trans., W. W. Norton & Co. 1985) (c. 380–360 B.C.E.) (discussing the order and character of the just City-State); RAWLS, *supra* note 28 (justifying the state under a model of social contract theory in which individuals in the original position with its veil of ignorance would choose the “liberty principle” and the “difference principle”); SCHMIDTZ, *supra* note 144 (legitimizing the State as necessary to provide the provision and production of public goods).

¹⁸¹ DAVID HUME, *ESSAYS MORAL, POLITICAL AND LITERARY* 471 (Eugene F. Miller ed., Liberty Classics rev. ed. 1987) (1777).

them.”¹⁸² Hume denied that same justification to modern States, however, on grounds that new systems of governance require new consent.¹⁸³

Randy E. Barnett likewise denies that a contemporary State can rightly lay claim to the express or implied consent of those over whom it claims jurisdiction.¹⁸⁴ Just as Hume granted the possibility of justifying ancient governments on consent, so Barnett grants that “unanimous consent to obey the law is quite possible, but only if the cost of exit is sufficiently small, either because jurisdiction is not territorially based or because the territory is not too large.”¹⁸⁵ An institution that does not claim exclusive jurisdiction over a particular geographic area does not qualify as anything like a State as we know it.¹⁸⁶ Barnett also holds that even a very small State would be “too large” to claim the justificatory power of consent founded on consent.¹⁸⁷ On that view, a State cannot rightly claim that its subjects actually consent to its rule.¹⁸⁸

The State’s failure to obtain the actual consent of those it governs, to many commentators, is irrefutable proof that it cannot be justified.¹⁸⁹ Lysander Spooner, for instance, famously complained: “If any considerable number of the people believe the Constitution to be good, why do they not sign it themselves, and make laws for, and administer them upon, each other; leaving all other persons (who do not interfere with them) in peace?”¹⁹⁰ Robert Wolff, likewise

¹⁸² *Id.* at 468. Hume immediately adds: “If this, then, be meant by the *original contract*, it cannot be denied that all government is, at first, founded on a contract, and that the most ancient rude combinations of mankind were formed chiefly by that principle.” *Id.* (emphasis in the original).

¹⁸³ *See id.* at 470–71 (“[T]he agreement, by which savage men first associated and conjoined their force . . . is acknowledged to be real; but being so ancient, and being obliterated by a thousand changes of government and princes, it cannot now be supposed to retain any authority.”).

¹⁸⁴ *See, e.g.,* BARNETT, *supra* note 180, at 11 (“I challenge the idea, sometimes referred to as ‘popular sovereignty,’ that the Constitution of the United States was or is legitimate because it was established by ‘We the People’ or the ‘consent of the governed.’”).

¹⁸⁵ *Id.* at 43.

¹⁸⁶ *See supra* note 179 (discussing the definition of the State).

¹⁸⁷ “Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent.” BARNETT, *supra* note 180, at 43.

¹⁸⁸ *See* Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 FORDHAM L. REV. 669, 671 (2006) (“[I] reject basing the legitimacy of the Constitution on the consent of the governed in any literal sense. Instead, legitimacy is based on the merits of the institutions established by the Constitution and whether the commands of those institutions are entitled to a *prima facie* duty of obedience.”). I take Barnett to thereby say that his theory of legitimacy relies on hypothetical rather than on implied or (especially) express consent.

¹⁸⁹ *See generally* Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753, 775 n.78 (2000) (collecting authorities).

¹⁹⁰ LYSANDER SPOONER, NO TREASON NO. VI: THE CONSTITUTION OF NO AUTHORITY (1870), *reprinted in* THE LYSANDER SPOONER READER 71, 87 (George H. Smith ed., 1992).

confronting the problem of justifying political coercion, concluded, “the solution requires the imposition of impossibly restrictive conditions which make it applicable only to a rather bizarre variety of actual situations.”¹⁹¹ Here, at least, philosophers have proven remarkably in touch with the people; a recent poll purports to show that only twenty-one percent of its voters think that the United States can claim the consent of the governed.¹⁹²

Barnett offers a somewhat more qualified assessment of the State’s justification. He both allows the possibility of expressly or impliedly consensual systems of self-governance,¹⁹³ and credits consent-justified laws as having the power to “restrict almost any freedom except an inalienable right or the freedom to respect the rights of others.”¹⁹⁴ Such views suggest a correlation between degrees of consent and degrees of justification.¹⁹⁵ But Barnett dwells on a different sort of spectrum—a spectrum of *legitimacy*¹⁹⁶—that measures whether and to what extent a given State’s subjects should presume that they have moral obligation to obey its laws.¹⁹⁷ “When consent is lacking,” explains Barnett, “a law must be both necessary to the protection of the rights of others and proper insofar as it does not violate the rights of those upon whom it is imposed if it is to bind in conscience.”¹⁹⁸ A lawmaking process that satisfies those two requirements enjoys more legitimacy than one that satisfies them less well, or not at all. Barnett concludes by describing legitimacy as “a matter of degree rather than an all-or-nothing-at-all characteristic.”¹⁹⁹ Barnett thus paints varying shades of legitimacy on institutions

¹⁹¹ ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 22–23 (Arthur C. Danto ed. 1970).

¹⁹² *Only 21% Say U.S. Government Has Consent of the Governed*, RASMUSSEN REP. (Feb. 18, 2010), http://www.rasmussenreports.com/public_content/politics/general_politics/february_2010/only_21_say_u_s_government_has_consent_of_the_governed. The survey also purports to show that sixty-three percent of the political class thinks the government has the consent of the governed, whereas only six percent of voters with mainstream views do, and that seventy-one percent of all voters view the federal government as a special interest group. *Id.*

¹⁹³ See BARNETT, *supra* note 180, at 40–43 (arguing that if the relevant lawmaking unit were very small, then unanimous consent would be possible and practical).

¹⁹⁴ *Id.* at 51.

¹⁹⁵ Barnett observes, for instance, that if a legal system to which “everyone does consent in a real way” is feasible, “the governmental legal system with which we are familiar might be both unnecessary and improper—or at least *less legitimate* than this polycentric alternative.” *Id.* at 77 (emphasis added).

¹⁹⁶ In Barnett’s usage, a “legitimate” law carries normative weight that a merely “valid” law—a law “enacted according to the accepted legal process”—may or may not. *Id.* at 48.

¹⁹⁷ See *id.* at 48 (“*In the absence of actual consent*, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just.” (emphasis added)); see also *id.* at 52 (framing his argument as one designed to show “that some constitutions are more legitimate than others”).

¹⁹⁸ *Id.* at 51.

¹⁹⁹ *Id.*

justified, if at all, by hypothetical consent.²⁰⁰ The spectrum described here does not necessarily thereby contradict Barnett's theory, however.²⁰¹ Rather, it confirms his methodology while applying it to a broader framework for assessing justificatory claims, one that spans from express consent to express unconsent and that applies not just to States but also to nonpolitical organizations and common-law transactions. The next subsection explains.

2. *Relativity and Political Justification*

We can evaluate the supposed justification of a State or other social institution by two standards: first, relative to the degree of consent that the institution can claim; second, relative to persons subjected to the institution's jurisdiction. This subsection explains those two standards and how they interact. This, a theory of relativity for political justification, measures any given State or social institution relative both to a *scale of consent* and to a *range of subjects*.²⁰² Justification, like the graduated consent with which it correlates, comes in degrees and varies across individuals.

a) Relativity in Degree of Justification

Different attempts to justify social institutions succeed or fail to different degrees. Justification, in other words, is not simply a binary, "yes or no" property. Many people would doubtless regard that as a truism, part and parcel of the nature of argumentation. Should the proposition need support, however, it can rely on the same sort of transcendental argument set forth above for the moral primacy of consent.²⁰³ Tailored to fit the question at hand—how to justify a social institution's exercise of jurisdiction—the argument runs thusly:

1. A justification aims to win the consent of its intended audience.

²⁰⁰ See *supra* notes 184–85 and accompanying text (discussing Barnett's denial that States can claim express consent). Separately, Barnett also denies that they can boast implied or consent. See BARNETT, *supra* note 180, at 14–19 (arguing that neither voting nor residency implies consent). At least according to the taxonomy set forth in this Article, that leaves States only hypothetical consent, at most.

