

Graduated Consent in Contract and Tort Law: Toward a Theory of Justification

by

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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 promote the progress of legal, moral, and economic reasoning in general.

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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. In that, a very low-resolution image, 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 *un*consensual 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

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*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (February 10, 2006), available at <http://plato.stanford.edu/entries/coercion/> (last visited February 21, 2010).

² The basic facts and outcome—but not all the terminology and reasoning—come from *Curtis v. Jaskey*, 326 Ill. App. 3d 90, 759 N.E.2d 962 (2nd Dist. 2001).

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 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 non-consent 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 above all else, of course, pursuing it as the supreme good. We can trace consent's influence on the face of most legal, moral, and economic theories, however. 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 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

³ *Id.* at 99, 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* 343 ("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 non-political 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; the quote above continues, "But this 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.*

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 non-interference, skeptical disapproval, or forceful objection. Consent and justification thus come in degrees and vary in step, one with the other. Figure 1, below, illustrates.

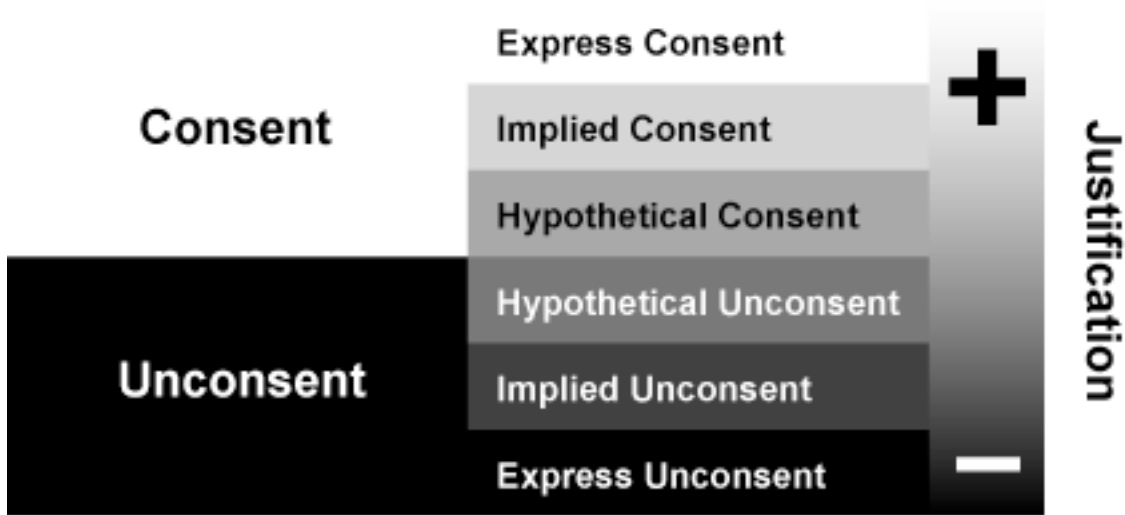


Figure 1: Types of Consent and Their Relationship to Justification

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 that, 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 of America more justified, such as by increasing our freedom to exit certain government

⁵ "Unconsent" herein means, as the suffix "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.

programs or by 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. That means, 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 instead enforcing 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.

I.A. The Legal Value of Consent

Consent plays a very prominent role in the law—so much so, that the point hardly needs elaboration. Many 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. Thus, for instance, does the common law regard consent as a necessary ingredient for creating a binding contractual bargain.⁹ Thus, too, does tort law require a showing of *un*consent

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 *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a constitution we are expounding.").

⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[The formation of a contract requires a bargain in which there is a manifestation of mutual assent . . ."). In rare instances, contract law also enforces non-bargains. Even these, however, require proofs of consent. *See, e.g., id.* § 90(1) (providing for enforcement of some promises that evoke reasonably foreseeable reliance).

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 counter-proofs. Tort law, in contrast, tends to manage with a more basic, even atavistic, notion of unconsent; except when unconsent comes mixed with off-setting 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 party's manifestations.²¹ In that, 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

¹⁰ See RESTATEMENT (SECOND) OF TORTS § 13 (1965) (defining battery).

¹¹ See *id.* § 158 (defining liability for intrusions on land)

¹² See RESTATEMENT (SECOND) OF CONTRACTS § 175.

¹³ See *id.* § 177.

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

¹⁵ See *id.* §§ 162-64.

¹⁶ See *id.* §§ 151-54.

¹⁷ See *id.* § 20.

¹⁸ See *id.* § 208 (limiting enforceability of unconscionable contracts or terms); § 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 (Minn. 1980) (affirming finding that those who attempted to forcibly "deprogram" a member of a religious cult were not liable for false imprisonment on grounds that she apparently and temporarily consented to their efforts) with *Eilers v. Coy*, 582 F.Supp. 1093 (D. Minn. 1984) (finding liability for false imprisonment on similar facts on grounds that the plaintiff never evinced consent).

²⁰ Tort law likewise offers comparatively little guidance for determining when consent obtains, saying simply, "Consent is willingness in fact for conduct to occur." RESTATEMENT (SECOND) OF TORTS § 892(1) (1979).

²¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 17(1) ("formation of a contract requires . . . a manifestation of mutual assent . . ."); § 24 ("An offer is the manifestation of willingness to enter a bargain . . ."); § 38(2) ("A manifestation of intention not to accept an offer is a rejection . . ."); RESTATEMENT (SECOND) OF TORTS § 892(2) (1979) ("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.*, Comment b ("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 24 (South-Western Publishing Co. 1986) (explaining that, to an economist, "your preferences are revealed by your actions"). *But*

impliedly *did agree* or hypothetically *would have agreed*, 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, and at all events does not lie close to the trinity at the common law's core: Property, contracts, and torts. Those three intertwined areas of law, because they arise out of civil customs, tout a consent-based justification notably different from, and notably 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.

I.B. The Moral Value of Consent

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. 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 dealing, and usage in trade as respectively weaker proofs of meaning).

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 *Legal Theory Lexicon 042: Consent* (March 3, 2009), available at http://lsolum.typepad.com/legal_theory_lexicon/2004/11/legal_theory_le.html (last visited February 18, 2010).

Consent plays a prominent role in moral reasoning.²⁷ Each of the three major types of moral theory—consequentialist, deontological, and arcaic—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, granted; 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

I.B.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 of those sorts of consequentialism. Mill praises freedom as the best guarantee of happiness,³³ for instance, while those who would

²⁷ See *id.* (reviewing the literature to conclude, "consent works moral magic. . . . consent 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 (1996), with Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996). As regards the mirror image of consent, *unconsent*, see SCOTT ANDERSON, *Coercion*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (February 10, 2006), available at <http://plato.stanford.edu/entries/coercion/> (last visited February 21, 2010) (reviewing the literature to conclude that the view "that coercion is *prima facie* or *pro tanto* immoral, is probably the most commonly held view.") (emphasis in the original).

²⁸ You might call this approach, with a nod at JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press 1971), "justice as consent."

²⁹ See, e.g., GEORGE K. STRODACH, *THE PHILOSOPHY OF EPICURUS* 72-82 (Northwestern Univ. Press 1963) (describing and analyzing the Epicurean hedonism). See also, JOHN STUART MILL, *UTILITARIANISM* 7-8 (Hackett Publ. Co. 1979) (1861) (defending Epicureans from the claim that promote the pursuit of base pleasures).

³⁰ See, e.g., *id.* 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* at 3, 9-10 (Cambridge Univ. Press 1973) (describing rule utilitarianism and contrasting, unfavorably, with act utilitarianism).

³² See, e.g., POSNER, *supra* note 4 at 15 ("[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 (Hackett Publ. Co. 1978) (1859)

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

I.B.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 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

("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 III.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.

³⁷ See SOLUM, *supra* note 26 ("for 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 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 29 (Basic Books 1979).

³⁹ *Id.* at 30-31.

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 COL. L. REV. 269, 298 (1986) (footnote omitted).

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 on *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 rights-set 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 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, if not sufficient, role in shaping deontological moral theory.⁴⁷

⁴² See MALCOM MURRAY, *THE MORAL WAGER: EVOLUTION AND CONTRACT* 153 (Springer 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 ("moral 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.

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* FRIEDRICH A. HAYEK, *I LAW, LEGISLATION, AND LIBERTY* (Univ. Chicago Press 1978).

