Dear Schmoozers,

For this year's schmooze, I was too pressed to write something new, and I figured the topic "citizenship" was so broad that I must have something already in print that I could use. It turns out that I did not really have something precisely on citizenship that was as long as 2500 words, but I did have the attached, which is broadly speaking, a reflection on how "government by consent of the governed" functions within the structure of a relatively juristocratic democracy, the contemporary U.S.

In other words, for the past forty years or so, as well as during other time periods, the U.S. Supreme court has considered itself authorized to protect fundamental rights whether or not a particular right has a specific textual referent in the U.S. Constitution or is specifically rooted in U.S. common law.[1] In fact, maybe one should say that the Court has almost always permitted itself this power when one recognizes that the Court's abjuring of this power in the *Carolene* footnote (April 25, 1938) was almost simultaneous with its assertion of this power in *Skinner* (May 6 1942).[2] (Weirdly, Justice Stone in his *Skinner* concurrence cites the footnote to support his view that there MUST be some limit [albeit unwritten] on majority power.) Similarly, Justice Powell's insistence on textual referents in *San Antonio v. Rodriguez* is almost simultaneous with his voting for abortion rights in *Roe v. Wade*.) If one presumes, as I do, that the body of people generally supposed to give "consent of the governed" is the citizenry, then fundamental rights jurisprudence raises some pretty deep questions about the meaning of citizenship and how this consent process can or does work. It is within this framework that I see the attached as relevant to this year's topic.

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[1] I consider the part in the footnote about discrete and insular minorities to be a reference to the equal protection clause and the part about safeguarding the democratic political process to be a reference to the republican form of government clause, and/or to specific voting rights clauses combined with the First Amendment.

[2] I build here on the work of people like Tom Grey and Walter Murphy who have documented the Court's protection of such rights in the pre-*Lochner* period.

Some scholars still believe it matters what political system the constitutional text established. The political theory underlying a text-guided jurisprudence is a familiar one. It gives priority to the written Constitution and, to some degree, to what the founding generation understood the text to mean. It is the tale told by *Marbury* and by *Federalist #78*. In it the people in their role as electors of representatives are the ultimate sovereign. They adopt the fundamental rules of the game by consenting to a written version of those rules, so that all people will know what they have agreed to. This consent is given, at least in the first instance, by a specially elected body of representatives. Governing authorities are the people's deputies, assigned to carry out the rules. If government agents violate the rules, judges enforce them by judicial review: They declare void the rule-breaking statutes.

It is true that all members of the government are duty bound to enforce the rules, but members of the judiciary have a special responsibility in that regard; it is "emphatically" their "province and duty" (as Marshall noted in *Marbury*). In this political theory the particular responsibility of the judiciary to enforce the rules is justified by the judges' specialized training as construers of law and also by the institutional structure that removes them from electoral pressures. The

absence of those pressures reduces the incentives for judges to distort the rules in their own self-interest.

In this political system the values of individual autonomy and equality of respect for each human being are built into the *base* of the system via popular consent to the fundamental rules in the Constitution-amending process, rather than guarded as policy outcomes by a tiny elite removed from popular control. This system honors more fully than the other does the ultimate moral authority of the will of the people, understood as expressed through those elected representatives who operate within the constitution-amending process. Judges are bound to look to the text of the Constitution—that is, to the will of the sovereign people—for the rules that they enforce.

This picture is not so fictional as its ancient lineage may make it seem. An obvious problem with it, however, is that we have no institutional mechanism for formally gathering mass popular consent to the rules.[79] As Paul Brest poses this critique, why should the opportunity for meaningful community debate over public values be limited to 1787 and 1866—the "rare occasions of constitution revolution"?[80] As others[81] have phrased the critique, everyone who ostensibly (through constitutional ratification or amendment) consented to the clauses generally litigated has long been dead. This concern underlay Jefferson's well-known interest in holding national constitutional conventions every 20 years (an interest he seems never to have promoted in any serious way, perhaps because he was a sitting president in 1807).

