

# ***Libertarian-But Not Originalist!-Constitutionalism***

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## **Abstract**

Just as libertarians transcend the left-right spectrum, so too should they transcend the false dichotomy that now reigns in constitutional law. My friends who read the Constitution from its left-hand side tend to regard its words as fuzzy, soft, and adaptable to current needs. My friends who read the Constitution from its right-hand side tend, in contrast, to look past its present words and deep into history, searching for the original meaning. I propose a different way to read the Constitution, a uniquely libertarian way, one that combines the *responsiveness* of "living" constitutionalism and the *textual fidelity* of originalism. This, a *consensualist* approach, interprets the Constitution according to its plain, present, public meaning and resolves any remaining vagueness in the manner most likely to win the consent of the governed. Drawing on graduated consent theory's account of the justifiability of State power, consensualism reads the Constitution so as to render exercises of federal authority as justified as possible. True patriots want nothing less for their country.

## **Constitutional Theory in 2-D**

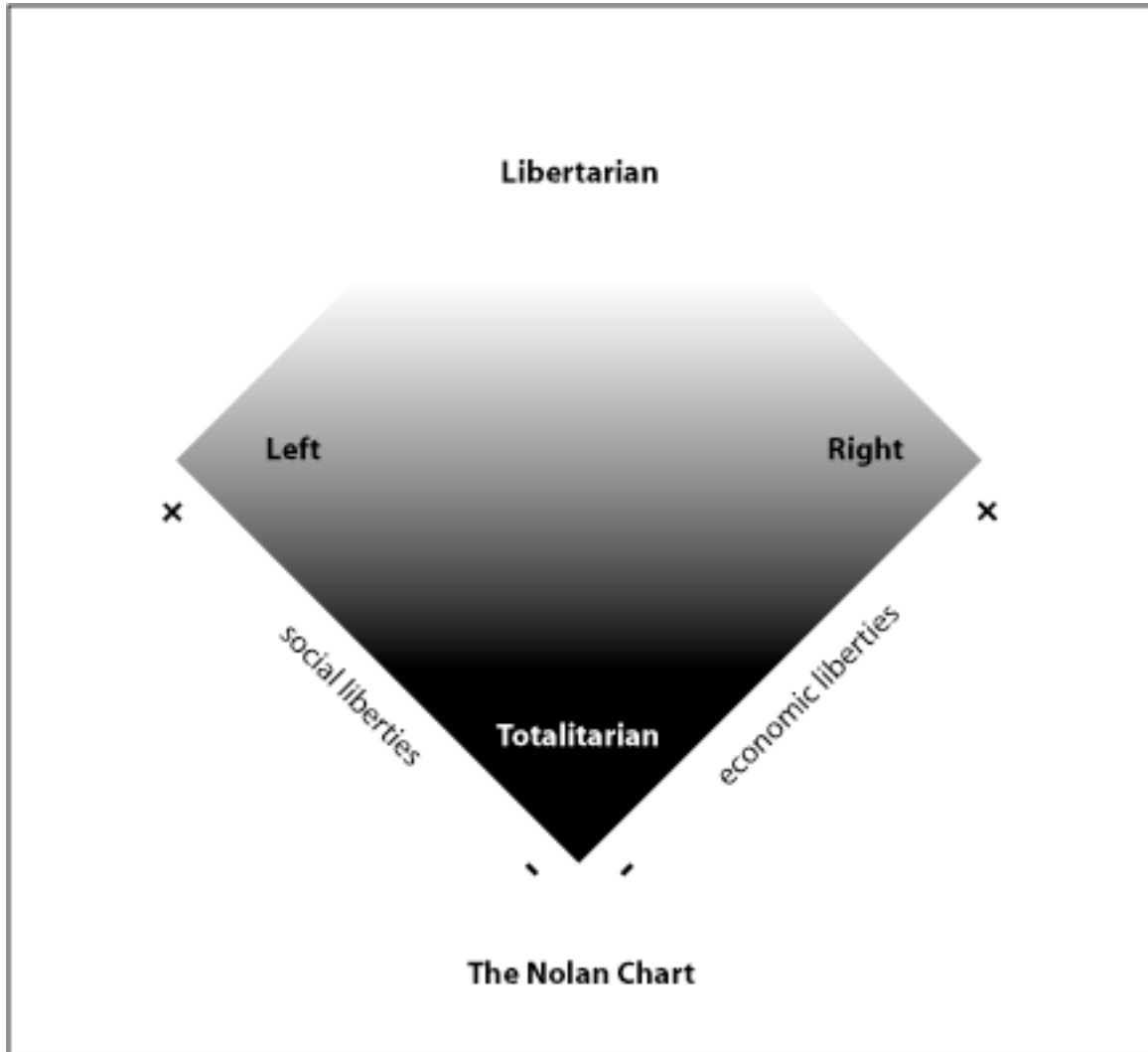
Most libertarians have encountered the Nolan Chart, an expository device that neatly explains how they transcend the typical left-right political spectrum.<sup>1</sup> The Nolan Chart graphs out two kinds of rights: *social rights*—e.g., freedom of expression, religion, and personal autonomy—on one axis, and *economic rights*—e.g., freedom to own and exchange property—on the other. The traditional, one-dimensional left-right spectrum straddles the middle of the 2-D Nolan Chart. Totalitarians, who disregard all rights but their own, anchor its bottom. Libertarians, because they respect both social and economic rights, generally