⁴⁷ *But see* MURRAY, *supra* note 42, at 153 (describing how consent is a necessary but not sufficient condition for determining right action and concluding that "the concept of

I.B.3. Artaic Arguments about Consent

Artaic moral theories value virtue.⁴⁸ A good person, in that view, evinces such habits of right action 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, artaic 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, so, too, does moral strength grow only out of moral struggle. Moral struggle requires moral choice and choice presumes consent.⁵¹

Because they focus on forms of action—virtues—rather than on moral conditions—such as happiness, injustice, or fairness—artaic 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, Prof. Lawrence B. Solum, a leading advocate of virtue theory, puts the matter this way:

[V]irtue ethics is inconsistent with a theory that views autonomy as the highest (and perhaps only noninstrumental) value 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

consent does no justificatory work Moral action is not determined by consent."). 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. 335-320 B.C.E., W.D. Ross trans.; J.O. Urmsen rev.), in *II THE COMPLETE WORKS OF ARISTOTLE*, at 1729 (Jonathan Barnes, ed., 1984).

⁴⁹ See, e.g., *id.*, Book II, 1105a30-ff (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.").

⁵¹ See for example, *id.* at Book III, 1109b30-ff (distinguishing voluntary from non-voluntary and in-voluntary actions).

⁵² See Ekow N. Yankah, *Virtue's Domain* (draft v. September 21, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265668 (last visited February 21, 2010).

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, arcaic moral philosophies should value consent as necessary constituent of human flourishing.

I.B.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 that fact, and concludes in support of the proposition. In brief, 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:

⁵³ Lawrence Solum, *Yankah on Virtue Jurisprudence*, LEGAL THEORY BLOG (Sept. 16, 2008), available at <http://lsolum.typepad.com/legaltheory/2008/09/yankah-on-virtu.html> (last visited February 21, 2010).

⁵⁴ IMMANUEL KANT, *CRITIQUE OF PURE REASON* A 84-92 (2nd ed. 1787) (trans. Norman Kemp Smith, trans., Macmillan and Co., Ltd. 1953) (describing principles of transcendental deduction).

⁵⁵ See Adrian Bardon, *Transcendental Arguments in* THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://www.iep.utm.edu/trans-ar/> (last visited February 21, 2010).

⁵⁶ See, e.g., HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* 1-21 (Cambridge University Press 1982) (arguing against metaphysical skepticism on grounds that it would be impossible for a being existing only as, say, a brain in vat to conceive of brains, vats, or kindred material objects).

⁵⁷ Kant, for instance, argued:

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. Therefore, independent, enduring substances exist.

See KANT, *supra* note 54 at A 29-41.

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 covaries 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 home-grown disaffection. In such a case we cannot properly say that the justification aims to win the consent of the governed, however; it aims, rather, to win their ignorant acquiescence. Though false propaganda might in practice win obedience, therefore, 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 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,

⁵⁸ Alert readers have directed me to a similar argument by Han-Hermann Hoppe, first offered in *A THEORY OF SOCIALISM AND CAPITALISM* 133 (Kluwer, 1989), in which he posits that self-ownership "is implied in the concept of justification as argumentative justification. Justifying *means* justifying without having to rely on coercion." (emphasis in the original). Hoppe argues toward a different end—establishing self-ownership—however, then the aim of the argument here—establishing the relationship between justification and consent.

⁵⁹ See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* §§ 162-164 (1965) (defining conditions under which fraudulent misrepresentations negate the formation and enforceability of a contract).

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, *NICHOMACHEAN ETHICS*, Book I, Ch. 1, 1094a1-3 (c. 335-320 B.C.E., W.D. Ross trans.; J.O. Urmson rev.), in II *THE COMPLETE WORKS OF ARISTOTLE*, at 1729 (Jonathan Barnes, ed., 1984) ("Every art and every inquiry, and similarly every action

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, granted, 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 *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 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

I.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

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 the a mirror image of the same thing, we might instead measure the *dissent* that the argument rouses.

⁶³ To "justify" is "to show to be just, right, or in accord with reason; vindicate . . ." *Webster's New World Dictionary of American English* 734 (Simon & Schuster 3rd College ed. 1988).

⁶⁴ See, e.g., Bruce L. Benson, *Property Rights and the Buffalo Economy on the Great Plains*, in *SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS* at 29, 58-61 (Terry L. Anderson, Bruce L. Benson, & Thomas E. Flanagan, eds., Stanford Univ. Press

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

Consent's power to reveal preferences, and thus promote efficiency, would not matter if we could read minds. We cannot, however. 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 myriad *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,

2006) (offering an economic model of inter-tribal relations on the great plains that accounts both for the gains from trading and for the gains from raiding).

⁶⁵ ARISTOTLE, *POLITICS*, Book I (c. 335-320 B.C.E., B. Jowett), in II *THE COMPLETE WORKS OF ARISTOTLE*, at 1986 (Jonathan Barnes ed., 1984).

⁶⁶ 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 Randy E. Barnett, *A Consent Theory of Contract*, 86 *COL. L. REV.* 269, 282 (1986) ("[I]n the absence of a consensual demonstration of preferences, we do not really know if the exchange is worthwhile--value enhancing--or not.") (footnote omitted).

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 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, 832-33 (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.

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/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.

II. The Scale of Consent

Whether they realize it or not, judges, moralists, and political philosophers frequently treat consent as a matter degree. This part reviews and summarizes their deliberations, mapping consent's features and charting through them a path to justification. Subpart 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. Subpart B demonstrates that the resulting scale, which runs from the most consensual transaction to the least, measures justification.

II.A. Gradations of Consent

This subpart describes three types of consent—express, implied, and hypothetical—in order. Both of the first two types qualify as *actual* consent; they differ primarily in how that consent gets communicated. As section 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

⁷⁰ See LUDWIG VON MISES, *SOCIALISM* 137-42 (rev. ed., 1951) (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 Monopoly*, *AGORAPHILIA* (May 20, 2007), available at <http://agoraphilia.blogspot.com/2007/05/supply-and-demand-of-government-qua.html> (last visited February 21, 2010) (charting both express and non-express demand for government services).

⁷² Such as accepting delivery of goods; see, e.g., UCC 2-206(1)(b) (specifying that shipment of goods in response to an order constitutes acceptance).

to it.⁷³ Section 2 explains. Hypothetical consent, covered in section 3, differs from its express or implied counterparts in that it ignores facts about what any given party does or does not want, instead relying on a counter-factual supposition about what the party *would have* wanted. Section 4 finds a similar pattern, in mirror form, among the varieties of *un*consent. Each of type of consent and *un*consent includes various subtypes, as Figure 2, below, illustrates. Section 5 discusses nonconsent, a category distinct from both consent and *un*consent.

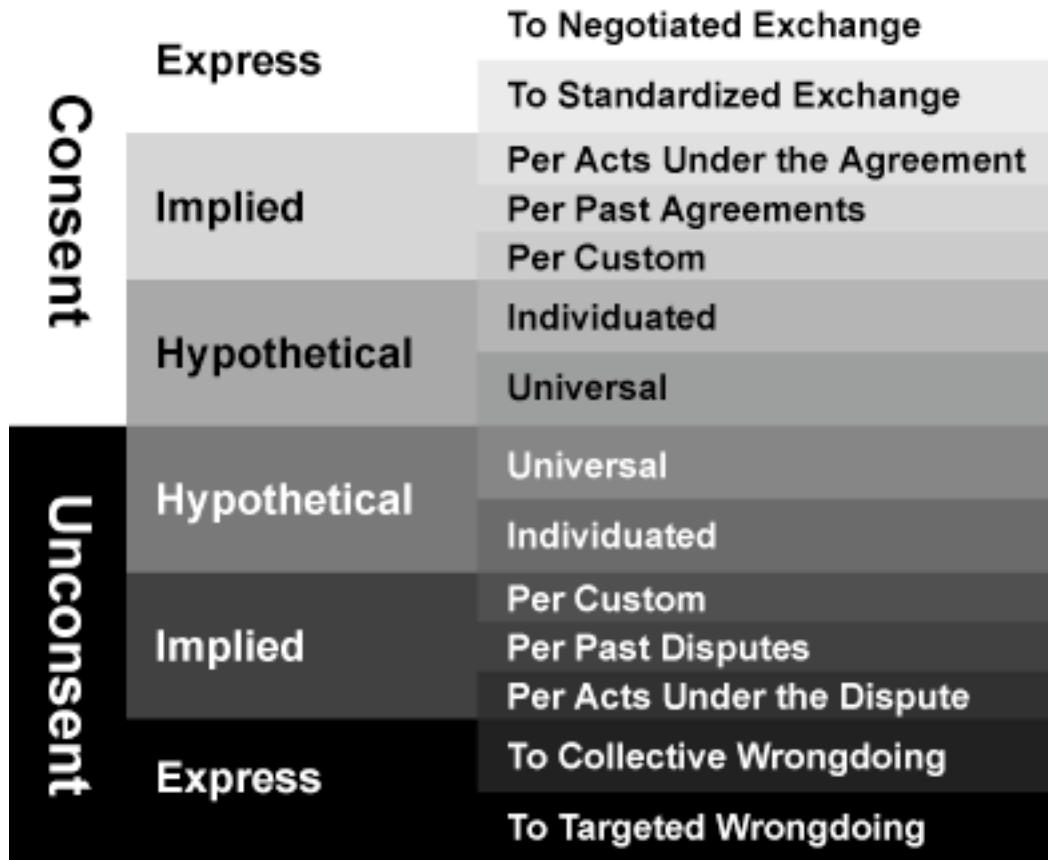


Figure 2: Types and Subtypes of Consent and Unconsent

II.A.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

⁷³ See generally Barnett, *supra* note 69.

whether express consent to an agreement obtains.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

At root, contract law embodies a set of rules defining when express consent justifies the invocation of judicial remedies. Around 53% of the RESTATEMENT (SECOND) OF CONTRACTS grapples 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 devotes one of its most powerful, subtle, and controversial sections to the defining 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 Contract law also recognizes a distinction between dickered and form agreements, treating negotiated exchanges with more respect than standardized ones.⁸² Express consent thus includes as subtypes consent to negotiated exchanges and consent to standardized exchanges.