There are some answers to this critique (although they are perhaps not fully satisfying). For one thing, the assertion that the ostensible voice of the people is really no more than the dead hand of the past underrates the degree of historical continuity that life in any society presupposes. To some degree the rule of law always creates bonds of a shared culture between living and dead.[82] A substantial number of the laws people live under were adopted by legislatures elected entirely by persons now deceased, but that fact does not produce a demand that all statutes be repassed annually or biennially. Popular acquiescence to laws—*as long as* it occurs within a political system that allows the majority institutionalized control over legislatures—can properly be viewed as consent to those laws.[83]

Although the United States does not hold regular constitutional conventions, it does allow people freedom to leave if they are dissatisfied with the system, and it does give the public in its role as elector of Congress, of state legislatures, and of potential constitutional conventions the opportunity to amend the Constitution. For St. George

Tucker, writing in 1803, these two institutional features were enough from which to conclude that people had "consented" to the Constitution whenever they refrained from amending it.[84]

During the three antebellum decades, the Garrisonian abolitionists emphatically proclaimed that every vote for any government office in the United States was an act of consent to the Constitution, for the Constitution (Art. VI, Sec. 3) explicitly mandates that all such officials swear an oath to support the document.[85] Obdurately opposed to the slavery compromises in the Constitution, this faction of abolitionists refrained (as a point of honor) from voting. One could, of course, argue that even today the act of voting continues to imply citizen consent to the constitutional system. And the suggestion that "the framers" might be understood to include all Americans who have refrained from attempting to amend the Constitution has even been made (perhaps not altogether seriously) in recent legal scholarship.[86]

Such suggestions fail to persuade, however, because the difficulty of amending the Constitution—its leaden bias toward the past—is notorious.[87] In other words, the voting majority may very well wish to express nonconsent to a part of the constitutional text, or to a Supreme Court interpretation of that text, but the obstacles of the amendment process force the public to live with the unpopular text or unpopular interpretation until opposition to it has not just captured majority sentiment but has become truly overwhelming (dominating two-thirds in each house of Congress and majorities in both legislative houses in three-fourths of the states).[88]

Still, these suggestions that the public does consent to the Constitution by participating in the voting system and by refraining from amending the document can be refined to make them more persuasive, by taking into account the broader *politics* of constitutional amendment. It is well known that the Supreme Court sometimes makes abrupt turns in its interpretations of particular clauses. It is not so widely recognized that two very prominent recent instances of these turns can be explained as judicial responses to constitutional amendment politics. The Supreme Court radically changed the meaning of the equal protection clause in regard to gender discrimination between the 1960s[89] and 1971.[90] This shift followed on the heels of overwhelming endorsement of the Equal Rights Amendment in the House of Representatives.[91] The Supreme Court's shift on child labor regulation in the 1930s[92] is widely attributed to judicial fear concerning FDR's Court-packing plan. That plan never got very far in Congress; but a child labor amendment to the Constitution had achieved a two-thirds vote in

both houses of Congress in 1924 (with no time limit on state ratification), and FDR's election spurred a renewal of state ratification activity in the 1930s.[93] The Supreme Court did not announce its shift on child labor until 1941;[94] by that time, the impact of FDR's appointing power had produced unanimity. But the key votes were already shifted by 1937,[95] shortly after FDR's landslide made state ratification appear a more viable possibility.

In fact, it is not unreasonable to add the president's appointment power, combined with congressional power over the size of the Court, to the consent-garnering calculus of Constitution politics. The Court produces an interpretation of the Constitution. The public experiences its impact for a while and reacts. If the interpretation is intensely and widely unpopular, it is likely to become a matter of electoral debate influencing congressional and presidential elections (e.g., the Lincoln–Douglas debates concerning *Dred Scott*,[96] Nixon's campaign for a "law and order" Court, Reagan's promise to appoint "pro-life" justices), and ultimately judicial appointments. It is of course true that every presidential or senatorial election contains a multiplicity of issues and thus, even if voter awareness were higher than it is, virtually never would present a clear mandate to appoint and confirm a particular kind of judge. On the other hand, if a long series of elections produces a long series of judicial appointments—long enough to wreak a dramatic transformation in the Supreme Court's approach to a particular electorally controversial doctrine—it is hard to resist the conclusion that the voting public has expressed its will as to the meaning of the Constitution.