²⁰¹ But see Barnett, *supra* note 188, at 671–72 ("[I] reject a notion of legitimacy based on the degree of actual acceptance by the population. Instead, legitimacy is based on whether the institutions established by the Constitution ought to be accepted; and, if so, the commands of those institutions are binding even upon those who do not consent to them.").

²⁰² More precisely, you might call it a theory of relativity *squared*.

²⁰³ See *supra* Part I.B.4.

2. If a justification aims to win the consent of its intended audience, then a justification of a social institution succeeds or fails depending on whether it obtains the consent of its intended audience.

3. Consent comes in degrees.

4. Therefore, a justification of a social institution succeeds or fails relative to the degree of consent that it obtains from its intended audience.

As with regard to the transcendental argument for consent's moral weight generally, this particular argument for adopting a relative approach to justifying social institutions starts with an unobjectionable premise about the nature of justification. Step two ties the argument to the particular problem of justifying a social institution. Step three offers an observation about consent, one detailed and defended above.²⁰⁴ From those steps the conclusion logically follows: a justification of a social institution succeeds or fails relative to the degree of consent that it obtains from its intended audience.

For example, most people would say that a social institution that governs its members only by their *express* consent does so with more justification than an alternative institution capable of claiming only *hypothetical* consent. Thus does the Catholic Church more justifiably govern the marriages of its baptized members than does, say, the Baptist Church. That holds true even if the Baptist Church were to claim that, because it offers the one true path to salvation, Catholics *would* convert if they realized their ignorance. The Baptist Church could in that event muster a claim only of hypothetical consent, at best, and one contingent on a contestable theological presumption, at that. The express consent supporting the Catholic Church's relationship with its members gives it a justification for exercising jurisdiction over their souls—a justification stronger than any that the Baptist Church can claim. (The Baptists can take consolation in the thought that their church has won many souls if its own, though.)

As discussed below, the State's jurisdictional claims submit to a similar analysis.²⁰⁵ In all such cases, we assess a social institution in terms more refined than "justified" or "not justified"; we rank it as "more justified" or "less justified" than a range of alternative institutions. Justification, like the consent it relies on, comes in degrees.

²⁰⁴ See *supra* Part II.A.

²⁰⁵ See *infra* Part III.B.3.b (discussing amending the Pledge of Allegiance, and changing how it is administered, as a way of making the United States more consent rich).

b) Relativity to Subjects

Because a justification succeeds only through persuasion, it stands or falls only relative to a particular audience. A justification cannot float about as a disembodied universal given, for nothing in the noumenal realm has the power to accept or reject it. Nor can a justification rest on its laurels, assuming that past success guarantees future results. Even a justification that boasts an unblemished record of prior endorsements must win the consent of any new party to whom it would apply.

Who makes up a justification's audience? As with any audience, people do. Loose metaphors about "company spirit" and "national will" notwithstanding, each individual remains a moral agent capable of independent sensation, reason, and choice. Almost no one remains a mere atomistic individual, of course; we instead join in complex social molecules, cells, organs, and bodies. Still, just as atoms serve as fundamental units for chemists, individual persons provide the fundamental units of consent theory. We must begin at its source if we want to understand consent's role in social institutions.²⁰⁶

In the first instance, only an individual can expressly consent to a proposition. That still holds true if a person acts in a representative capacity, choosing as an agent for some absent principal, because even a deliberative body such as a congress or parliament relies on individual choices and binary votes. If we want to know whether a particular institution justifiably exercises jurisdiction over someone, therefore, we must ask whether that person consented to it. A justification stands or falls only relative to each individual person who accepts or rejects it.

Although the individual stars in this account of justification, social institutions play an important supporting role. If an individual consents to have her interests represented through a social mechanism, she by default consents to the acts that her duly authorized agents take within the proper bounds of their employment.²⁰⁷ What Nozick said of justice thus also holds true of justification: "Whatever arises from a just situation by just steps is itself just."²⁰⁸ Analogously, whatever we regard as justified with respect to a particular social institution we should also regard as

²⁰⁶ See ARISTOTLE, *supra* note 65, at 1986 ("As in other departments of science, so in politics, the compound should always be resolved into the simple elements or least parts of the whole.").

²⁰⁷ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining agency relationship); *id.* § 12 ("An agent . . . holds a power to alter the legal relations between the principal and third persons . . .").

²⁰⁸ NOZICK, *supra* note 38, at 151.

justified with respect to any individual who has consented to that institution's representation. In other words, justification holds true in transition.

One need not become a methodological individualist to accept this account of justification. Methodological individualism casts doubt on the very existence of social organizations. Murray N. Rothbard, for example, maintained, "'Societies' or 'groups' have no independent existence aside from the actions of their individual members."²⁰⁹ But one can believe that social organizations exist independently of their members²¹⁰ and still agree that a justification succeeds only relative to the individuals who consent to it, whether they do so directly or via the representation of a social institution to which they have consented.²¹¹ At the extreme, one could even adopt this relational view of justification while believing that social institutions act, sense, and think with all the ontological status of individual human persons.²¹²

What beliefs does this theory of justification preclude? It precludes believing that a justification succeeds relative to a person who *refuses* to consent to its terms, either directly or through a justified representational scheme. It also precludes believing that a justification succeeds relative to a person who could have but did not consent, or relative to a person who did not consent and would not have consented.²¹³ For example, one who accepts that both individual human persons and social institutions have the power to expressly consent to a justification would find it well nigh impossible to

²⁰⁹ MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 2–3 (Ludwig von Mises Institute, 2nd ed., scholar's ed. 2004).

²¹⁰ For a thoughtful exposition of that view, see HERZOG, *supra* note 145, at 202. After a brief critique of methodological individualism, he boldly concludes, "[n]othing then stands in the way of casting the consent of the governed as a relation between two corporate actors, the people and the government." *Id.* at 202.

²¹¹ It is not so clear that Herzog would follow so far. Against the view that individual consent to social institutions matters, he counters, "The demand that each individual's views determine political outcomes is impossible to satisfy, or (to put the same point differently) romantic, or (again) a puerile bit of anarchism." *Id.* But Herzog makes a categorical error. To condition the justification of a social institution's power over an individual on that individual's consent is not to say that each individual member of an institution must have the power to control it. If we want act in cooperation with others, as Herzog says, "[I]n the end we must renounce some options and proceed." *Id.* Contra Herzog, however, we can renounce those options consensually, and thereby justify an institution's actions.

²¹² Those who hold such beliefs will find that they can read every use of "individual" or "person" in these pages to also refer to "individual social organization" or "legal person" with no loss of effect. But fascists, who regard social organizations as more real and important than individual humans, will probably find that this translation strategy gives unsatisfying results.

²¹³ These two conditions flow out of preferring express consent to implicit or hypothetical consent. For the example of the doctor who stumbles across an unconscious man, see *supra* Part II.A.3. For a discussion of the validity of justifications based on these substitutes for express consent, see *supra* Part II.B.1.

simultaneously believe that a social institution can rightly bind an individual who objects to its representation. The power of consent to justify social relations does not increase as it flows from individuals to larger entities; if anything, consent's justificatory power weakens with each attenuating level of agency and sub-agency. A successful justification must therefore aim to win express consent in each case where it might be had.

It consequently follows that no one can justify a social order's claim to power over a person by mere invocation of a supposed "collective will." Such a justification fails on grounds of circularity, for it presumes that the characterization of a group's will binds its constituents prior to their having agreed to such representation. How could a scheme of collective representation rightly bind an individual who dissents to having its voice drown out her own? Even if a social organization has sufficient ontological standing to entertain cognitive states independent of its members—a highly suspect supposition—its express consent to a given justification cannot bind any individual who denies that the organization's consent reflects his or her own.

Although this account emphasizes that a justification stands or falls only relative to those who accept or reject it, it is not thereby equivalent to moral relativism. Like most major ethical theories, relativism comes in more than one flavor.²¹⁴ Editorialists get upset over a particular sort of moral relativism, the sort that holds both that "right" means "right for a given culture," and that it is therefore wrong to condemn another culture's morals. Though editorialists attack that type of moral relativism for eroding honored values, philosophers attack it for employing "right" and "wrong" in a contradictory fashion. Bernard Williams has thus described moral relativism as "possibly the most absurd view to have been advanced even in moral philosophy."²¹⁵ The theory of relative justification set forth here should give neither editorialists nor philosophers similar grounds for outrage, however, because it does not hold that standards of justification vary from society to society. Quite the contrary, measuring each putative justification relative both to alternative justifications and to the justification's intended audience generates a standard, one that works both within and across cultures, based on the universal features of consent.