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\* For the accompanying PowerPoint presentation, see [www.tomwbell/writings/SFL2010talk.ppt](http://www.tomwbell/writings/SFL2010talk.ppt).

<sup>1</sup> See, *Nolan Chart*, [http://en.wikipedia.org/wiki/Nolan\\_Chart](http://en.wikipedia.org/wiki/Nolan_Chart) (visited Oct. 22, 2010). Although I use the popular nomenclature, here, it bears noting that Nolan popularized the chart but did not originate it. See, BRIAN DOHERTY, *RADICALS FOR CAPITALISM* 321 (2008) (attributing the chart to Maurice Bryson and William McDill).

regarding them as fundamentally indistinguishable, hold the high ground at the top of the Nolan Chart. Figure 1, below, illustrates.



**Figure 1**

We can understand the bipolar character of contemporary constitutional law with a similar device. We begin by graphing responsiveness to the understandings of living people on one axis and fidelity to constitutional text on the other. Just as in the Nolan chart, the chart's middle band marks out degrees on the left-right political spectrum. Here, though, the left-hand side of that scale corresponds to a constitutional theory that aims to render the Constitution relevant to current conditions by reading its text loosely, while the right-hand side corresponds to a theory under which the meaning that long-dead people gave the constitution matters most. In the chart's depths lies tyranny: The view that neither the beliefs of the constitution's subjects nor the words of its text constrain political authority. At the

extreme opposite that constitutional hell, above the left-right fray, rises a distinctly libertarian position: Give the Constitution its plain, present, public meaning. Figure 2, below, illustrates.