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).

⁷⁵ RESTATEMENT (SECOND) OF TORTS, § 10A (1965) (defining "consent"); § 892(1) (1979) (offering same definition and adding, "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.

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.

⁷⁸ The RESTATEMENT (SECOND) OF CONTRACTS (1981) 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 203 such sections: §§ 3-109, 129, 139, 148-177, 200-230, 250-251, 273-287, 322-323, and 327-330, inclusive.

⁷⁹ See *id.* § 2-207.

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., RESTATEMENT (SECOND) OF CONTRACTS § 90(1). Plainly, the promisor consents to making the sort of promise at issue in 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 failure to afford a remedy. See also *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).

Tort law, because it aims primarily to remedy unconsensual acts, treats express consent almost as an afterthought. Only about 6% of the sections of 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* affirmed the denial of an assault and battery claim on grounds that the plaintiff's intestate had expressly consented to engage the defendant in a boxing match that turned out deadly.⁸⁵ 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."⁸⁶ Absent the deceased's express consent, the defendant's punches would have qualified as intentional torts; excused by consent, they became mere unactionable sport.⁸⁷ In the guise of the affirmative defense of assumption of risk, express consent can also negate a claim of negligence.⁸⁸

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.⁸⁹

II.A.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,⁹⁰ for instance, and an agreement's terms by default hew to usage in the relevant trade.⁹¹ Those implied terms win only contingent respect, however; express unconsent can negate the imposition of obligations justified by only impliedly, by default. A contract's offeror can

⁸³ The RESTATEMENT (SECOND) OF TORTS (1965-79) has 900 active sections, of which some 50 define the scope or effect of consent. In the latter group I count §§10A, 49-53, 55-62, 69, 167-175, 252-256, 496A-496G, 523, 583-84, 687, 694, 702, 704, 840C, and 892-892D, inclusive.

⁸⁴ See RESTATEMENT (SECOND) OF TORTS, § 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.").

⁸⁵ 208 Ala. 492 (1922).

⁸⁶ *Id.* at 493.

⁸⁷ Tort law also recognizes express consent as a defense to unintentional torts, such as those alleging negligent or reckless conduct. See 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 . . .").

⁸⁸ See RESTATEMENT (SECOND) OF TORTS, Chapter 17A, §§ 496A-496G.

⁸⁹ See *infra* Part II.A.4.

⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 63(a).

⁹¹ *Id.* § 202(3)(b).

thus opt out of the presumed contract rules for defining acceptance and instead require, say, a firm handshake.⁹² Similarly, terms of art keep their technical meaning "[u]nless a different intention is manifested" by the parties.⁹³

Contract law recognizes subtle shadings within implied consent, distinguishing between terms implied by performance under the agreement,⁹⁴ terms implied by past dealings between the parties,⁹⁵ 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 treats respects implied consent. A community's customs establish default presumptions about whether silence or inaction constitutes consent, for instance—a presumption that only express *un*consent can trump.⁹⁸ More generally, given that the defense of assumption of risk can obtain 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," speaks to express and implied consent, alike, foreclosing otherwise valid tort claims as freely chosen by the supposed victim.¹⁰⁰

Tort law treats implied consent with less precision that contract law does. The RESTATEMENT (SECOND) OF CONTRACTS 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

⁹² *Id.* § 30(1). *See also id.* § 63 (conditioning default term that an acceptance takes place when put out of the offeree's possession with, "Unless the offer provides otherwise . . .").

⁹³ *Id.* § 202(3).

⁹⁴ *See* UCC § 2-208, RESTATEMENT (SECOND) OF CONTRACTS §§ 203(b), 202(4).

⁹⁵ *See* UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

⁹⁶ *See* UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

⁹⁷ Express terms "control," UCC §§ 1-205(4), 2-208(2), or have "greater weight than," RESTATEMENT (SECOND) OF CONTRACTS § 203(b), course of performance, course of dealing, and usage in trade.

⁹⁸ *See* RESTATEMENT (SECOND) OF TORTS § 892, comment 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 phrase means, "if one, knowing and comprehending the danger, voluntarily exposes himself to it . . . he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." BLACK'S LAW DICTIONARY 1088 (abridged 6th ed., 1991)

¹⁰¹ *See* RESTATEMENT (SECOND) OF TORTS § 892, comment c (1979) (appending cases).

¹⁰² Thus, for instance, the court in *Bradford v. Winter* 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." 15 Cal. App.

no seasoned student of the common law, though; torts have always primarily concerned unconsensual transactions, leaving detailed treatment of consensual ones to contract law.

II.A.3. Hypothetical Consent

Hypothetical consent plays little role in contract law proper, but rather 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* win restitution for the medical aid he administered to an unconscious man found laying in the street.¹⁰⁴ 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.¹⁰⁵ Universal hypothetical consent proves easier to establish, and weaker in effect, than hypothetical consent premised on what a particular individual would have done.¹⁰⁶

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*.¹⁰⁷ 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* observed that, "in an emergency situation where a doctor is privileged to proceed with necessary surgery, there

2d 448, 454 (2nd Dist. 1963). The defendant physician thereby won a defense against the patient's battery claim.

¹⁰³ See, e.g., *Collano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 108, 219 A.2d 332, 334 (N.J. Super. A.D. 1966) (explaining that 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 83 Ark. 601, 104 S.W. 164 (Ark. 1907).

¹⁰⁵ 83 Ark. at 608, 104 S.W. 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.").

¹⁰⁶ See RESTATEMENT (FIRST) OF RESTITUTION § 116, comment 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.").

¹⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 892A, illustration 3 (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.).

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 actual or apparent assent."¹⁰⁸ Here as generally, however, 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 express unconsensual care.¹⁰⁹

II.A.4. Varieties of Unconsent

All of the sorts of consent detailed above¹¹⁰ 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 repeat in the negative range, too. 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.¹¹¹

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 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* court concluded that, in the tort suit before it, "No reason occurs to us why the same rule should not apply between physician and patient."¹¹²

¹⁰⁸ *Kritzer v. Citron*, 101 Cal. App. 2d 33, 39 (2nd Dist. 1950).

¹⁰⁹ *See, e.g., Curtis v. Jaskey*, 326 Ill. App. 3d 90, 759 N.E.2d 962 (2nd Dist. 2001).

¹¹⁰ *See supra* Part II.A.1-3.

¹¹¹ The latter speaks more powerfully, too. As discussed below, at Part II.B., universal hypothetical unconsent has more justificatory force—or perhaps more clearly, *less anti-justificatory force*—than individuated hypothetical unconsent does.

¹¹² 95 Minn. 261, 268-69, 104 N.W. 12, 15 (1905).

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,¹¹³ 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.¹¹⁴

Like express consent, express *un*consent contains subtle shadings. Tort law reserves its strongest remedy—punitive damages—for maliciously personal, intentional wrongs.¹¹⁵ Protests to impersonal and unintentional wrongs, in contrast, tend to evoke mere remedies for negligence.¹¹⁶ Though each of those and other forms of express 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 caused purely by accident 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

¹¹³ As discussed below, at Part II.B., those distinctions order those three types of unconsent along a scale of justification.

¹¹⁴ The court in *Curtis*, 326 Ill. App. at 97, 759 N.E.2d at 967, for instance, 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." 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 326 Ill. App. at 97, 759 N.E.2d 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.

¹¹⁵ 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.").

¹¹⁶ See *id.* § 901 (describing general principles of tort law damages).