²¹⁴ For a discussion of the distinctions between different sorts of relativism, see Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995 (1986).

²¹⁵ Bernard Williams, *An Inconsistent Form of Relativism*, in RELATIVISM: COGNITIVE AND MORAL 171, 171 (Jack W. Meiland & Michael Krausz eds., 1982).

The account of justification given here does resemble another sort of moral relativism, however: the sort Gilbert Harman defends as no more than “a soberly logical thesis . . . about logical form.”²¹⁶ Harman claims that morality arises among people who come to an agreement or understanding about their relations with one another.²¹⁷ He concludes that although cross-cultural moral judgments are not “wrong,” they make sense only in relation to such agreements or understandings.²¹⁸ The approach to justification offered here likewise presents a “soberly logical thesis”: a justification applies only with regard to its intended subject. It thus makes no sense, strictly speaking, to flatly claim, “X is justified.” The sentence should, properly speaking, go on to add, “X is justified *with respect to Y*.” In other words, we should treat “justify” as a transitive verb.

Nonetheless, this theory of justification differs from Harman’s moral relativism in an important sense. Harman has drawn criticism for stripping cross-cultural judgments of all moral weight.²¹⁹ He would have us judge Hitler, for example, only relative to the moral agreements or understandings that Hitler shares with others. But Harman’s critics maintain that someone like Hitler “ought not to kill us—he would be wrong to kill us—and there are reasons justifying these judgments, unappealing as they may be to one of his background.”²²⁰ In contrast to Harman’s moral relativism, the theory of relativity for justification gives those who suffer coercion a ready defense against their oppressors. The difference lies in the scope of the theories. Harman’s restricts moral judgments to intra-group relations. But justification applies between groups, between individuals, and between groups and individuals. Anywhere that two bodies capable of consent meet, it stands ready to evaluate whether or not their relations satisfy the criterion for justification: has each party consented to the relationship, either directly or through a justified representational mechanism?

²¹⁶ Gilbert Harman, *Moral Relativism Defended*, in RELATIVISM: COGNITIVE AND MORAL *supra* note 215, at 189, 189. For a discussion of how justifications may be relative in the sense of being more or less powerful with respect to one another, see *supra* Part III.B.2.a.

²¹⁷ Harman, *supra* note 216, at 189.

²¹⁸ *Id.*

²¹⁹ See, e.g., Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1094 (1982) (explaining that Harman’s “counterintuitive conclusion[] . . . that there are no objectively valid reasons ultimately justifying any moral position” ought to be questioned); Heidi Margaret Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1494–1504 (1988) (providing a critique entitled “Harman’s Relativism of Inner Judgments”).

²²⁰ Moore, *supra* note 219, at 1094–95.

3. *Making the United States More Consent Rich*

Recognizing that consent comes by degrees encourages us to seek marginally more of it. Particularly, in politics, new possibilities for reform appear once we begin to see States as justified only relative to better or worse forms of government, and only relative to the individual persons subject to a State's exercise of jurisdiction.²²¹ In contrast, to speak of a State simply as "justified" (or not) discourages us from even asking the right questions. This subsection demonstrates how the theory of graduated consent works in practice, applying it to an exemplar State—the United States—in an effort to make it more justified with respect to those it governs—its citizens and residents. Far from a merely theoretical concern, that project aims to remedy the surprisingly widespread view, revealed in a recent poll, that the U.S. government cannot claim the consent of those it claims to govern.²²² Clearly, the United States could stand to grow more consent rich.

a) Easing Exit

Because implied consent does more to justify a State than hypothetical consent alone can,²²³ a State that affords its citizens full freedom of exit enjoys a stronger claim to rightfully exercise jurisdiction over its them than does a State that denies a like freedom.²²⁴ In the real world, of course, freedom of exit comes only by degrees. Still, it varies enough from case to case to allow for fruitful comparisons.

During much of the mid-twentieth century, for instance, the United States allowed its citizens greater freedom of exit than did the Soviet Union.²²⁵ That marked difference between the countries gave the former a comparatively stronger justification for exercising jurisdiction over its citizens than the latter could claim over its own.²²⁶ Hence the moral force of Ronald Reagan's demand, "Mr.

²²¹ See *supra* Part III.B.2 (describing the double relativity of political justification).

²²² *Only 21% Say U.S. Government Has Consent of the Governed*, *supra* note 192.

²²³ I add "alone" because a State that can plausibly claim both implied and hypothetical consent might well enjoy a better justificatory status than one claiming only implied consent.

²²⁴ We might add "and residents" to canvas the class of persons over which States typically claim jurisdiction. Interestingly, however, residents do not (unless imprisoned) typically suffer much loss of the freedom of exit their host States' jurisdiction. Rather, States typically try to expel unwelcome residents.

²²⁵ Even granting cases such as U.S. citizens fleeing the draft by moving abroad, the United States never had anything close to the Iron Curtain.

²²⁶ The United States could also claim, as a signal that it enjoyed a comparatively stronger claim to the implied consent, that appreciable numbers of those who managed to slip through the Iron Curtain fled to the United States, pledged their allegiance to it, and became citizens.

Gorbachev, tear down this wall!”²²⁷ Hence, too, the celebration, by that wall’s destroyers, of their newly won freedom from oppression.

To say that the United States offered a more consent-rich form of government than the Soviet Union did is not to say, finally and flatly, “The United States was justified.” A State cannot fail to fall short of winning the universal express consent of all over whom it claims a monopoly on the initiation of coercion,²²⁸ but instead can claim justification only by degrees, relative to some alternative mode of social organization.²²⁹ Even if it bested the Soviet Union in terms of winning the consent of its subjects, the mid-twentieth-century United States still fell far short of consent’s highest standard. The United States did not, does not, and cannot claim universal and express consent. No State reasonably could. The United States in the 1950s did justly claim a comparatively greater degree of consent from its subjects than the Soviet Union could, granted, and even today the United States remains a fairly consent-rich jurisdiction. The United States would have enjoyed a stronger claim to the hypothetical consent of its subjects if it had done a still better job of protecting their natural and civil liberties back in the 1950s, however. We could say the same of the United States today.²³⁰

More to the point, the United States could have done more to respect its citizens’ freedom to exit, even though it decidedly beat the Soviet Union on that count. The United States could do more today, too. It could, for instance, heed Ilya Somin’s call for recognition of generalized exit rights, under which individuals and groups would enjoy the freedom to opt out of all but a few government functions relating to national defense and legal rulemaking.²³¹ Those exercising their exit rights would escape any taxation or regulation associated with the programs they escape but also, of course, forego the associated benefits.²³² Because they would make it easier to escape federal programs such as Social Security or health and safety

²²⁷ President Ronald Reagan, Remarks on East-West Relations at the Brandenburg Gate in West Berlin 3 (June 12, 1987), available at http://www.reaganfoundation.org/pdf/Remarks_on_East_West_Relations_at_Brandenburg%20Gate_061287.pdf.

²²⁸ See *supra* Part III.B.1 (discussing the difficulties of justifying the State by actual consent).

²²⁹ See *supra* Part III.B.2 (discussing the double relativity of political justification).

²³⁰ Cf. BARNETT, *supra* note 180, at 48–52 (“The problem of legitimacy . . . is to establish why anyone should care what a constitutionally valid law may command. My answer is that we should care and, consequently, may owe a prima facie duty to obey a law, only if the processes used to enact laws provide good reasons to think that a law restricting freedom is necessary to protect the rights of others without improperly infringing the rights of those whose liberty is being restricted.”).

²³¹ Ilya Somin, *supra* note 189, at 782–84.