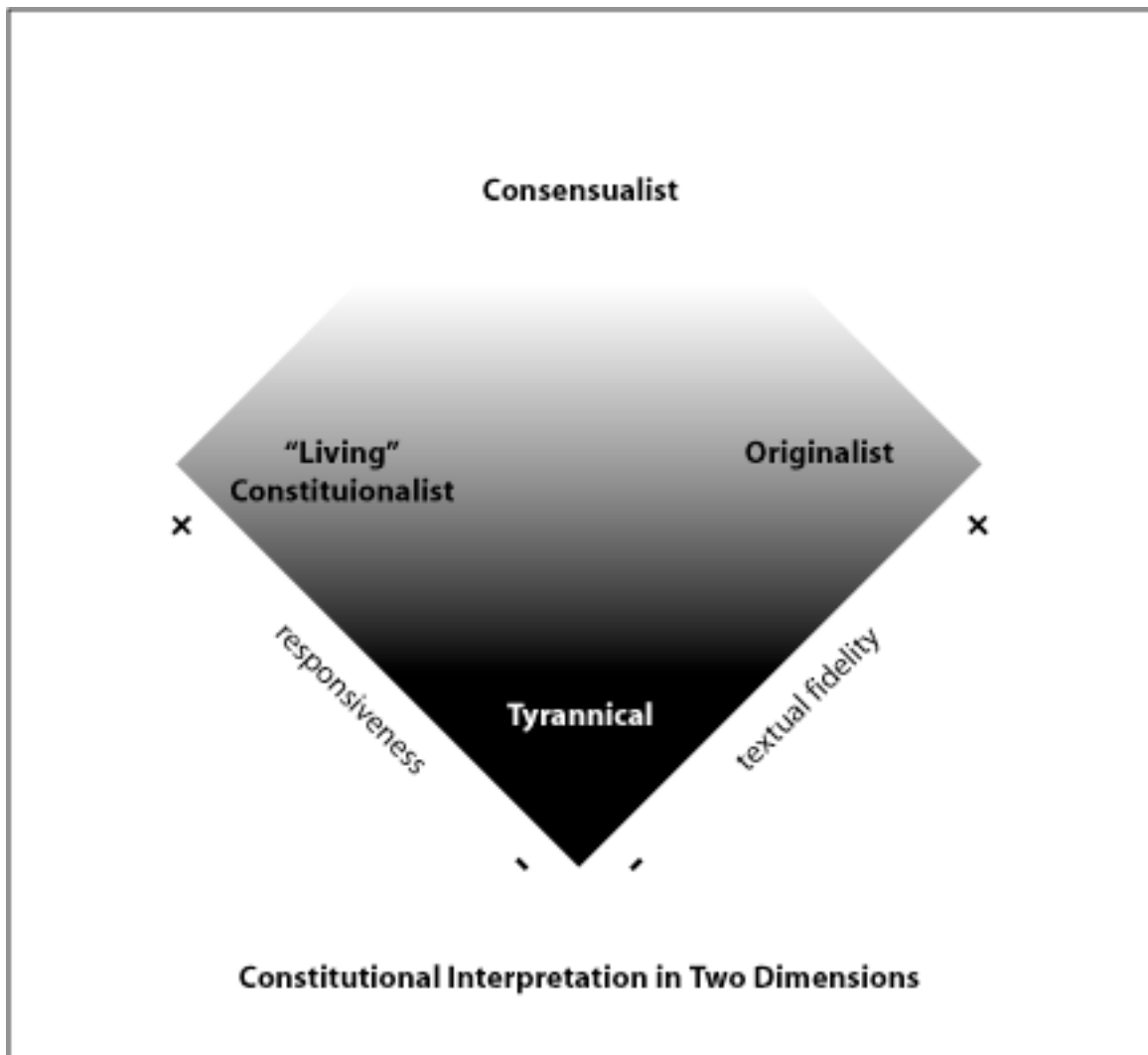


Figure 2

Call this new, third way to read the Constitution *consensualist*.<sup>2</sup> Though it doubtless qualifies as a libertarian view of the constitution, this is not "the" libertarian theory. No such

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<sup>2</sup> My use of the term differs from that advanced in SOTIROS A. BARBER & JAMES E. FLEMING, 75-76 CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (Oxford Univ. Press 2007), which instead describes as "consensualist" a living constitution method of interpretation that conceives "the Constitution as an abstract scheme of principles to be elaborated over time . . . not as a concrete code of specific conceptions and enumerated rights or as a deposit of historical practices to be discovered and preserved." *Ibid.* at 76.

thing exists among the independent, freethinking, and sometimes irascible (though usually loveably so) libertarians.

A consensualist approach to the Constitution first interprets its words according to their plain, present, public meaning—the meaning that we who live, here and now, under claims of federal authority give to the Constitutional text. If vagueness still persists after that interpretative step, the consensualism approach *constructs* the words, applying them to the problem at hand, in the way most likely to maximize the consent of the governed. Why construct the Constitution with that particular aim? Because consensualism, as its name implies, arises from a theory about consent, one that links the justifiability of subjecting someone to the jurisdiction of the Constitution to the degree to which that person has consented to that document.<sup>3</sup>

### **Marginally Justifying the Constitution**

Few parties have so thoroughly and expressly committed themselves to constitutional power as to form an expressly contractual relationship with it; as Lysander Spooner wryly observed,

Where would be the end of fraud and litigation, if one party could bring into court a written instrument, without any signature, and claim to have it enforced, upon the ground that it was written for another man to sign? that this other man had promised to sign? that he ought to have signed it? that he had had the opportunity to sign it, if he would? but that he had refused or neglected to do so? Yet that is the most that could ever be said of the Constitution.<sup>4</sup>