Torts such as innocent trespass or nuisance may also evoke injunctive relief, of course; see *id.* Ch. 48, Injunction, Scope Note. 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, "(a) the nature of the interest to be protected" and "(b) the relative adequacy to the plaintiff of injunction and of other remedies.").

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.¹¹⁷

Unconsent here stands for something distinct from nonconsent.¹¹⁸ 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.¹¹⁹ 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*.

II.A.5. Nonconsent

"Nonconsent" marks a categorical distinct from "unconsent."¹²⁰ 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, granted, which provide the background on which free people paint their life projects. To a large extent, and happily, we largely live in a world 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 un-consent, the opposing forces that drive much legal, moral, and economic reasoning.

II.B. Evaluating the Justificatory Force of Different Types of Consent

As the prior part 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

¹¹⁷ Like hypothetical and implied unconsent, the subtypes of express consent also range along a scale of justification. *Infra* Part II.B.

¹¹⁸ For a discussion of nonconsent, see *infra* Part II.A.5.

¹¹⁹ I recognize that not everyone hews to that suggested usage. I explain and use it here, though, hoping that more will.

¹²⁰ I thank Kurt Eggert for convincing me that nonconsent deserves discussion as something interestingly distinct from unconsent.

seek out a hidden order, a ranking of consent implicit in practice and confirmed by theory. This subpart takes up that project, and posits a scale of 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, and down to express unconsent. Figure 3, below, illustrates.

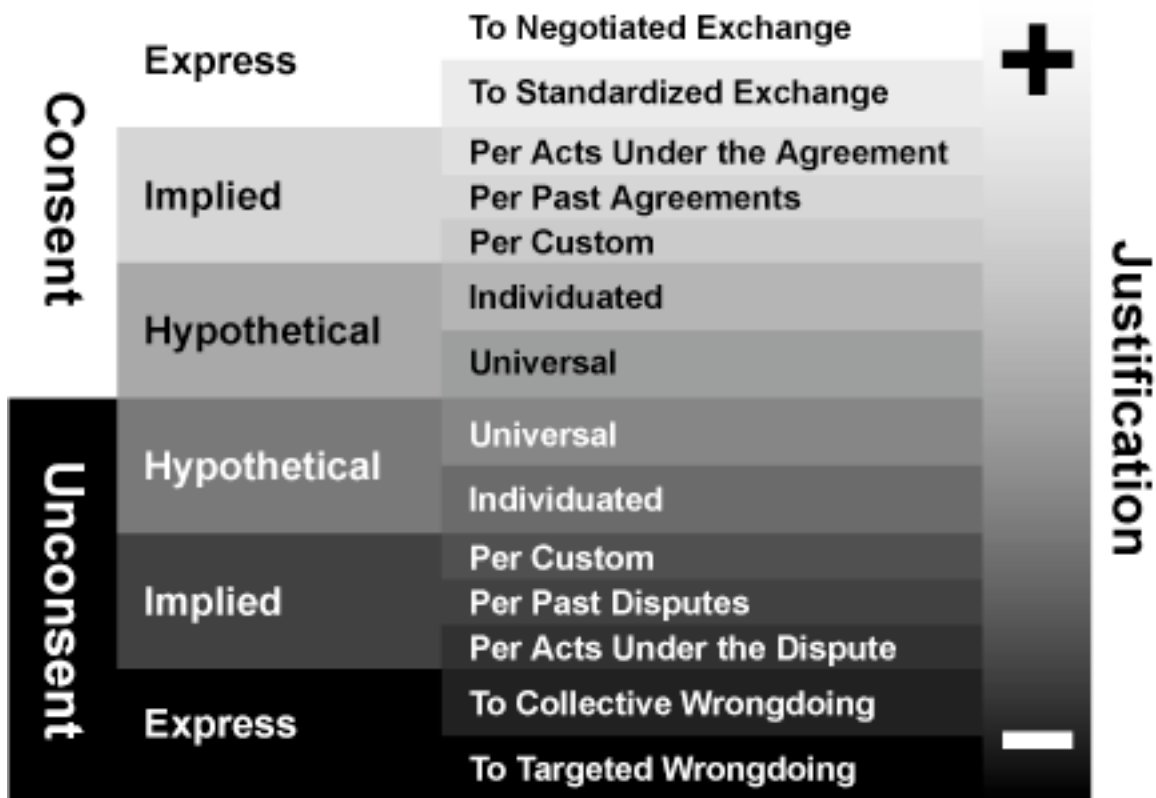


Figure 3: The Scale of Consent

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, while 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.¹²¹ In fuzzier but more practical terms, the scale of consent affords a rough

¹²¹ The economic justification for valuing consent, *supra* Part I.C., does suggest, however, that we might move towards more exact measures of consent by applying

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. Sections 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.

II.B.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.¹²² 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.¹²³ Thus, for instance, might a court decline to enforce such an agreement if convinced that a more knowledgeable party *would not have agreed* to it (showing hypothetical unconsent) and that people *customarily do not agree* to it (showing implied unconsent).¹²⁴

Even when circumstances preclude obtaining express consent, it continues to set the standard for judging such surrogates as hypothetical and implied consent. The closer they come to mirroring express consent, the better claim those lesser forms of consent have to our respect. When interpreting a contract, for instance, courts begin with the language to which the parties have expressly agreed.¹²⁵ 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.¹²⁶ Failing that, courts favor evidence of how the parties have acted in prior dealings under *other* contracts.¹²⁷ Should those interpretive tools still prove inadequate, courts fall back on usage in

information theory to it. *See, e.g.*, CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (Univ. Ill. Press 1963).

¹²² *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (defining "contract"); § 71 (describing types of bargained for exchange); § 344 (listing interests served by judicial enforcement of contracts).

¹²³ *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 . . .").

¹²⁴ *See infra* Part III.A.

¹²⁵ Express terms "control," UCC §§ 1-205(4), 2-208(2), or have "greater weight than," RESTATEMENT (SECOND) OF CONTRACTS § 203(b), course of performance, course of dealing, and usage in trade.

¹²⁶ *See* UCC § 2-208, RESTATEMENT (SECOND) OF CONTRACTS §§ 203(b), 202(4).

¹²⁷ *See* UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

trade¹²⁸—evidence of how similarly situated parties have customarily interpreted the sort of language in question.¹²⁹ 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.

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.¹³⁰ Thus, for instance, might a court refuse to enforce an unexpected indemnification clause put inserted in tiny print by the party it favors and understandably overlooked by the other.¹³¹ Individuated hypothetical 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.¹³²

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.¹³³ Courts do so hesitantly, however—only when no stronger form of consent can resolve the issue¹³⁴ and to compensate only vital aid.¹³⁵ 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.¹³⁶

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.

¹²⁸ See UCC § 1-205, RESTATEMENT (SECOND) OF CONTRACTS § 203(b).

¹²⁹ See UCC 1-205 (defining "usage of trade").

¹³⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (explaining that such a "term is not part of the agreement.').

¹³¹ See, e.g., *California Tanker Co. v. Todd Shipyards Corp.*, 206 F. Supp. 872 (S.D.N.Y. 1962).

¹³² See RESTATEMENT (SECOND) OF CONTRACTS §§ 161(a)-(c); 162; 163.

¹³³ See RESTATEMENT (FIRST) OF RESTITUTION § 116 (1937) (allowing restitution for vital aid rendered to a party unable to give consent).

¹³⁴ See *id.* § 116(d) (allowing restitution only if "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.').

¹³⁵ See *id.* § 116(b) (allowing restitution only for "things or services [] necessary to prevent the other from suffering serious bodily harm or pain.').

¹³⁶ See RESTATEMENT (SECOND) OF TORTS § 49, illustration 2 (explaining that a doctor suffers no liability for performing a tonsillectomy on an unconscious patient without that patient's permission—a non-emergency 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 . . .).

Those types include various subtypes, likewise ranged along a scale of justification, as illustrated in Figure 3, above.

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.¹³⁷ Even though by default we do not consent to being struck, express consent outweighs implied or hypothetical *un*consent in such cases.

II.B.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 rang 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.¹³⁸ Similarly, despite the fact that most people would object to suffering bodily injury, courts sometimes excuse hypothetically unconsensual harms as impliedly assumed risks.¹³⁹ Tort law thus ranks express unconsent as less justifiable than implied unconsent, and implied consent as less justifiable than hypothetical.

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,¹⁴⁰ 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.¹⁴¹ 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.¹⁴² In express unconsent, too, we see echoes of consent's subtypes. Rights

¹³⁷ *Hart v. Geysel*, 159 Wash. 632 (1930).

¹³⁸ *See* RESTATEMENT (SECOND) OF TORTS § 496B (1965).

¹³⁹ *See id.* § 496C.

¹⁴⁰ *See* RESTATEMENT (SECOND) OF TORTS § 49, illustration 2.