Still, commitment to "government by consent of the governed" has to include agreement with Abraham Lincoln's concession that once a Supreme Court decision has been "fully settled"—that is, once it has been "affirmed and re-affirmed through a course of years"[97]—it eventually does become in a practical sense part of the Constitution. For if the voters over a long course of years refrain from using constitutional politics to try to alter it, they ought to be viewed as exercising a sovereign power of choice. This assertion admittedly is a two-edged sword, for noninterpretivists can and do argue that popular acquiescence in extratextual decisions of the Supreme Court means that the public (post facto) has consented to those rules as well as to rules derived from the text. All that can really be said in reply is that human beings are fallible. The citizenry and government of the United States permitted a system of chattel slavery to endure for decades even though this system surely did run counter to principles embodied in

the Fifth Amendment due process clause; to Article I, Section 10 prohibitions on titles of nobility, bills of attainder, and ex post facto laws; and to any minimally significant meaning of the "republican form of government" that was supposed to be guaranteed to the states by Article IV, Section 4. The Supreme Court sometimes does announce decisions that are contrary to constitutional principles, properly understood. The public sometimes acquiesces in them for extended periods. This chapter argued earlier that in time these decisions have generally been overturned. But there always remains the possibility that over a long course of years a judicial "amendment" to the Constitution will simply be accepted by the voting public and by its representatives as a matter of national legal custom. This is not a phenomenon that the Constitution desires, as it were. But the nature of human fallibility makes it an inevitable possibility.

A distinction here is important. The Constitution provides a formal amending process in Article V (one that the American public shows little interest in altering). This Article V procedure appears to establish a different, higher, more binding status for amendments formally adopted than for those that occur through judicial interpretation with or without public acquiescence. Long acquiescence in *Plessy v. Ferguson* (1896)[98] had a markedly less powerful hold on the Court than would have been true of a hypothetical Fourteenth Amendment clause saying, "Nothing in this amendment shall be construed to forbid legislatures from mandating separation of the races in public places." The latter would be the public voice speaking (via elected representatives) as formally, as solemnly, and as forcibly as it can; the former (long acquiescence in a particular Court reading of the Constitution) is the public speaking tentatively, provisionally, and until circumstances change. When the voting and lobbying portion of the public speaks through constitutional politics (succeeding in pushing a proposed amendment through both houses of Congress in reacting to Court decisions; continually electing presidents who plan to move Court interpretations in a certain direction), it is in a sense speaking to the Court, saying, "We read the Constitution differently. Please reconsider." If the Court refuses to reconsider, the voting public may become dissatisfied to the point that a successful amendment will result.

The distinction can be developed by a concrete example. The Court has made a number of "mistakes" in the sense of distorting the apparent meaning of the constitutional text. One such mistake was *Plessy v. Ferguson*. Another was to "incorporate" First Amendment

freedoms (via a long series of decisions) into the due process clause of the Fourteenth Amendment instead of into the privileges or immunities clause of the same amendment, where such incorporation would make more textual sense. The latter mistake survived and remains part of our national legal custom. The former did not survive. *Roe v. Wade*,[99] in terms of the argument presented here, is another textual mistake; but it—or at least its legacy of a fundamental right to procreative privacy—may well survive and become part of constitutional law, just as due process clause incorporation has. If so, this would mean that the people through constitutional politics had tacitly consented to it, but such tacit consent is in principle not so binding on the Court as explicit consent (through amendment) would be.

The argument thus far has been that there is a subsystem of constitutional politics operative within the American political system. Within the variegated processes of constitutional politics the American voting public and its elected representatives in Congress, state legislatures, and potential constitutional conventions[100] provide consent (of a tacit but meaningful variety) to the American constitutional document by refraining, over the course of years, from attempting to amend that document. Constitutional politics is a rather sloppy system; its results cannot be neatly calibrated, unlike the results of a yes/no referendum on the Constitution or its parts. It has been aptly characterized in the public law literature as an ongoing dialogue between the judiciary and the branches elected by the voters.[101] Still, its amorphous, ongoing quality does not make it any less real as a set of devices for garnering the consent of the living to the U.S. Constitution. And the fact of that consent—however amorphous, fluid, and difficult of measurement—does provide a nonfictional foundation for the *Marbury* theory of textual judicial review adumbrated above.

The core difference between the role of the judge in this political system and in the system of the fundamental rights jurists is that in this system the judges are duty bound to interpret the written Constitution, not morality or up-to-date public opinion—in the words of Professor Owen Fiss, "The legal text, not the moral or social texts."[102] The judges look to the written text because it is the expressed will of the people—expressed through the tacit consent system of constitutional politics—that this text be the highest law of the nation. Justices' selection among plausible interpretations of the text—and there always is a range of choice or we would not need judges—will of course be colored by their sense of morality or justice. And it is also appropriate for them to consider the constitutional politics going on around them.