²³² *Id.* at 783.

regulations, generalized exit rights would render those programs more consensual. It would also, per the causal link described above, render the U.S. government more justifiable, relative both to those who accept its services and to those who decline them, than at present.

b) Amending the Pledge of Allegiance

As typically administered—impressed on children well under the age of consent and not taken very seriously by adults—the U.S. Pledge of Allegiance²³³ does not carry much justificatory weight. Nor could the government redeem the Pledge by demanding that each of its adult citizens officially say or even sign it, because even the most patriotic of us would bridle at the prospect.²³⁴ Any such indoctrination ceremony would, however facially free, carry an inevitable taint of coercion.²³⁵ The power differential between the U.S. federal government and an individual person renders any supposed expression of consensual allegiance suspect, as does the take-it-or-leave-it nature of the proposed deal. A court would, if it considered the transaction through the lens of contract law, doubtless judge the Pledge of Allegiance procedurally unconscionable.²³⁶

Nor do the substantive terms of the Pledge of Allegiance encourage confidence in the fairness of the bargain. The citizen reciting the Pledge offers allegiance “to the flag of the United States of America, and to the republic for which it stands,” followed by a description of the latter—“one Nation,” and so forth. The Pledge does not specify what, if anything, the United States must do to *deserve* a citizen’s allegiance. Granted, perhaps we could read “with liberty and justice for all” as a condition on the pledger’s allegiance. But that would also suggest, much more controversially, that the Pledge’s force would lapse if the United States failed to qualify as “one nation, under God, [or] indivisible . . .” At the least, the Pledge could certainly make any such supposed quid pro quo much clearer.

The United States might have a marginally stronger claim to justly exercise jurisdiction over its subjects if the Pledge of Allegiance were given under less suspect circumstances and in less one-sided terms.

²³³ See 4 U.S.C. § 4 (2006) (setting forth the text of the Pledge of Allegiance and the proper manner of its delivery).

²³⁴ But see Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440 (1986) (questioning the reasons behind widespread resistance to political loyalty oaths).

²³⁵ See HERZOG, *supra* note 145, at 192 (reviewing the “ugly” use of loyalty oaths in Tudor England and concluding, “[t]hose hankering after the use of such oaths today are simply starry-eyed, unwilling to think seriously about the degrading and punitive experiences of those forced to swear.”)

²³⁶ See *supra* Part III.A (discussing standard form agreements).

Rather than training children to habitually recite the Pledge, for instance, we might reserve it for the sober contemplation of fully capable adults, and ask them to recite the Pledge—or not, as each alone sees fit—free from any hint of state coercion, bribery, or even notice.²³⁷ Changing the administration of the Pledge, from collective indoctrination to personal deliberation, would help ease its procedural unconscionability. To fix the Pledge's *substantive* unconscionability, we have to edit its terms.

The following Pledge, version 2008, offers improved clarity and fairness: "I pledge allegiance to the laws of the United States of America, on condition that it respect my rights, natural, constitutional, and statutory, with liberty and justice for all."²³⁸ Pledge v.2008 improves on the 1954 version in several ways. For one thing, it has its speaker pledge allegiance not to the *flag*, nor even to the political institution *for which that flag stands*, but rather to "the laws of the United States of America." The United States was founded, after all, on an argument that when a State violates the rights of its citizens, it does not deserve their allegiance.²³⁹ For the same reason, this upgraded Pledge clarifies that its speaker's commitment comes conditioned on the United States respecting his or her rights. Pledge v.2008 thus puts the United States and its citizens more equal footing than Pledge v.1954 does.

Admittedly, however well reasoned as a theoretical manner, any suggestion to edit the 1954 Pledge of Allegiance risks rousing heartfelt objections.²⁴⁰ A flag may not be an argument, but it still inspires powerful devotion; so, too, does the Pledge of Allegiance. Proposing that we drop "under God" from the Pledge adds wounded piety to patriotic fervor, summoning a dark storm of emotions.

Nobody should feel compelled to abandon the customary Pledge of Allegiance, however. For most Americans, for quite some time, the 1954 version will remain well known and frequently recited.

²³⁷ Having citizens sign pledges would, because it would allow the State to keep close tabs on dissenters, tend to cast doubt on the probity of the whole enterprise.

²³⁸ Uncopyright 2008, Tom W. Bell. For the Pledge's first publication and some background about its inspiration, see Tom W. Bell, *Upgrading the Pledge of Allegiance*, AGORAPHILIA (June 4, 2008, 5:05 PM), <http://agoraphilia.blogspot.com/2008/06/upgrading-pledge-of-allegiance.html>.

²³⁹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it . . .").

²⁴⁰ See, for example, for the tenor of comments to a blog post in which I initially proposed *Pledge of Allegiance v.2008*. Comments to *Pledging to Mislead Students*, COLLEGE LIFE OC (June 4, 2008, 6:15 PM), <http://collegelife.freedomblogging.com/2008/06/04/pledging-to-mislead-students>.

Prudence would probably council that result even if human nature did not compel it. But some might come to prefer a newer pledge, one that hearkens back to the fundamental principles of the U.S. way of self-government. Happily, anyone who prefers the 2008 Pledge can adopt it with little fanfare, leaving others to stick with the 1954 Pledge if they see fit. All of us can recite our pledges together, too, because the cadences of the 2008 Pledge march in step with those of its predecessor.

Allegiance v.1954	Allegiance v.2008
I pledge allegiance	I pledge allegiance
To the flag	To the laws
Of the United States of America	Of the United States of America,
And to the Republic	On condition that
For which it stands	It respect my rights,
One nation,	Natural,
Under God,	Constitutional,
Indivisible,	And statutory,
With liberty and justice for all.	With liberty and justice for all.

Americans have a long tradition of challenging—and sometimes rejecting—every political institution that has dared to claim to rule them. We have celebrated our liberty to pursue happiness, and our freedom from oppression, in many various and changing ways.²⁴¹ The Pledge of Allegiance went through various versions prior to the 1954 version, for instance, and calls for a newer, better Pledge have sounded frequently since them.²⁴² The 2008 Pledge offers fidelity to traditional American principles, easy accessibility, and, most relevantly for present purposes, a way to help make the United States more consent rich.²⁴³ What more could a true patriot want?

²⁴¹ See generally DAVID HACKETT FISCHER, *LIBERTY AND FREEDOM: A VISUAL HISTORY OF AMERICA'S FOUNDING IDEAS* (2005) (analyzing how the words “liberty” and “freedom” have been defined through images since colonial times).

²⁴² See John W. Baer, *The Pledge of Allegiance: A Short History*, OLD TIME ISLANDS (1992), <http://www.oldtimeislands.org/pledge/pledge.htm> (last visited Mar. 4, 2009) (reviewing previous versions of the Pledge and offering two possible changes for the future).

²⁴³ To ensure that no statutory privilege interferes with the free use of the Pledge I have described, I have deliberately cast it into the public domain—hence the “Uncopyright 2008” notation used in footnote 238. For a description of the legal and policy aspects of that publication strategy, see Tom W. Bell, *Intellectual Privilege: A Libertarian View of Copyright* 167–81 (Feb. 1, 2010) (unpublished manuscript) (on file with author).

c) Citizen Courts

It stands as a fundamental principle of justice that we cannot entrust one party to unilaterally judge its disputes with other parties. Locke cited the threat of self-judgment as a fundamental justification for the State, which offers a neutral third party to adjudicate disputes between contesting private parties.²⁴⁴ James Madison, in *The Federalist No. 10*, argued that the proposed Constitution would help remedy the ills of faction, echoed that sentiment.²⁴⁵ If it cannot plausibly claim to administer justice impartially, a court cannot win the trust of those subjected to its jurisdiction. A biased court cannot, properly speaking, adjudicate; it can only command one party to serve another's will. As the label suggests, a *partial* court lacks the virtues of a real, entire, *impartial* one.

This poses a problem for the resolution of disputes between a State and those subjected to its legal jurisdiction. How impartially can agents of the State, acting as the judges of its courts, decide such disputes? "Not well enough," citizens and residents might understandably worry.²⁴⁶

It thus looks at least unwise, and arguably unjust, to give federal authorities exclusive jurisdiction over disputes that call for applying the U.S. Constitution. Granted, federally appointed judges typically grapple with issues that raise no immediate risk of self-judgment, such as a diversity tort claim between private parties rather than, say, litigation over the constitutionality of affording judges life tenure. Still, though, such judges remain employees of the federal government, duty bound to serve its interests. More significantly, from the point of view of parties ordered to appear in federal court, the confirmation process for federal judges discriminates against those most likely to defend private rights against political power. No judge who reads the Constitution with an eye to sharply limiting the federal government will likely survive the confirmation process. Federal politicians prefer to appoint judges who will, at the margin,

²⁴⁴ LOCKE, *supra* note 143, at 344 (describing "the *end of Civil Society*, being to avoid, and remedy those inconveniencies of the State of Nature, which necessarily follow from every Man's being Judge in his own Case") (emphasis in the original).