¹⁴¹ *See* RESTATEMENT (FIRST) OF RESTITUTION § 116, comment b ("[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.").

¹⁴² *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 892D(b) (affording an actor a 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

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, that master of unconsent, allegedly observed, "A single death is a tragedy, a million deaths is a statistic."¹⁴³

II.B.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 "no body doubts" creates very strong obligations.¹⁴⁴ Almost everyone—including Locke—discounts the possibility that governments can claim to rule by the express consent of their subjects.¹⁴⁵ 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.¹⁴⁶ That sort of calculation impliedly recognizes that express consent matters more than implied consent does.

"reason to believe" another would unconsent, but so can other proofs. *See id.* comment a (explaining that the 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.").

¹⁴³ BARTLETT'S FAMILIAR QUOTATIONS 686 (17th ed., Little, Brown & Co. 2002) (attributed).

¹⁴⁴ John Locke, *The Second Treatise of Government*, §119, in TWO TREATISES OF GOVERNMENT 365 (Peter Laslett ed., Cambridge Univ. Press 2nd ed. 1967) (1690).

¹⁴⁵ 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 obtained. *See also*, DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT 13 (Westview Press 1991) (saying of express consent, "we 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, THOMAS HOBBS, LEVIATHAN ch. XVIII, p. 159 (1651) in III THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY (Sir William Molesworth, ed., Bohn 1839-45) (emphasis in the original), recognizes the impossibility of universal express consent when he argues that implied consent binds dissenters. *Id.* at 162-63.

¹⁴⁶ *See, e.g.*, DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 185 (U. Chicago Press 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 [T]hese 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.¹⁴⁷ 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?¹⁴⁸ 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,¹⁴⁹ while protecting an unconscious patient's rights may call for the invocation of hypothetical consent.¹⁵⁰

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 long-standing problems as the legal enforceability of standard form agreements, the justification of political coercion, and the meaning of a constitution. Sub-part A explains judicial skepticism about the enforceability of standard form agreements as a reflection of their reliance on a second-rate sort of consent. Sub-Part B analyses 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. Sub-Part B concludes with number of specific suggestions about how to render the United States of America more justified. Consistent

¹⁴⁷ 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. 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, as especially probative of justification.

¹⁴⁸ 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 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).

¹⁴⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b).

¹⁵⁰ See, e.g., RESTATEMENT (SECOND) OF TORTS § 892D (1979) (explaining scope of defense of consent in emergency situations).

with that patriotic program, Sup-Part C outlines a consensualist theory of constitutional meaning, one that, in contrast to originalist and "living constitution" theories, would read the constitution so as to maximize the consent of those whom it claims to govern.

III.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.¹⁵¹ Other authorities, including most courts, instead 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.¹⁵² 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 fraud¹⁵³ or duress¹⁵⁴ might lead us to second-guess facial proofs of 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.¹⁵⁵

¹⁵¹ See, e.g., Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176 (1982) ("[Q]uite contrary to 'ordinary' contract law, the form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable."). 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.").

¹⁵² See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-94 (1991) (describing benefits to both parties of enforcement of 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 (2D) OF CONTRACTS § 211 comment 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.").

¹⁵³ See Restatement (Second) of Contracts § 162(1) (defining a fraudulent misrepresentation); § 164 (defining when fraud makes a contract voidable).

¹⁵⁴ See *id.* § 175 (defining when duress by threat makes a contract voidable).

¹⁵⁵ 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.

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.¹⁵⁶ More particularly, the U.C.C. calls for enforcing only "conspicuous" exclusions or modifications of implied warranties,¹⁵⁷ 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"¹⁵⁸ from imposing contract terms on consumers,¹⁵⁹ ensuring that consumers continue to enjoy the common law's standards for option contracts,¹⁶⁰ and protecting consumers from unwittingly agreeing to merchant contracts that would otherwise curtail modification or rescission rights.¹⁶¹ More generally, many courts regard standard form agreements as by default *procedurally* unconscionable.¹⁶² Upon proof of some accompanying *substantial*

Only by satisfying the devil's terms—often by way of equally devilish cleverness—can the hero win freedom. *See, e.g.,* Stephen Vincent Benet, *The Devil and Daniel Webster* in FAVORITE TRIAL STORIES 204 (A.K. Adams, ed., Dodd, Mead, & Co. 1966) (1936).

¹⁵⁶ *See id.* § 211(3).

¹⁵⁷ Uniform Commercial Code § 2-316(2). *But see id.* § 2-316(3) giving effect to "expressions like 'as is'" without evidently requiring that sellers make them conspicuous.

¹⁵⁸ 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."); § 50(1) (defining acceptance as a manifestation of assent "in a manner invited or required by the offer."); § 69(1)(a) (providing that receipt of benefits presumably offered conditional on compensation can operate as acceptance).

¹⁵⁹ *See* U.C.C. § 2-207(2) (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 (6th Cir. 1972) (interpreting the language of 2-207(1) so as to foreclose mere acceptance of goods from proving acceptance of proposed additional terms).

¹⁶⁰ *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 (allowing merchants to form option contracts through other means).

¹⁶¹ *See id.* § 2-209(2). 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; 2-209(2) plainly aims to protect consumers from merchants offering form agreements.

¹⁶² *See Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3rd 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.*, 28 Cal. 3d 807, 181; 623 P.2d 165, 170 (1981) (explaining that standard form agreements "bear within them the clear danger of oppression and overreaching."). In some courts, qualifying as an

unconscionability,¹⁶³ such as a price far above market¹⁶⁴ or an abandonment of vital legal rights,¹⁶⁵ such courts will decline to specifically enforce the contract.¹⁶⁶ A court might even go so far as to declare such a supposed agreement void.¹⁶⁷

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 better standard form agreements in achieving all those same ends that make consent so 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,¹⁶⁸ integration,¹⁶⁹ and signatures.¹⁷⁰ 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-

adhesion contract does not alone render a contract procedurally unconscionable. *See, e.g.,* *Zuver v. Airtouch Communications*, 153 Wn.2d 293, 304; 103 P.3d 753, 760 (2004) (applying Washington law). 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 303 n.4.

¹⁶³ *See, e.g.,* *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (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].") (*quoting* *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d at 820 (footnote omitted)).

¹⁶⁴ *See, e.g.,* *FrostiFresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966) (refusing to enforce standardized form agreement requiring payment of \$1,364.10 for a freezer worth \$348), *reversed on other grounds*, 54 Misc. 2d 119; 281 N.Y.S.2d 964 (N.Y. App. Term 1967).

¹⁶⁵ *See, e.g.,* *Amendariz*, 24 Cal. 4th at 117 ("[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.").

¹⁶⁶ *See, e.g.,* *McKinnon v. Benedict*, 38 Wis. 2d 607, 621 (1968) (holding that where "the inadequacy of consideration is so gross as to be unconscionable" it acts as "a bar to the plaintiffs' invocation of the extraordinary equitable powers of the court.").

¹⁶⁷ *See, e.g.,* *Amendariz*, 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.").

¹⁶⁸ *See* U.C.C. § 2-201 (establishing a statute of frauds for the sale of goods).

¹⁶⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (making a party's assent to a standardized agreement an adoption of the agreement as integrated).

¹⁷⁰ *See id.* § 131 (describing standards for the enforceability of signed writings).

called "adhering" one—to the standard form agreement.¹⁷¹ That represents a very real cost of standardized form agreements. That is not to say that on net they impose more 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 *unconsent*. Again, some such proofs—such as proof that one party signed under duress—would prove powerful enough to void any facially valid contract.¹⁷² Showing a weakness unusual in contract law, however, standard form agreements can fall prey to proofs of implied or hypothetical *unconsent*.¹⁷³ Thus, for instance, might a court strike from a standard form agreement a term to which one of the parties would not have agreed, had that party known about the term when manifesting assent, if the other party had had reason to foresee hypothetical *unconsent*.¹⁷⁴ Thus, too, a court might void an agreement to which no reasonable person would have agreed (thus marking the agreement as *hypothetically unconsensual*)¹⁷⁵ and that deviates from customary norms (thus marking the agreement as *impliedly unconsensual*).¹⁷⁶ Typically, the victimized

¹⁷¹ 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.

¹⁷² See RESTATEMENT (SECOND) OF CONTRACTS § 175 (specifying when duress makes a contract voidable).

¹⁷³ See *e.g.*, *Williams v. Walker-Thomas Furniture*, 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 "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)).