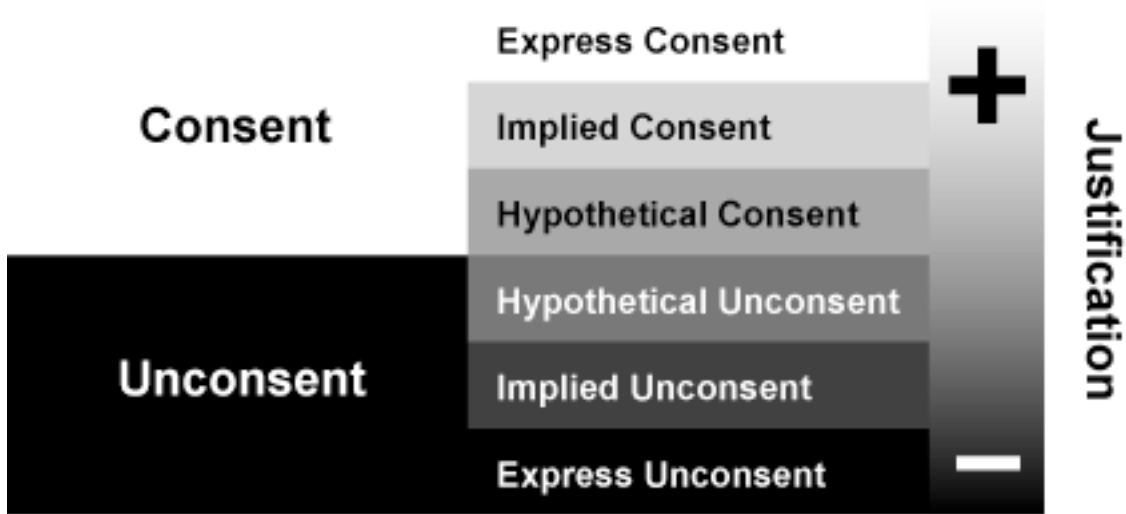
In Spooner's view, the Constitution has no legal authority because it makes no provision for individual citizens to sign on the dotted line (or, more pointedly, to refused to sign over their rights at all). Still, the ideal of an expressly consensual exchange negotiated between equals serves as the ideal, when we have to calculate the justifiability of imposing constitutional authority on someone who at best only impliedly or hypothetically consents to it.

We evaluate the justifiability of the exercise of authority by some social institution over a given individual by assessing the degree to which that person has consented to the jurisdiction of that institution. This generates assessments of justification that apply both relative to particular parties, rather than relative to the whole undifferentiated mass of humankind, and relative to alternative institutions, which may claim stronger or weaker consensual ties to the person. Figure 3, below, illustrates.

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<sup>3</sup> See Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE WESTERN L. REV. \_\_\_ (2010) (forthcoming).

<sup>4</sup> LYSANDER SPOONER, NO TREASON 24 (1870) (Ralph Myles Pub., Inc. 1973).



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

Because it failed to satisfy the requirements to create a binding agreement under contract law, Spooner concluded that the Constitution had no legal authority. Graduated consent theory offers a more tempered and precise analysis, explaining that the U.S. Constitution may well have a more justified claim to authority, over a specific subject, than institutions touting only weaker consensual ties to him or her. That is not to say that the Constitution is flatly justified, however, completely and for everyone. Unless it can claim the same sort of consent that makes an express agreement negotiated between equals so indisputably binding—and, as Spooner noted, it cannot—the Constitution can always stand to win more consent. Good patriots, of which I count myself one, cannot aspire for better for their country than to have it win more consent from those it governs, giving it a more justifiable claim of authority over them.

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

Though that approach to interpretation might strike legal academics as too simple-minded to guide the subtleties of Constitutional jurisprudence, the Supreme Court itself has repeatedly avowed that "we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as

distinguished from technical meaning."<sup>5</sup> Whether we should recur to the plain and public meaning of the words at the time of their ratification, as originalism would have it, or at the present, as consensualism would, remains a separate and contestable question.<sup>6</sup> In either case, though, the Supreme Court at least nominally eschews giving the Constitution's text a meaning discernable only in the case law rather than on the document's face.

Constitutional scholars distinguish between interpretation—the art of discerning the meaning of the Constitution's text—and construction—the practical problem of figuring out what to do when that meaning proves elusive.<sup>7</sup> I've thus far spoken about interpretation, explaining why graduated consent theory tells us we should read the Constitution's text in light of the plain, present, public meaning of its words. The same graduated consent theory also tells us how to *construct* the Constitution when its words evade interpretation. Basically, to again treat the Constitution as much as a contract as possible, we should construct it as we would a standard form agreement, offered by its writer on a take-it-or-leave-it basis, from an awesomely powerful party to a comparatively powerless one. Courts enforcing contracts formed in similar circumstances routinely read vague terms in the favor of the party—usually a sole individual person—presented the agreement on a take-it-or-leave-it basis by the other party—usually a soulless collective legal person, such as a corporation or a state. In the Constitutional context, that basically gets us to the presumption of liberty that Randy Barnett has eloquently defended (albeit on other grounds).