²⁴⁵ THE FEDERALIST NO. 10, at 55–56 (James Madison) (E.H. Scott ed., 1898) (1788) ("No man is allowed to be a judge in his own cause: because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

²⁴⁶ For a similar expression of skepticism applied to the related question of the proper scope of juries' powers, see LYSANDER SPOONER, TRIAL BY JURY (1852), *reprinted in* THE LYSANDER SPOONER READER, *supra* note 190, at 121, 121 ("But for their right to judge of the law, and the justice of the law, juries would be no protection to an accused person, *even as to matters of fact*; for, if the government can dictate to a jury any law whatever, in a criminal case, it can certainly dictate to them the laws of evidence.") (emphasis in the original).

benefit federal politicians. And what could benefit a politician more than power?

If we view the U.S. Constitution as a contract—a standard form agreement offered on a take-it-or-leave-it basis by an awesomely powerful government to a comparatively powerless individual²⁴⁷—we cannot help but note the glaring inequity of letting only federal authorities decide questions of federal power. No just court would enforce a standard form agreement between grossly unequal parties, imposed by one on the other under conditions that raise serious doubts about the offeree's consent, and that lets the all-powerful offeror alone decide disputes arising under the agreement.²⁴⁸ A clause reading, "I have the sole power to interpret this agreement," reeks too much of substantive unconscionability to win a court's approval.²⁴⁹ Indeed, the patent unfairness of such a clause cannot help but raise procedural doubts about whether the parties bargained for an exchange at all,²⁵⁰ undermining the enforceability of the entire agreement.²⁵¹

Happily, we can easily read the U.S. Constitution to avoid the vice of self-judgment. Its plain text by no means mandates that only federally employed judges can decide the scope of federal power. Rather, it provides that the Constitution itself—not federal judges—"shall be the supreme Law of the Land."²⁵² Even Article III, which establishes constitutional courts, goes only so far as to say, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution";²⁵³ it does not claim *exclusive* jurisdiction over all such cases. We thus remain at complete liberty to remedy the problem of self-judgment by establishing what we might call *citizen courts*: adjudicative bodies designed to resolve disputes between the

²⁴⁷ See *infra* Part III.C (arguing in favor of this view).

²⁴⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (voiding contracts where threats leave no reasonable alternative but to manifest assent); *id.* § 177 (establishing that undue influence can render contract unenforceable); *id.* § 208 (authorizing limitations on or voiding of unconscionable contracts).

²⁴⁹ See *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 177 (Cal. 1981) ("[A] contract which purports to designate one of the parties as the arbitrator of all disputes arising thereunder is to this extent illusory—the reason being that the party so designated will have an interest in the outcome which, in the view of the law, will render fair and reasoned decision, based on the evidence presented, a virtual impossibility.").

²⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 71(1) ("To constitute consideration, a performance or return promise must be bargained for."); *id.* § 77 (specifying how a promise which "by its terms the promisor . . . reserves a choice of alternative performances" can fail as consideration).

²⁵¹ See *id.* § 17(1) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

²⁵² U.S. CONST. art. VI, § 2.

²⁵³ *Id.* art. III, § 2.

federal government and other parties under the same arbitration procedures that private parties customarily use in resolving civil litigation.²⁵⁴

How would citizen courts work? They would arise at the option of any party to a legal dispute with the federal government being heard by a federal court. Each party—including the federal one—would choose one judge. Those two judges would then agree on a third. Together, the panel of three judges would decide the parties' dispute. Rather than leaving questions about the power of the federal government solely in the hands of federal agents, therefore, a citizen court would rely on judges to which the disputants have consented. Because they would help to remedy the potential for partiality by federal courts, citizen courts would offer more justifiable judgments.

Giving citizens direct access to the "judicial power" created by the Constitution would, granted, represent a rather different approach to adjudicating federal disputes than the one currently in force. The prospect of citizen courts raises a great many questions. For instance: does the U.S. Constitution make room for them? It proves encouraging that the Constitution grants federal officials broad leeway in appointing inferior officials²⁵⁵ and that federal judges already show remarkable flexibility in following rules of procedure agreed to by litigating parties.²⁵⁶ But further exploration of the constitutionality, mechanics, and wisdom of citizen courts can wait; we will doubtless have plenty of time before the U.S. federal government surrenders the power to act as its own judge. When and if it does, though, we will have occasion to celebrate a more justified government.

C. Toward a Consensualist Theory of Constitutional Law

How should we read and apply a constitution? The answer depends, in large part, on why we want to attribute any particular meaning *at all* to its words. A philosophically minded jurisprude

²⁵⁴ See, e.g., *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N, § R-13 (June 1, 2009), <http://www.adr.org/sp.asp?id=22440#R13> (describing the process by which directly appointed arbitrators choose a third arbitrator).

²⁵⁵ See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

²⁵⁶ See, e.g., Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579 (2007) (examining "the limits on parties' ability to design and implement through contractual agreements their own set of public dispute resolution rules" and concluding that "there is a presumption that litigation rules may be modified by an ex ante contract and that such a contract is subject to specific performance.").

might, for instance, pursue an ideal, and probably idyllic, Truth, approaching constitutional hermeneutics the way that people of faith approach religious texts. Even apart from the risk of idolatry it would pose, however, that approach would ill serve the main reason why most of us care about a constitution's meaning: to resolve disputes.

A constitution serves as a social-coordination device, one that we read with an eye to promoting peace, prosperity, and personal freedom.²⁵⁷ Here I argue that we can best achieve those ends by adopting a consensualist theory of constitutional decision making, one that interprets and constructs the Constitution so as to maximize the consent of those it claims to govern and, thus, maximizing its justifiability. With all due respect to Justice John Marshall, in other words, we should aspire to *forget* the trappings of power and pomp that surround a constitution,²⁵⁸ instead subjecting it to the same interpretive rules that we routinely apply to humble contracts.²⁵⁹

Because we invoke a constitution in order to resolve disputes, constitutional decision making often serves as little more than a sort of weapon, taken up or set aside for purely tactical reasons. Although courts and commentators should ultimately aspire to a more universal standard when they choose between interpretive theories, none of us should disregard the virtues of partisan constitutional debate. Legal warfare spills far less blood than the lethal warfare it supplants, provides the entertaining spectacle of jurisprudential contests, and encourages the discovery and refinement of new and better interpretative tools.

Still, despite those benefits of treating constitutional decision making as merely a weapon of partisan advantage, it has a distinct cost: it tends to erode the social capital embodied in the rule of law. We *expect* private civil litigants to treat constitutional law as little more than one of many tactical devices. So long as they do not in practice violate an adjudicated understanding of the law, after all, we leave private parties free to pursue their private ends, and so long as they stop short of wasting a court's time with a bad-faith argument,²⁶⁰

²⁵⁷ See, e.g., U.S. CONST. pmbl. (explaining the Constitution as a mechanism to "insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty").

²⁵⁸ Arguing for construing congressional powers broadly, Marshall famously said "we must never forget, that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

²⁵⁹ But see MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 23 (1988) ("Treating the Constitution like a contract . . . is difficult to defend cogently."); see also Larry G. Simon, *The Authority of the Framers of The Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1495-519 (1985) (rejecting a consent-based justification of originalism).

²⁶⁰ See, e.g., Fed. R. Civ. P. § 11(b)(2) (requiring that legal arguments to a federal court be

we excuse private parties to argue for any meaning of the law they like. We expect *public* parties to meet a different and higher standard, however. Those empowered to enforce a constitution, in other words, should set aside their private interests and read it so as to best promote the public good.