¹⁷⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

¹⁷⁵ See, *e.g.*, *FrostiFresh Corp. v. Reynoso*, 52 Misc. 2d 26, 26; 274 N.Y.S.2d 757, 759 (N.Y. Dist. Ct. 1966) (suggesting that defendants would not have agreed to contract had they been better informed of its terms, but that they "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."), *reversed on other grounds*, 54 Misc. 2d 119; 281 N.Y.S.2d 964 (N.Y. App. Term 1967).

¹⁷⁶ See, *e.g.*, *ibid.* (stressing the difference between the contract and market prices).

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.¹⁷⁷

To put it 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.¹⁷⁸ 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.¹⁷⁹ 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.

III.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,¹⁸⁰ has drawn the attention of many political philosophers and received many various answers.¹⁸¹ This section offers a fresh approach to the problem of justifying political coercion. Subsection 1 describes the

¹⁷⁷ An administrative agency conceivably might, however.

¹⁷⁸ That formula does not necessarily describe the moral or economic value of standardized form agreements; I here discuss only the law.

¹⁷⁹ 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.

¹⁸⁰ "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 Warner's classic one. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (A.M. Henderson and Talcott Parsons trans., Talcott Parsons ed., Oxford Univ. Press 1947) ("A compulsory political organization 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.") (emphasis in the original).

¹⁸¹ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 11-86 (Princeton Univ. Press 2004); DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT* (Westview Press 1991); NOZICK, *supra* note 35; JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971); John Locke, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 365 (Peter Laslett ed., Cambridge Univ. Press 2nd ed. 1967) (1690); THOMAS HOBBS, *LEVIATHAN* (1651) in *III THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY* (Sir William Molesworth, ed., Bohn 1839-45); PLATO, *THE REPUBLIC* (Richard W. Sterling & William C. Scott trans., W. W. Norton & Co. 1985) (c. 380-360 B.C.E.).

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.

III.B.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 to "assert 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."¹⁸² 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 them."¹⁸³ Hume denied that same justification to modern States, however, on grounds that new systems of governance require new consent.¹⁸⁴

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.¹⁸⁵ 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."¹⁸⁶ 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.¹⁸⁷ Barnett also holds that even a very small State would be "too large" to claim the

¹⁸² David Hume, *Of the Original Contract*, in *Essays Moral, Political and Literary* at 465 (Eugene F. Miller ed., Liberty Fund rev. ed. 1986) (essay originally published 1748).

¹⁸³ *Id.* at 468. Hume adds immediately thereafter with, "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." *Ibid.* (emphasis in the original).

¹⁸⁴ *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.").

¹⁸⁵ *See, e.g.*, BARNETT *supra* note 173, at 11-31.

¹⁸⁶ BARNETT, *supra* note 173, at 43.

¹⁸⁷ *See supra* note 172 (discussing definition of the State).

justificatory power of consent founded on consent.¹⁸⁸ On that view, a State cannot rightly claim that its subjects actually consent to its rule.¹⁸⁹

The State's failure to obtain the actual consent of those it governs serves, to many commentators, as irrefutable proof that it cannot be justified.¹⁹⁰ 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?"¹⁹¹ Robert Wolff, likewise confronting the problem of justifying political coercion, concluded that "the solution requires the imposition of impossibly restrictive conditions which make it applicable only to a rather bizarre variety of actual situations."¹⁹² Here, at least, philosophers have proven remarkably in touch with the people; a recent poll purports to show that only 21% of its voters think that the U.S. can claim the consent of the governed.¹⁹³

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,¹⁹⁴ 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."¹⁹⁵ Such views suggest a correlation between degrees of consent and degrees of justification.¹⁹⁶ But Barnett dwells on a different sort of spectrum—a spectrum of

¹⁸⁸ "Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent." *Id.* at 43.

¹⁸⁹ See also Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 *FORDHAM L. REV.* 669, 671 (2006) (explaining that he "reject[s] 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.

¹⁹⁰ See generally, Ilya Somin, *Revitalizing Consent*, 23 *HARV. J. L. & PUB. POLICY* 753, 775, n. 78 (2000) (collecting authorities).

¹⁹¹ Spooner, *No Treason No. IV: The Constitution of No Authority*, in *THE LYSANDER SPOONER READER* at 87 (cited in note 121).

¹⁹² ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 22-23 (Harper & Row 1968).

¹⁹³ Rasmussen Reports, *Only 21% Say U.S. Government Has Consent of the Governed*, February 18, 2010, at http://www.rasmussenreports.com/public_content/politics/general_politics/february_2010/only_21_say_u_s_government_has_consent_of_the_governed (last visited February 22, 2010). The survey also purports to show that 63% of the political class thinks the government has the consent of the governed, whereas only 6% of voters with mainstream views do, and that 71% of all voters view the federal government as a special interest group.

¹⁹⁴ BARNETT, *supra* note 173 at 40-43.

¹⁹⁵ *Id.* at 51.

¹⁹⁶ Barnett observes, for instance, says if a legal system to which "everyone does consent in a real way" is feasible, "the governmental legal system with which we are familiar

*legitimacy*¹⁹⁷—that measures whether and to what extent a given State's subjects should presume that they have moral obligation to obey its laws.¹⁹⁸ "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."¹⁹⁹ 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,"²⁰⁰ Barnett thus paints varying shades of legitimacy on institutions justified, if at all, by hypothetical consent.²⁰¹ The spectrum described here does not necessarily thereby contradict Barnett's, however.²⁰² 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 non-political organizations and common law transactions. The next subsection explains.

III.B.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*.²⁰³ Justification, like the graduated consent with which it correlates, comes in degrees and varies across individuals.

might be both unnecessary and improper—or a least *less legitimate* than this polycentric alternative." *Id.* at 77 (emphasis added).

¹⁹⁷ 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.

¹⁹⁸ *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.").

¹⁹⁹ *Id.* at 51.

²⁰⁰ *Ibid.*

²⁰¹ As discussed above, Barnett denies that States can claim express consent. Text accompanying notes 130-31. Separately, he also denies that they can boast implied or consent. *See id.* at 14-19. At least according to the taxonomy set forth in this article, that leaves States only hypothetical consent, at most.

²⁰² *But see* Barnett, *supra* note 181, at 671-72 (explaining that Barnett "reject[s] 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.").

²⁰³ More precisely, you might call it a theory of relativity-*squared*.

III.B.2.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.²⁰⁴ 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.
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.²⁰⁵ 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 but 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 they enjoy an equally strong claim over their own members' souls, however.)

As discussed below, the jurisdictional claims of States submit to a similar analysis.²⁰⁶ 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 I.C.4.

²⁰⁵ See *supra* Part II.

²⁰⁶ See *infra* Part III.B.3.b.

III.B.2.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.²⁰⁷

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 act that her duly authorized agents take within the proper bounds of their employment.²⁰⁸ What Nozick said of justice thus also holds true of justification: "Whatever arises from a just situation by just steps is itself just."²⁰⁹ Analogously, whatever we regard as justified with respect to a particular social institution we should also regard as 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."²¹⁰ But one can

²⁰⁷ See ARISTOTLE, *POLITICS*, Book I, Ch. 1, 1252a17-19 (c. 335-320 B.C.E., B. Jowett trans.), in II *THE COMPLETE WORKS OF ARISTOTLE*, at 1986 (Jonathan Barnes ed., 1984) ("As in other departments of science, so in politics, the compound should always be resolved into the simple elements or at least parts of the whole.").

²⁰⁸ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining agency relationship); § 12 (describing power exercised by agent to "alter the legal relations between the principal and third persons . . .").

²⁰⁹ NOZICK, *supra* note 38 at 151.

²¹⁰ Murray N. Rothbard, *MAN, ECONOMY, AND STATE 2* (Nash 1970). See also JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (Cambridge Press 1989). Elster claims that Arrow's Theorem demonstrates "that the notion of a popular will is incoherent, or that the popular will is itself incoherent, whichever you prefer." *Id.* at 155.

believe that social organizations exist independent of their members²¹¹ 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.²¹² 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.²¹³

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.²¹⁴ 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 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

²¹¹ For a thoughtful exposition of that view, see HERZOG, *supra* note 146 at 201-202. After a brief critique of methodological individualism, he boldly concludes, "Nothing 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.

²¹² 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.* at 202. 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." *Contra* Herzog, however, we can renounce those options consensually, and thereby justify an institution's actions.

²¹³ 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.

²¹⁴ These two conditions flow out of preferring express consent to implicit or hypothetical consent. See the example of the doctor who stumbles across an unconscious man, *supra* Part II.A.3. For a discussion of the validity of justifications based on these substitutes for express consent, see *infra* Part II.B.1.

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.²¹⁵ 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."²¹⁶ 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.

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."²¹⁷ Harman claims that morality arises among people whom come to an agreement or understanding about their relations with one another.²¹⁸ He concludes that although cross-cultural moral judgments are not "wrong," they make sense only in relation to such agreements or understandings.²¹⁹ 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.²²⁰ 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

²¹⁵ 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).