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

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

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<sup>5</sup> *District of Columbia v. Heller*, 544 U.S. \_\_\_, slip op. at 3 (2008), *quoting*, *United States v. Sprague*, 282 U. S. 716, 731 (1931).

<sup>6</sup> The passage from *Heller* continues an vein that makes its originalist leanings evident: "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation," (emphasis added). 544 U.S. at \_\_\_, slip op. at 3.

<sup>7</sup> Lawrence Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2008/04/legal-theory-le.html](http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html) (visited Oct. 22, 2010).

adjudicators, decide the dispute. I could say more about this—I have before<sup>8</sup> and will probably again, later—but for now it suffices to note that consensualism tells us not only how to interpret and construct the Constitution, but also how to judge it.

### **For Recovering Originalists**

Most libertarians, to the extent they adopt any particular approach to the Constitution, probably adopt some version of originalism—specifically, the original public meaning version.<sup>9</sup> Randy Barnett, for instance, has argued, "[T]he words of the Constitution should be interpreted according to the meaning that they had at the time they were enacted."<sup>10</sup> Allow me, then, to explain why libertarians should reconsider their allegiance to originalism.

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

Originalism has another virtue: It tends to generate substantively attractive results such as limited government, the rule of law, and respect for individual rights. The textualist engine that powers originalism deserves much of the credit for that, too, given that the Constitution usually protects the freedom of its subjects in straightforward and timeless language. Reading it from an eighteenth century point of view sometimes bolsters the defenders of individual liberties, granted, as *District of Columbia v. Heller* in its interpretation of the Second Amendment. But recurring to original meaning can reduce the scope of liberty, too, such as when questions about "cruel and unusual" arise.

Consensualism offers all the textual fidelity of originalism without any of the historical trappings. Indeed, by relying on the plain, present, public meaning of the Constitution's text, the consensualist approach admits to greater exactitude than originalism, which relies crucially on a limited set of various and variously interpreted documents, could ever offer. We can use a wide variety of mechanism to discern how the Constitution's living subjects understand its words in the here and now.

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<sup>8</sup> See Bell, *supra*.

<sup>9</sup> Larry Solum, *Legal Theory Lexicon 019: Originalism*, at [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/01/legal\\_theory\\_le\\_1.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html) (visited Oct. 22, 2010).

<sup>10</sup> RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89 (Princeton Univ. Press 2004). Barnett so argues because the Constitution is written and, "Original meaning follows naturally, *though perhaps not inevitably*, from the commitment to a written text." *Ibid.* at 100 (emphasis added). That caveat suggests that Barnett at least sensed that respect for the written nature of the Constitution might entail not originalism, but something more responsive to the understandings of living subjects.

## What does a Consensualist Give Up?

Eugene Volokh once observed that every constitutional theory ought to make its proponents sacrifice some policy that they care about deeply.<sup>11</sup> If not—if your constitutional theory generates all of and only your substantive preferences—we have reason to doubt its objectivity. What do consensualists give up?

A libertarian consensualist might, at the very least, give up some companionable agreement with fellow friends of liberty who, rather than reading the Constitution in light of its plain, present, public meaning, prefer to stick with originalism. That might change over time, of course, as consensualism wins converts, but prudence will at all events counsel against rashly abandoning originalism for a new and relatively untried constitutional theory. In the meantime, though they will continue to agree on many other points, consensualists might miss the company of fellow libertarians when it comes to questions of how to read the constitution.

More specifically, a consensualist reading of the Constitution arguably threatens the individual right to keep and bear arms—a matter about which libertarians care profoundly. The problem arises because the Second Amendment's first two clauses—"A well regulated Militia, being necessary to the security of a free State,"—arguably qualify its last two clauses, "the right of the people to keep and bear Arms, shall not be infringed." The recent decision in *District of Columbia v. Heller*,<sup>12</sup> because it affirmed that the Second Amendment protects an individual right to keep and bear arms, somewhat eases practical concerns on that front. Because that case relied on an originalist reading of the Constitution, however, it leaves open the worrying possibility that consensualism poses a theoretical challenge to libertarians' preferred policy.

Or perhaps not. Under an argument I first encountered in the writing of Erwin Hass, the Second Amendment that ensures the sanctity of an individual right to keep and bear arms even on a consensualist approach. Hass recognized in the Second Amendment a "gerundive construction" of the sort that classical Latin uses to highlight the tension between two contrasting clauses. With that in mind, Hass read the Second Amendment to say, "Because, on the one hand, the state needs an armed militia, the people, on the other hand, shall retain their own weapons to counteract the state."<sup>13</sup>

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

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<sup>11</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) ("Interpretation means sometimes having to say you're sorry.").