The public good alone offers a dangerously vague standard for guiding constitutional decision making, however. Apart from the obvious costs of uncertainty—confusion, conflict, and error—applying a constitution by light of simply “the general Welfare”²⁶¹ would, contrary to that avowed aim, encourage the pursuit of private advantage. Where we cannot agree on the meaning of a constitutional term, after all, each of us will tend to favor a more marginally self-serving one. Interpretive uncertainty engenders partisan conflict, eroding the rule of law. To best serve the public good, therefore, we must read the Constitution subject to the constraints of a particular interpretive method, rather than merely according to good intentions, and furthermore a method chosen not because it generates any particular, favorite result, but rather because it in general tends to resolve disputes in a justifiable manner.

Popular interpretive theories such as originalism or living constitutionalism can certainly lay better claim to resolving disputes than the pursuit of private advantage or the unvarnished public good can. I do not plan here to exhaustively critique the virtues of those theories, which at least offer us more than nothing. Here, rather, I offer an outline of an alternative approach to constitutional decision making, one that aims to maximize the justifiability of the Constitution with regard to those whom it would bind. Such a consensualist theory aims, in other words, to interpret and construct a constitution so as to respect the consent of the governed.

As discussed above, an expressly consensual transaction between fully informed and equally powerful parties sets the gold standard for consent. We cannot expect any political constitution to meet that standard, of course.²⁶² We can, however, interpret and construct a constitution to encourage forms of government that converge on that ideal. Thus, for instance, we should generally favor reading a constitution to allow freedom of exit from the constitution’s jurisdiction.²⁶³

“warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

²⁶¹ U.S. CONST. pmbl.

²⁶² See *supra* Part III.B (discussing the problem of justifying political coercion).

²⁶³ See *supra* Part III.B.3.a.

More generally, a consensualist approach would tend to subject a constitution to the same demands the law generally imposes on only weakly justified agreements. On that view, argues Ethan J. Leib, we should adopt the following principles of constitutional interpretation and construction:

- (1) investigate the type of assent we can justifiably ascribe to citizens; (2) enforce bits of text that are plain, uncontroversial, and particularly clear; (3) construe ambiguous phrases against the “drafter” and in favor of those who are assenting today; (4) protect the kinds of inalienable rights that the contractual document must be read to respect . . . ; (5) protect the reasonable expectations of today’s signatories; and (6) assess whether the document and its potential applications accord with fundamental fairness.²⁶⁴

To those strictures, contract law suggests we might add this one: given the gross irregularities that plague a constitution’s adoption and enforcement, it should not take much *substantive* unconscionability to justify striking a provision as void and unenforceable.²⁶⁵ Courts place procedural and substantive flaws on the same side of the scale when judging an agreement’s unconscionability, after all; strong proofs of one can offset weak proofs of the other.²⁶⁶

To the text not winnowed out as unconscionable, we should assign a plain meaning consistent with the understanding of all contemporary parties to the constitution, politicians and citizens alike. If we can find no *common* meaning, we should assign the text its plain *public* meaning, because we can impute to political actors knowledge of what citizens think about the constitution’s meaning.²⁶⁷ As agents of the public, politicians owe a fiduciary obligation to understand and implement the preferences of those in whose name they claim to act.²⁶⁸ Thus, a politician who adopts or enforces a

²⁶⁴ Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 368 (2008) (footnote omitted). As discussed below, *infra* note 296, Professor Leib perhaps does his theory a disservice by classifying it as a variant of living constitutionalism, given that it generates results so different from those that have so often issued under that banner).

²⁶⁵ Indeed, one might well argue that, because federal courts claim the sole authority to judge the constitutionality of federal law, the Constitution describes an inherently unconscionable bargain, wherein one of the parties claims to act as its own judge. *See supra* Part III.B.3.c (describing the nature of that problem and a possible cure).

²⁶⁶ *See supra* Part II.B (evaluating the justificatory force of different types of consent).

²⁶⁷ *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981) (specifying which meaning prevails when the parties attach different meanings to an agreement and one of them knows or should know of the other’s understanding).

²⁶⁸ *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (defining fiduciary obligations of agent to principal).

constitution, without regard to the meaning ascribed to it by the citizens—who are supposedly bound by the constitution—would thereby breach not only his fiduciary obligations, but the duty of good faith and fair dealing incumbent on every party to a contract.²⁶⁹ Such wayward political agents could not rightfully command our obedience. We must therefore interpret the enforceable terms of a constitution consistent with the plain meaning ascribed to them by those subjected to the constitution's jurisdiction.

Uncertainty will remain, of course; words do not always have plain meanings, and context does not always clarify. We then turn from interpretation to construction.²⁷⁰ Even then, though, we should favor the meaning most likely to advantage the parties subjected to a constitution's jurisdiction—those whom it claims to govern, in other words. After all, a constitution represents the ultimate in standard form agreements, offered on a take-it-or-leave-it basis to comparatively powerless offerees.

Other tools of construction might also help to resolve vagueness. A court might, for instance, look to prior performances between the parties to the constitutional agreement²⁷¹—legal precedents, in particular. Next, it might look to other dealings between the same parties, such as statutes passed under authority of the constitution.²⁷² And, should those devices fail to decipher the constitution's text, a court might refer to customary practices, such as common-law rights²⁷³ and international law.²⁷⁴ Those supplementary tools for

²⁶⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

²⁷⁰ For an explanation of the distinction between interpretation and construction, see Lawrence B. Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html (last updated May 16, 2010).

²⁷¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202(4) ("[A]ny course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."). But see *id.* § 203(b) ("[E]xpress terms are given greater weight than course of performance"); see also U.C.C. § 1-205(4) (2004) (prior) ("[T]he express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable . . . express terms control").

²⁷² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 203(b) ("[E]xpress terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade.").

²⁷³ A like presumption already applies in questions of statutory interpretation. See, e.g., *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." (omission in original) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

²⁷⁴ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (referencing international legal sources in support of holding unconstitutional the execution of mentally retarded

constructing a constitution would, however, come into play only after a court has done all it can to protect the rights of any citizen or resident subjected to the constitution's standardized terms. The one-way nature of the constitutional bargain demands a very critical scrutiny of government power.

In those respects, a consensualist theory largely resembles other prominent theories of constitutional decision making. Both originalists and advocates of a living constitution voice great regard for individual rights, for instance,²⁷⁵ and claim to resort to their favored supplementary devices only when the plain meaning of the text proves elusive.²⁷⁶ But a consensualist approach would place far greater weight on the plain public meaning of constitutional terms than prevailing methods of interpretation seem willing to admit. No court reading a standard form agreement that grants the offeror authority to regulate only "interstate commerce" would understand it to limit the right of a comparatively powerless offeree to grow wheat²⁷⁷ or marijuana²⁷⁸ for personal consumption, for instance. Nor, therefore, should a court that aims to respect the consent of the governed read the constitution's text any differently.

A consensualist theory would also differ from currently prevailing theories by focusing on the contemporary public meaning of the constitution's text, rather than on the public meaning ascribed to the text at the time of its ratification or the contemporary meaning ascribed to the text by latter-day judges. If we aim to respect the consent of the governed, after all, we care what *they* think when they read the plain text of the constitution—not what people long dead originally thought about that text, nor what judges and legal commentators now think.

An originalist might counter that viewing the constitution as a contract should in fact compel us to consider the opinions of those

criminals).

²⁷⁵ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (citing the original understanding of the Second Amendment in support of an individual right to keep and bear arms); *Roe v. Wade*, 410 U.S. 113 (1973) (citing recent developments in medical technology, changing social mores, and developments in the case law in support of a right to abortion).

²⁷⁶ See, e.g., *Heller*, 128 S. Ct. at 2791–97 (citing both contemporary and, when that generates indeterminate results, historic meaning of "to keep and bear arms" in order to clarify the meaning of the Second Amendment); *Roe*, 410 U.S. at 152 (prefacing the argument for a constitutional right to privacy emanating from penumbras of Bill of Rights with: "The Constitution does not explicitly mention any right of privacy.").

²⁷⁷ But see *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding "interstate commerce" to encompass growing wheat for private consumption).

²⁷⁸ But see *Gonzales v. Raich*, 545 U.S. 1 (2005) (finding "interstate commerce" to encompass growing marijuana for private consumption).

who ratified it, long dead though they may be, as binding on contemporary citizens. As Judge Frank H. Easterbrook observes: “If I buy a house with borrowed money, the *net* value of the house is what my heirs inherit; they can’t get the house free from the debt. This is so whether my heirs consent to the deal or not; contract rights pass to the next generation as written.”²⁷⁹ Easterbrook’s analogy suggests that citizenship comes attached to a constitutional covenant, one created many generations ago that “runs with the nation,” we might say.