²¹⁶ Bernard Williams, *An Inconsistent Form of Relativism and the Truth in Relativism*, in RELATIVISM: COGNITIVE AND MORAL 171, 171 (J. Meiland & M. Krausz eds., Univ. of Notre Dame Press 1982).

²¹⁷ Gilbert Harman, *Moral Relativism Defended*, in *id.* at 189, 190. 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.

²¹⁸ Harman, *supra* note 217 at 189.

²¹⁹ *Id.*

²²⁰ See for example Michael Moore, *Moral Reality* 1982 WIS. L. REV. 1061; Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion* 61 S. CAL. L. REV. 1417 (1988).

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."²²¹ 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?

III.B.3. Making the United States More Consent-Rich

Recognizing that consent comes by degrees encourages us to seek marginally more of it. In politics, in particular, 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.²²² 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.²²³ Clearly, the U.S. could stand to grow more consent-rich.

III.B.3.a. Easing Exit. Because implied consent does more to justify a State than hypothetical consent alone can,²²⁴ 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.²²⁵ 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.

²²¹ Moore, *supra* note 210 at 1094-95.

²²² See *supra* Part III.B.2 (describing the double relativity of political justification).

²²³ Rasmussen Reports, *Only 21% Say U.S. Government Has Consent of the Governed*, February 18, 2010, at http://www.rasmussenreports.com/public_content/politics/general_politics/february_2010/only_21_say_u_s_government_has_consent_of_the_governed (last visited February 22, 2010).

²²⁴ 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.

²²⁵ We might add "and residents" to canvas the class of persons over which States typically claim jurisdiction. Interestingly, however, residents do not (unless imprisoned)

During much of the mid-twentieth century, for instance, the U.S. allowed its citizens greater freedom of exit than did the U.S.S.R.²²⁶ That marked difference between the countries gave the latter a comparatively stronger justification for exercising jurisdiction over its citizens than the former could claim over its own.²²⁷ Hence the moral force of Ronald Reagan's demand, "Tear down this wall, Mr. Gorbachev!"²²⁸ Hence, too, the celebration, by that wall's destroyers, of their newly won freedom from oppression.

To say that the U.S.A. offered a more consent-rich form of government than the U.S.S.R. did is not to say, finally and flatly, "The U.S. 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,²²⁹ but instead can claim justification only by degrees, relative to some alternative mode of social organization.²³⁰ Even if it bettered the U.S.S.R. in terms of winning the consent of its subjects, the mid-twentieth century U.S. still fell far short of consent's highest standard. The U.S. did not, does not, and cannot claim universal and express consent. No State reasonably could. The U.S. in the 1950s did justly claim a comparatively greater degree of consent from its subjects than the U.S.S.R. could, granted, and even today the U.S. remains a fairly consent-rich jurisdiction. The U.S. 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 U.S., today.²³¹

More to the point, the U.S. could have done more to respect its citizens' freedom to exit, even though that it decidedly beat the U.S.S.R. on that count. The U.S. 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.²³² 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.²³³ Because they would make it easier to escape federal programs such as Social Security or health and safety regulations, generalized exit rights would render those

typically suffer much loss of the freedom of exit their host States' jurisdiction. Rather, States typically try to expel unwelcome residents.

²²⁶ Even granting cases such as U.S. citizens fleeing the draft by moving abroad, the U.S. never had anything close to the Iron Curtain.

²²⁷ The U.S. 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 U.S., pledged their allegiance to it, and became citizens.

²²⁸ Ronald Reagan, *Remarks on East-West Relations at the Brandenburg Gate*, West Berlin, Germany, June 12, 1987, available at http://www.reaganfoundation.org/pdf/Remarks_on_East_West_Relations_at_Brandenburg%20Gate_061287.pdf (last visited February 21, 2010).

²²⁹ See *supra* Part III.B.1.

²³⁰ See *supra* Part III.B.2.

²³¹ See BARNETT, *supra* note 173, at 48-52.

²³² Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753, 782-84 (2000).

²³³ *Id.* at 783.

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.

III.B.3.b. 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.²³⁴ James Madison, arguing in Federalist No. 10 that the proposed Constitution would help remedy the ills of faction, echoed that sentiment.²³⁵ 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.²³⁶

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

²³⁴ John Locke, *The Second Treatise of Government*, § 90, in TWO TREATISES OF GOVERNMENT 344 (Peter Laslett ed., Cambridge Univ. Press 2nd ed. 1967) (1690) (describing "the *end of Civil Society*, being to avoid, and remedy those inconveniences of the State of Nature, which necessarily follow from every Man's being Judge in his own Case") (emphasis in the original).

²³⁵ THE FEDERALIST NO. 10 (James Madison) ("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.").

²³⁶ For a similar expression of skepticism, applied to the related question of the proper scope of juries' powers, see Lysander Spooner, *Trial by Jury* in THE LYSANDER SPOONER READER at 121, 121 (George H. Smith, ed., Fox & Wilkes 1992) (1852) ("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).

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 individual²³⁷—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, that lets the all-powerful offeror alone decide disputes arising under the agreement.²³⁸ A clause reading, "I have the sole power to interpret this agreement," reeks too much of substantive unconscionability to win a court's approval.²³⁹ Indeed, the patent unfairness of such a clause cannot help but raise procedural doubts about whether the parties bargained for an exchange at all,²⁴⁰ undermining the enforceability of the entire agreement.²⁴¹

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."²⁴² 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"; it does not claim *exclusive* jurisdiction over all such cases.²⁴³ 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 federal government and other parties under the same arbitration procedures that private parties customarily use in resolving civil litigation.²⁴⁴

²³⁷ See *infra* Part III.C for an argument in favor of that view.

²³⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 175 (voiding contracts where threats leave no reasonable alternative but to manifest assent), § 177 (establishing that undue influence can render contract unenforceable), § 208 (authorizing limitations on or voiding of unconscionable contracts).

²³⁹ See *Graham v. Scissor-Tale, Inc.*, 28 Cal. 3d 807, 827 (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.").

²⁴⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 71(1) ("To constitute consideration, a performance or return promise must be bargained for."), § 77 (specifying how a promise which "by its terms the promisor . . . reserves a choice of alternative performances" can fail as consideration).

²⁴¹ See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) ("[The formation of a contract requires a bargain in which there is a manifestation of mutual assent . . .]").

²⁴² U.S. CONST., ART. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land . . .").

²⁴³ *Id.* Art III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .").

²⁴⁴ See, e.g., American Arbitration Association, *Commercial Arbitration Rules and Mediation* § R-13 (Sept 1, 2007), available at <http://www.adr.org/sp.asp?id=22440#R13>

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 officials²⁴⁵ and that federal judges already show remarkable flexibility in following rules of procedure agreed to by litigating parties.²⁴⁶ 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.

III.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 jurist 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.²⁴⁷ I here 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

(last visited February 21, 2010) (describing process by which directly appointed arbitrators choose a third arbitrator).

²⁴⁵ U.S. CONST. ART. II, § 2, cl. 2.

²⁴⁶ 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).

²⁴⁷ See, e.g., U.S. CONST., Preamble (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 . . .").

pomp that surround a constitution,²⁴⁸ instead subjecting it to the same interpretive rules that we routinely apply to humble contracts.²⁴⁹

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 weapons 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,²⁵⁰ 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"²⁵¹ 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 constitution" pragmatism can certainly lay better claim to resolving disputes than the pursuit of private

²⁴⁸ 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, 406-07 (1819).

²⁴⁹ *But See* MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 23 (1988) (asserting that "[t]reating 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).

²⁵⁰ *See, e.g.*, Fed. R. Civ. P. § 11(b)(2) (requiring that legal arguments to a federal court be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . .").

²⁵¹ U.S. CONST., Preamble.

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 better than nothing. Rather, I here 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.²⁵² 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.²⁵³

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.²⁵⁴

To those strictures, contract law suggests we might add this one: Given the gross irregularities that of necessity plague a constitution's adoption and enforcement, it should not take much *substantive* unconscionability to justify striking a provision as void and unenforceable.²⁵⁵ 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.²⁵⁶

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

²⁵² See *supra* Part III.B.

²⁵³ See *supra* Part III.B.3.b.

²⁵⁴ Ethan J. Leib, *Anxiety of Living Constitutionalism*, 24 CONST. COMMENTARY 353, 368 (2008). As discussed below, *infra* note 287, Prof. Leib perhaps does his theory a disservice by classifying it as a variant of living constitutionalism, given that it generate results so different from those that have so often issued under that banner.

²⁵⁵ 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).