<sup>12</sup> 544 U.S. \_\_\_ (2008)

<sup>13</sup> Erwin Hass, *Arms and the Man*, LIBERTY (Sept. 2010) at pp. 12, 13.



meaning in statute, case law, and commentary, "Militia," as used elsewhere in the Constitution, evidently refers to a military body subject to tight federal control. Article I, section 8, clause 16 includes among the powers of Congress, "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States. . . ." Article II, section 2, clause 1 begins, "The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States. . . ." Even if, as the Constitution provides, each of the several states has authority to appoint officers and to train the ranks, they would carry the burden of "training the Militia according to the discipline prescribed by Congress; . . ." <sup>14</sup> (Note well the use of the singular; the Constitution evidently favors view the Militia as a single body, even if made up of parts from various states.)

Well, then, might a citizen fear Militias as a potential instrument of federal tyranny. Such a public fear would shape the public understanding of "Militia," as used in the Second Amendment, which would in turn help determine the plain and present meaning of the word. On that reading, the Second Amendment guarantees each subject's right to keep and bear arms in order that they might credibly threaten *in extremis*, and thus discourage in due course, the overweening ambition of tyrants-in-waiting. <sup>15</sup> Perhaps, then, consensualism would not require libertarians to give up their preferred approach to gun rights, after all.

Still, there remains another result of consensualist constitutional theory that libertarians might find hard to welcome: A reading favoring generosity of benefits doled out by the federal government. Libertarians tend to favor a stingy government in any case, and one at all events limited to a few narrowly defined categories of expressly Constitutional expenditures, such as to "establish Post Offices and post Roads;" <sup>16</sup> to "raise and support Armies," <sup>17</sup> and to "provide and maintain a Navy; . . ." <sup>18</sup> Arguably, though, a consensualist reading of the Constitution would first tell us that the plain, present, public meaning of "general Welfare," first in the Preamble and then again in Article I, section 8, clause 1, which grants Congress the power to provide for "the General Welfare of the United States," equates to something very much like a federal dole. Even accepting that an alternative reading, one that ties "general Welfare" to benefits granted to the federal system rather than to individual citizens, carries enough weight to cast the phrase into the construction zone, it looks likely

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<sup>14</sup> U.S. CONST., Art. I, cl. 8 § 16.

<sup>15</sup> This is not quite the same reading of "Militia" favored by proponents of what Glenn Reynolds calls the "Standard Model" of the Second Amendment, which instead claims that "the purpose of the Second Amendment is to ensure an armed citizenry, from which can be drawn the kind of militia that is necessary to the survival of a free state." Glenn Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 473 (1995). Though Reynolds wrote those lines well before *Heller*, that recent opinion confirms that "the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia." 544 U.S. at \_\_\_, slip op. at 26.

<sup>16</sup> U.S. Const. Art. I, cl. 8 § 7.

<sup>17</sup> U.S. Const. Art. I, cl. 8 § 12.

<sup>18</sup> U.S. Const. Art. I, cl. 8 § 13.

that a reading favoring the subjects of the Constitution would again point to the dole. Libertarians can and should reply that the phrase remains "general Welfare," which precludes special legislation, and that the Constitution sharply limits the ways in which the federal government can collect revenue for redistribution.

Still, though, it seems at least arguably true that a consensualist reading of the Constitution fairly authorizes the distribution of certain benefits to which all subjects may qualify. I might prefer it otherwise, given my worry that bread and circuses will beget declines and falls, but I concede the point as a fair application of consensualism. Perhaps ruin will not follow the general welfare dole—especially if, as seems likely, the consensualist approach generates comprehensive and robust limits on federal power to tax and regulate. Some system of "general welfare" may qualify as Constitutional, but that does not make it mandatory or even prudent. Wise—and constrained—lawmakers might well decide they cannot afford to buy the consent of the governed, but instead have to earn it by modest restraint and effective action.

### **Conclusion**

Consensualism interprets the Constitution according to its plain, present, public meaning. It justifies that interpretative strategy as more likely than alternatives to maximize the consent of those governed by the Constitution. Such a consent-based reading not only offers a way to interpret the constitution; it also invokes the same rules that courts routinely apply to standard form agreements to *construct* the Constitution's meaning when mere words fail. Because it combines the responsiveness of "living" constitutionalism with the textual fidelity of originalism, consensualism offers the prospect of greater objectivity, certainty, and justifiability.