That analogy shows only that while you may adopt a contract initially formed between others, it does not establish that we should read the contract to bind you to the understanding of those original parties. Suppose, for instance, that you purchased land bound by a covenant, originally formed in 1789 between other parties, allowing the use of “outdoor lighting” on the property. Today, thanks to technological advances, that term effectively means something quite different from what it once did. What covenant did you agree to? One that permits only rustic torches in your backyard or one that lets you install energy-efficient LEDs?

That nice puzzle of contract law appears so obscure and unlikely as to have escaped much judicial attention. Evidence that parties in like cases have seen fit to spell out that original meaning controls suggests that courts should, as a customary default rule, favor the meaning of the late-agreeing party.²⁸⁰ Sound theory suggests likewise. We must choose to favor one reading over another, after all—the objective meaning of the parties at the time of the contract’s initial formation or the meaning of the parties who later join the agreement. Time erodes meaning, poisoning it with error. Simple efficiency tells us to favor the meaning that we can find most quickly, easily, and accurately. That test favors using the present public meaning of the late-joining party.

Equity offers the same answer, adding the caveat that we must not work an injustice on other, older parties to the contract. Those parties can easily change the default, however, as part of the transaction by which the new party joins the extant agreement. An extant party’s offer could, for instance, say, “The parties attribute to this agreement

²⁷⁹ Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 HARV. J.L. & PUB. POL’Y 901, 905 (2008).

²⁸⁰ See *Trostel v. Am. Life & Cas. Ins. Co.*, 168 F.3d 1105, 1107 (1999) (noting that the parties stipulated that a tenant taking over the lease in 1990, “‘accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in [the 1917 lease].’” (alteration in original) (quoting *Trostel v. Am. Life & Cas. Ins. Co.*, 92 F.3d 736, 739 (8th Cir. 1996), *vacated and remanded by* Am. Life & Cas. Ins. Co. v. *Trostel*, 519 U.S. 1104 (1997)).

its public meaning at the time of its first formation.”²⁸¹ Private parties already evidently solve the problem that way after all. But the Constitution contains no such clause. Evidence suggests, moreover, that no clause binding the Constitution's meaning to one era would have won ratification in eighteenth-century post-Colonial America.²⁸²

Easterbrook's example, however accurate a description of the legal impact of inheriting mortgaged property, thus falls far short of justifying originalism. For one thing, it focuses on a problem of estate law, and describes a transaction in which the present-day grantee has no say. In fact, however, consent plays a vital role in such transactions. In free societies, debts cannot be forced on heirs, for to hold otherwise would in effect allow human bondage.²⁸³ In our law, therefore, an heir unhappy with the net assets of an estate can freely disclaim it, thereby escaping the debts of the deceased.²⁸⁴

That does not quite tell us whose meaning we should adopt when interpreting a contract that one party, having already entered into the same agreement with others, offers to another, new party. Easterbrook's example concerns estate law, after all. It does helpfully remind us, though, that contract terms cannot be forced on a party against that party's consent. The law can and does force people to act in certain ways, of course. But we cannot grace those legal mechanisms with the label “contract”—at least not without disfiguring the meaning of the word.

1. *Questions for Originalists*

Because contract law respects mutual consent, our best rules for interpreting and constructing a constitution come from our rules for interpreting and constructing contracts. In that way, we might

²⁸¹ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 912 (1985) (reviewing the public debate at the time of the Constitution's proposed ratification about how the document should be interpreted and concluding that “there were sharp disagreements over which interpretive approach was acceptable.”) (footnote omitted).

²⁸² See *Trostel*, 168 F.3d at 1107.

²⁸³ See Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 65–66 n.97 (2003) (describing mechanism in southeast Asian countries by which children “inherit their families’ debts and remain trapped in a cycle of debt bondage.”).

²⁸⁴ See UNIF. PROBATE CODE § 2-1105(a) (amended 2008), 8 U.L.A. 190 (Supp. 2010) (“A person may disclaim, in whole or part, any interest in or power over property”); see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 170 (rev. 2d ed. 1979) (“Under common law, when a beneficiary received notice of the creation of a trust for his benefit, he had a reasonable time to decide whether to accept the equitable interest under the trust or to disclaim or renounce it and thus prevent the interest from vesting in or passing to him. . . . [This] power has now been adopted by statute in most states.” (footnotes omitted)).

maximize the justifiability of the constitution's enforcement on those subjected to its jurisdiction. How could we justify an approach that fails to pay as much respect to the consent of the governed? Not easily.²⁸⁵

Perhaps originalists can justify their favored mode of constitutional interpretation as the same approach that a court would take if tasked to interpret an agreement between, on the one hand, a young adult and, on the other hand, an awesomely powerful unnatural person, unliving and yet undead, that claims the sole right to initiate coercion, that offers the bargain on a take-it-or-leave-it basis, and that acts as its own judge when challenged. Perhaps originalists would, in such a case, disfavor the present public meaning that a contemporary offeree would reasonably assume controls the one-sided standard form agreement, instead favoring a meaning that the offeror adopted some two hundred years before, or perhaps not.

Regardless, original meaning would remain vital to constitutional interpretation. For one thing, the meanings of words change very slowly. In practice, originalism will almost always offer the same meaning as an interpretive method that places the consent of the governed foremost. For another, even originalists support stepping far back from the text when interpretation runs out and construction begins, as when confronting a question the Founders never had occasion to consider.²⁸⁶

In further defense of originalism, it bears emphasizing that the public debates that surrounded such constitutional events as the ratification of the U.S. Constitution or the adoption of the Fourteenth Amendment provide serious and detailed discussions by partisans, experts, and citizens. The first people asked to consent to constitutional terms have powerful incentives to think long and hard about what those words mean to them, as well as what those words might mean when applied years hence. The Founders thus took care to deliberate, and vote, with an eye to protecting their posterity.²⁸⁷

²⁸⁵ Those who join in such a conspiracy to neglect or abuse the consent of the governed might, of course, regard the constitution as more justified when read with a self-serving slant. That would at most make their preferred interpretative method justified among their fellow thieves, however; it would not suffice to establish the consent of their victims.

²⁸⁶ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 145 (Amy Gutmann ed., 1997) (affirming his belief that the Eighth Amendment is an abstract principle, explaining, "If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted."). Query whether Justice Scalia would uphold the constitutionality of a punishment, such as tarring and feathering, which the Founding era evidently thought appropriate but that many today would regard as cruel and unusual.

²⁸⁷ And, sometimes, posteriors. See, e.g., Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117 (1993) (reviewing evidence that federal

As John O. McGinnis and Michael B. Rappaport observe, the supermajorities required to adopt or amend the U.S. Constitution have helped to ensure its “beneficence.”²⁸⁸ On their view, original-meaning jurisprudence generates not only good results but, since the Constitution aims to “promote the general welfare,” helps to render the Constitution more justified.²⁸⁹ That defense of originalism comes with a twist, however; the authors require modern-day courts to adopt interpretative rules from the Founding era.²⁹⁰ Their form of originalism comes with caveat, too; it must give way if another approach “is more likely to reach consequences that are as sound as the consequences reached by originalism.”²⁹¹

It thus remains unclear what McGinnis and Rappaport would say about interpreting the Constitution—or at least those of its provisions that directly impact citizens—as modern courts would interpret a standard form agreement between unequals, offered on a take-it-or-leave-it basis, backed with only weak proofs of consent. We cannot very well know exactly what interpretive rules Founding-era courts would have applied to that, a transaction characteristic of the modern commercial age. Perhaps they would have regarded such supposed agreements as unenforceable insults to freedom; the spirit of the then-recent Revolution of 1776 certainly suggests as much.²⁹²

At any rate, though, we have no reason to think that the Founding generation would have objected to the methods of interpretation and construction that a modern court would typically apply before enforcing any weakly justified standard form agreement between extant and new parties. All courts would favor reading the contract so as to best safeguard the consent of those relatively powerless latecomers from whom the older, more powerful party has asked submission. That approach would moreover have the commendable pragmatic result of protecting natural, common-law, and

lawmakers deliberately, but covertly, narrowed the scope of the Third Amendment during their congressional deliberations).