²⁵⁶ See *supra* Part II.B.

text its plain *public* meaning, because we can impute to political actors knowledge of what citizens think about the constitution's meaning.²⁵⁷ 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.²⁵⁸ A politician who adopted or enforced a constitution without regard to the meaning ascribed to it by citizens supposedly bound by the constitution would thereby breach the obligations, incumbent on every party to a contract, to act in good faith and fair dealing, as well as act as fiduciaries of their principals, the public.²⁵⁹ 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.²⁶⁰ 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 agreement²⁶¹—legal precedents, in particular. Next, it might look to other dealings between the same parties, such as statutes passed under authority of the constitution.²⁶²

²⁵⁷ See RESTATEMENT OF CONTRACTS (SECOND) § 201(2) (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).

²⁵⁸ See, e.g., RESTATEMENT OF AGENCY (SECOND) § 13 (1958) (defining fiduciary obligations of agent to principal).

²⁵⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 201 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

²⁶⁰ For an explanation of the distinction between interpretation and construction, see Lawrence B. Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, (February 15, 2010), available at http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html (last visited February 21, 2010).

²⁶¹ See, e.g., *id.* § 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 Uniform Commercial Code § 1-205(4) ("The 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 . . .").

²⁶² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 203(b) ("[E]xpress terms are given greater weight than . . . course of dealing . . . course of performance is given greater weight than course of dealing . . . and course of dealing is given greater weight than usage of trade . . .").

And, should those devices fail to decipher the constitution's text, a court might refer to customary practices, such as common law rights²⁶³ and international law.²⁶⁴ Those supplementary tools for 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,²⁶⁵ and claim to resort to their favored supplementary devices only when the plain meaning of the text proves elusive.²⁶⁶ 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 wheat²⁶⁷ or marijuana²⁶⁸ 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

²⁶³ A like presumption already applies in questions of statutory interpretation. *See, e.g.*, *United States v. Texas*, 507 U.S. 429, 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."), *quoting* *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

²⁶⁴ *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 criminals).

²⁶⁵ *See, e.g.*, *District of Columbia v. Heller*, ___ U.S. ___, 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; 93 S. Ct. 705 (1973) (citing recent developments in medical technology, changing social mores, and developments in the case law in support of a right to abortion).

²⁶⁶ *See, e.g.*, *Heller*, 128 S.Ct. at 2791-2797 (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 argument for a constitutional right to privacy emanating from penumbras of Bill of Rights with explanation, "The Constitution does not explicitly mention any right of privacy.").

²⁶⁷ *But see* *Wickard v. Fillmore*, 317 U.S. 111 (1942) (finding "interstate commerce" to encompass growing wheat for private consumption).

²⁶⁸ *But see* *Gonzalez v. Raich*, 545 U.S. 1 (2005) (finding "interstate commerce" to encompass growing marijuana for private consumption).

constitution—not what people long dead originally thought about that text, nor what judges, cases, 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 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.²⁶⁹

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 you may adopt a contract initially formed between others, however; 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. Some evidence suggests that parties in like cases have seen fit to spell out in their agreement that the original meaning controls, a practice suggesting that courts should, as a customary default rule, favor the meaning of the late-agreeing party.²⁷⁰ Sound theory suggests that we should do likewise. We must choose to favor one or another reading, 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 suggests that we should 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, but adds 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 its public meaning at the time of its first formation."²⁷¹ Private parties already evidently solve the problem that way after all.²⁷²

²⁶⁹ Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J. L. & PUB. POL. 901, 905 (2008) (emphasis in the original).

²⁷⁰ See *Trostel v. American 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 original, 1917 lease].").

²⁷¹ Notably, the U.S. Constitution contains no such clause. The evidence suggests, moreover, that no such clause would have won ratification in eighteenth-century post-Colonial America. H. Jefferson Powell, *The Original Understanding of Original Intent*,

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.²⁷³ 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.²⁷⁴

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"—leastwise not without disfiguring the meaning of the word.

III.C.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 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.²⁷⁵

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, "[T]here were sharp disagreements over which interpretive approach was acceptable.") (footnote omitted).

²⁷² 168 F.3d at 1107.

²⁷³ See Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 65 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.").

²⁷⁴ Uniform Probate Code § 2-1105(a) ("A person may disclaim, in whole or part, any interest in or power over property . . ."). See also, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, AMY MORRIS HESS, *BOGERT'S TRUSTS AND TRUSTEES* § 170 (2008) ("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. . . . the power has now been adopted by statute in most states.") (footnotes omitted).

²⁷⁵ 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

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 meaning 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.²⁷⁶

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.²⁷⁷

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."²⁷⁸ On their view, original meaning jurisprudence generates not only good results but, since the Constitution aims to "promote the general welfare," helps to render

their fellow thieves, however; it would not suffice to establish the consent of their victims.

²⁷⁶ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 145 (Princeton U. Press 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, that the Founding era evidently thought appropriate but that many today would regard as cruel and unusual.

²⁷⁷ And, sometimes, posteriors. See, e.g., Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RIGHTS J. 117 (1993) (reviewing evidence that federal lawmakers deliberately, but covertly, narrowed the scope of the Third Amendment during their congressional deliberations).

²⁷⁸ John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J. L. & PUB. POL'Y 917, 925 (2008).

the Constitution more justified.²⁷⁹ That defense of originalism comes with a twist, however; the authors require modern-day courts to adopt interpretative rules from the Founding era.²⁸⁰ 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."²⁸¹

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 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 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.²⁸²

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 constitutional rights—probably more so than originalism does.²⁸³ Granted, a consensualist approach to constitutional decision-making might upset a few apple carts; some long-standing 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.

III.C.1. Questions for Living Constitutionalists

Just as it differs from originalism in some regards, so to 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"

²⁷⁹ 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.").

²⁸⁰ *Id.* at 926.

²⁸¹ *Id.* at 928.

²⁸² The revolutionaries complained, for instance, that the King of England "has made Judges dependent on his will alone," THE DECLARATION OF INDEPENDENCE, ¶ 11 (1776), "impos[ed] taxes on us without our consent," *id.* at ¶ 19, and answered humble petitions "only by repeated Injury." *Id.* at ¶ 30.

²⁸³ As McGinnis and Rappaport observe, *id.* at 932-35, the original Constitution had a flawed view of the rights of slaves and women, which later amendments have corrected. Query, though, whether we can completely exonerate founding-era interpretive rules for suffering those wrongs to survive judicial review.

mode of decision-making, emphasizes flexible meanings and respect for judicial precedent.²⁸⁴ 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."²⁸⁵

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.²⁸⁶ 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.²⁸⁷

Are living constitutionalists willing to give up such cases as *Kelo v. City of New London*, 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,²⁸⁸ *Home Building &*

²⁸⁴ See Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1322-25 (2008) (collecting and reviewing authorities).

²⁸⁵ Jack M. Balkin, *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 698 (2005) (footnote omitted). 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.

²⁸⁶ Ethan J. Leib takes a similar view of the constitution and yet describes the interpretative methodology that results as "one variant" of "living constitutionalism." Ethan J. Leib, *Anxiety of Living Constitutionalism*, 24 CONST. COMMENTARY 353, 355 (2008). 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 many." *Id.* at 362.

²⁸⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (preferring express terms over course of performance, course of performance over course of dealing, and course of dealing over usage in trade); UNIFORM COMMERCIAL CODE § 1-205(4) (ranking express terms, course of dealing, and usage of trade in like fashion); § 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 Restatement of Contracts nor the Uniform Commercial Code 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.

²⁸⁸ 545 U.S. 469 (2005).

Loan Association v. Blaisdell,²⁸⁹ which effectively gutted the Constitution's mandate that states pass no law "impairing the Obligation of Contracts,"²⁹⁰ or *Gonzalez v. Raich*, which read the power to "regulate purely intrastate activity that is not itself 'commercial'"²⁹¹ into text allowing Congress only to "regulate Commerce . . . among the several States" ²⁹² 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 parts 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.²⁹³

Living constitutionalists might regard that prospect with horror, granted. For that matter, originalists might, too.²⁹⁴ But somebody has to decide what the Constitution means. Why not choose someone likely to maximize the consent of the governed?

²⁸⁹ 290 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.

²⁹⁰ U.S. CONST., ART. I, § 10.

²⁹¹ 545 U.S. 1, 18 (2005).

²⁹² U.S. CONST., ART. I, § 8, cl 3.

²⁹³ *See supra* Part III.B.3.c.

²⁹⁴ 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." *Constitutional Cliches*, 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.

Conclusion

This article has 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 long-standing 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,"²⁹⁵ 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 that and other applications of graduated consent theory for another day.

²⁹⁵ Easterbrook, *supra* note 269, at 905.