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. 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). (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. 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”? As others 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. 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.

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-fifths 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 and 1971.89 This shift followed on the heels of overwhelming endorsement of the Equal Rights Amendment in the House of Representatives.90 The Supreme Court’s shift on child labor regulation in the 1930s91 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.92 The Supreme Court did not announce its shift on child labor until 1941;93 by that time, the impact of FDR’s appointing power had produced unanimity. But the key votes were already shifted by 1937,94 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,95 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”—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
For them to consider the constitutional policies going on around them, they must first come to an understanding of what is required of them by the Constitution. The Constitution is a set of rules that must be followed in order to ensure the protection and promotion of the highest principles of freedom, equality, and democracy. The Constitution is the supreme law of the land, and it is the fundamental document that establishes the framework for the government and outlines the rights and responsibilities of citizens.

The Constitution provides a foundation for the operation of the government and the protection of individual rights. It establishes the legislative, executive, and judicial branches of government and outlines the process by which laws are made and enforced. The Constitution also guarantees certain fundamental rights, such as freedom of speech, religion, and the press, and it prohibits the government from infringing on these rights.

The Constitution is a living document, and it has evolved over time to address new challenges and changing circumstances. As the country has grown and changed, so has the Constitution. The Constitution is a reflection of the values and beliefs of the people who have lived and governed in this country, and it continues to shape the nation's future.

The Constitution is a complex and sometimes confusing document, but it is essential to understanding the government and the rights and freedoms of citizens. By studying the Constitution, we can gain a deeper understanding of the principles on which our country is based and the values that guide our nation. The Constitution is a testament to the ideals of freedom, equality, and democracy, and it serves as a beacon for those who seek a just and equitable society.

Reference:


[2] Article I, Section 10: The Separate and Equal Rights of the States; and Any Amendment to the Constitution Not Made by a Joint Resolution of Congress, and as Post-Penicillin Prophylaxis in Cases of Military, Civil, or Local Concern: To the Sections of the Constitution, and the Constitution as a Whole.