²⁸⁸ John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917, 925 (2008).

²⁸⁹ See *id.* at 920 (“[I]t is the supermajoritarian genesis of the Constitution that explains both why the Constitution is desirable and why that desirability depends on its original meaning.”).

²⁹⁰ *Id.* at 926.

²⁹¹ *Id.* at 928.

²⁹² The revolutionaries complained, for instance, that the King of England “has made Judges dependent on his Will alone,” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776), “impos[ed] Taxes on us without our Consent,” *id.* para. 19, and answered humble petitions “only by repeated injury,” *id.* para. 30.

constitutional rights—probably more so than originalism does.²⁹³ Granted, a consensualist approach to constitutional decision making might upset a few apple carts; some longstanding Supreme Court opinions would probably fall by the wayside, for instance. In the long run, though, applying the time-tested methods of contract law to constitutional problems promises to generate efficient, equitable, and consistent results.

2. Questions for Living Constitutionalists

Just as it differs from originalism in some regards, so too would a consensualist approach to interpretation and construction differ from one that vests judges with wide latitude to adapt the Constitution to modern times. That, a so-called living-Constitution mode of decision making, emphasizes flexible meanings and respect for judicial precedent.²⁹⁴ Under living constitutionalism, “the best interpretation of the Constitution’s meaning changes in accordance with changing circumstances and events, and . . . it is the duty of all actors, including judges, to change their interpretations of the Constitution to reflect these changing circumstances.”²⁹⁵

A consensualist approach, in contrast, reads the Constitution in a manner calculated to maximize the consent of the governed, viewing the Constitution as a standard form agreement between unequals, offered on a take-it-or-leave-it basis, and supported by only weak and controvertible proofs of assent. A consensualist starts, and often finishes, with the plain present public meaning of the text.²⁹⁶ That meaning would certainly trump judicial rulings to the contrary, which at best offer only evidence of prior performances by the same parties under the same agreement.²⁹⁷

²⁹³ As McGinnis and Rappaport observe, the original Constitution had a flawed view of the rights of slaves and women, which later amendments have corrected. McGinnis & Rappaport, *supra* note 288, at 932–35. Query, though, whether we can completely exonerate Founding-era interpretive rules for suffering those wrongs to survive judicial review.

²⁹⁴ See Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1322–25 (2008) (collecting and reviewing authorities).

²⁹⁵ Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 698 (2005). Balkin adds, perceptively, “Not surprisingly, living constitutionalism is a controversial theory, which, since the New Deal, has proved much more acceptable to liberals than to conservatives.” *Id.* at 699.

²⁹⁶ Ethan J. Leib takes a similar view of the constitution and yet describes the interpretative methodology that results as “one variant” of “living constitutionalism.” Leib, *supra* note 264, at 355. That label perhaps risks obscuring the virtues of regarding the Constitution as a contract between the federal government and present-day citizens, however, for such an approach avoids the “messiness, seeming lack of discipline, purported lack of fidelity (and actual lack of faith from time to time), disrespect for the document, and too substantial delegation to the judiciary” that make “living constitutionalism . . . unattractive to so many.” *Id.* at 362.

²⁹⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981) (ranking those tools

Are living constitutionalists willing to give up such cases as *Kelo v. City of New London*,²⁹⁸ in which the Supreme Court held that a forced transfer from one private party to another qualified as a “public use” under the Fifth Amendment; *Home Building & Loan Association v. Blaisdell*,²⁹⁹ which effectively gutted the Constitution’s mandate that states pass no law “impairing the Obligation of Contracts;”³⁰⁰ or *Gonzales v. Raich*,³⁰¹ which read the power to “regulate purely intrastate activity that is not itself ‘commercial’”³⁰² into text allowing Congress only to “regulate Commerce . . . among the several States?”³⁰³ It would seem hard to countenance those and other judicial deviations from the Constitution’s plain, present, public meaning. In those and other cases, the living Constitution would part ways with the consensual one.

Because it aims to maximize the consent of parties subject to the Constitution’s jurisdiction here and now, rather than as of some 200 years ago, consensualist constitutionalism does share with living constitutionalism a concern for the present. The latter apparently trusts federal agents to decide questions of the Constitution’s meaning, however. A consensualist reading, in contrast, focuses on what living citizens and residents of the United States think the Constitution means. Maximizing the consent of the governed also calls for something better than entrusting federal agents with the sole authority to issue binding constitutional opinions; it calls, rather for empowering citizens to choose less partial judges of the proper scope of government power.³⁰⁴

in like fashion); U.C.C. § 1-205(4) (2004) (prior) (ranking express terms, course of dealing, and usage of trade in like fashion); *id.* § 2-208(2) (placing course of performance into the ranking between express terms and course of dealing). In practice, given that the judicial system far outlives individual citizens, precedents typically offer even weaker proofs of the consent of the (presently) governed: prior performances by *different* parties under an agreement having the same terms. Although neither the U.C.C. nor the *Restatement (Second) of Contracts* specify exactly where that sort of evidence would fall in their ordinal rankings of interpretative tools, logic suggests that courts should regard it as less probative than course of performance, at least, and perhaps less probative than course of dealing.

²⁹⁸ 545 U.S. 469 (2005).

²⁹⁹ 290 U.S. 398 (1934). “The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts,” the majority opined. *Id.* at 437. Astonishingly, however, it nowhere saw fit to quote the Constitution’s plain language on the subject.

³⁰⁰ U.S. CONST. art. I, § 10.

³⁰¹ 545 U.S. 1 (2005).

³⁰² *Id.* at 18 (2005).

³⁰³ U.S. CONST. art. I, § 8, cl. 3.

³⁰⁴ See *supra* Part III.B.3.c (discussing the creation of citizen courts).

Living constitutionalists might regard that prospect with horror, granted. For that matter, originalists might, too.³⁰⁵ But somebody has to decide what the Constitution means. Why not choose someone likely to maximize the consent of the governed?

CONCLUSION

This Article argued, in a nutshell, that consent varies by degrees and provides a standard for evaluating the justification of social institutions. Evidence for that claim pervades legal, moral, and economic reasoning. After verbally and graphically illustrating graduated-consent theory, the Article applied it to several longstanding puzzles, generating fresh insights into the enforceability of standard form agreements, the justifiability of political institutions, and the meaning of the Constitution.

For all that, graduated-consent theory offers room for further development. The relationship between the nature of transactions—their consensuality—and the subjects of transactions—their *res*—remains undeveloped. Exploring that new area will call not just for a close examination of contract and tort law, the primary concerns here, but also of property law.

The prospect of applying economic reasoning to non-expressly consensual transactions also holds great, and as yet almost untapped, promise. This Article has offered only some preliminary comments about a consensualist approach to reading a constitution, for instance. And, yet, despite Judge Frank Easterbrook's claim that "it is important to separate the theory of political justification from the theory of interpretation appropriate to that theory of justification,"³⁰⁶ we have much to gain by crafting a theory of constitutional meaning that flows directly from our theory of constitutional justification. With the reader's leave, however, I will set aside fuller exploration of

³⁰⁵ Randy Barnett, a leading proponent of original meaning jurisprudence, explains that "the principal reason for adhering to original meaning is that we the living, *right here, right now*, profess a commitment to a written constitution. And the function of a written constitution would be seriously compromised if its meaning can be altered by the will of judges or legislators." Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 506 (2008) (emphasis in the original; footnote omitted). But originalism does not tell us who *now* should decide what the Constitution meant *long ago*. The problem of self-interested judges remains.

On that count, an originalist might find something useful in the consensualist approach. As Barnett says, "[T]he meaning of a written constitution should remain the same until it is *properly* changed, and judges and legislators have no power under our system to change its meaning." *Id.* at 506–07 (emphasis in the original; footnote omitted). I would add only that we should recognize evolution in the present, public, plain meaning of its text as a proper way that the meaning of the Constitution might change—and that we should settle that question of fact via a mechanism that maximizes the Constitution's justifiability.

³⁰⁶ Easterbrook, *supra* note 279, at 905.

that and other applications of graduated-consent theory for another day.