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What Are Constitutions, and What Should (and Can) They Do?

by

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A constitution is, as Article VI of the United States Constitution declares,[1] the fundamental law of the land, supreme as a legal matter over any other nonconstitutional law. But that almost banal statement raises a number of theoretically vexed issues. What is law? How is constitutional law to be distinguished from nonconstitutional law? How do morality and moral rights fit into the picture? And what are the implications of the answers to these questions for such questions as how and by whom should constitutions be interpreted? These are the issues that I shall address.

I shall proceed as follows: In section I I take up law's principal function of settling controversies over what we are morally obligated to do. In section II I then relate law's settlement function to the role of constitutional law. In particular, I discuss how constitutional law is distinguished from ordinary law. And I also discuss the role of constitutions in establishing basic governmental structures and enforcing certain moral rights. In section III I address the topic of constitutional interpretation, and in section IV the topic of judicial review. Finally, in section V, I discuss constitutional change, both change that occurs through a constitution's own rules for amendments and change that is the product of constitutional misinterpretations and revolutions.

I. Law and the Settlement of Moral Controversy

What is the principal function of law—all law? I would argue—and have argued[2]—that law's principal function is to settle what we are obligated to do. More precisely, law's principal function is to settle what our moral obligations are that are properly subject to coercive

enforcement. Even if we were all motivated to fulfill our enforceable moral obligations, our disagreements about what those obligations are and what they entail in particular situations would produce huge moral costs. Because of our moral disagreements, we could not predict with any certainty what others were going to do. And because what is the morally correct conduct for me often depends upon what others are doing, my inability to predict and coordinate with others will lead me to do what is morally wrong even if I am trying to do what is morally right. Legal settlement of what I and others are obligated to do allows me to coordinate my acts with others' acts and avert the moral costs of colliding good intentions.

Legal settlement also can improve moral decisionmaking through giving decisionmakers the benefits of others' expertise. I may know that polluting is wrong, but I may not know whether the substance I am about to dump in the river is a pollutant. I may know that I should not operate equipment that endangers others, but I may be ignorant of the fact that this particular piece of equipment is dangerous. Good intentions without factual expertise can be as problematic in terms of morally significant consequences as are bad intentions. Legal settlement can improve our moral decisionmaking if the law makes use of expertise.

Legal settlement also makes moral decisionmaking more efficient in terms of time and other resources. Even if I could eventually acquire expertise and the ability to predict how others will act, my decisions regarding what I am morally obligated to do, if unaided by law, may require a great deal of time and energy that could be put to better use if there were a legal settlement of the issue that was clear and easily accessible.

Thinking of law in terms of settlement of what we are enforceably morally obligated to do explains how law and morality co-exist on the same terrain. Both purport to tell us what we are obligated, forbidden, or permitted to do. So the question might be asked, "Why do we need

law, given that we already have morality?" Why do we have many volumes chock-full of laws rather than only the one, Spike Lee law, "Do the right thing"?[3] The answer is that although the Spike Lee law is in one sense perfect and would be appropriate for a society of omniscient gods, in another sense, in our world of less than omniscient humans, "Do the right thing" is not "the right thing." Although we are neither gods nor angels, law is a response to the fact that we are not gods, not to the fact that we are not angels.[4] If we were omniscient gods, but some of us were not angels, "Do the right thing" would suffice. If one of us did the wrong thing, others, being omniscient, would know the right thing to do in response.[5] But if we were angels but not gods—always motivated to do the right thing but uncertain of and disagreeing about the right thing to do—specific laws settling what we should do would effect a moral improvement over the Spike Lee law. Paradoxical perhaps, but true nonetheless, the perfect Spike Lee law is morally inferior to a regime of quite specific and likely imperfect laws.

Of course, to fulfill its settlement function and improve upon Spike Lee, law will have to consist of determinate rules. It is determinacy that produces settlement and its moral benefits of coordination, expertise, and efficiency.[6] Standards—those legal norms that are not determinate rules but rather instruct us to do what is "reasonable," "fair," or "just"—leave matters unsettled. They in effect tell subjects to "do the right thing" within the region of decisionmaking subject to them. They fail to fulfill the settlement function. Rather, they defer settlement.

II. The Nature and Functions of Constitutional Law

If law's function is to settle what ought to be done through determinate rules, constitutional law's function is to settle the most basic matters regarding how we ought to organize society and government.[7] One can think of a constitution's being basic law through different prisms. Looked at in terms of legal validity, constitutional law is the law that is highest

in the validity chain. It validates lower level law. Just as an administrative law may be valid only if it is authorized by a statute, a statute may be valid only if it is authorized by the constitution. The constitution is the highest law there is and is neither valid nor invalid but just accepted.[8]

The second way to think of a constitution's being basic law is to think of it in terms of relative entrenchment against change. Typically, a constitution is more entrenched against change than a statute, administrative rule, or common law court decision.[9]

Now usually the law that is highest in the validity chain is also the most entrenched. The reason for this is obvious. If lower level laws like statutes were more entrenched than the higher level constitutional laws that authorized such statutory entrenchments, one could repeal the entrenched statutes by the easier route of repealing the less entrenched constitution's authorization of the statutory entrenchment. So it makes sense to have higher level law be more entrenched than lower level law. Nevertheless, it is theoretically possible to have a lower level law be more entrenched than the higher law that validates it.

Constitutions, as I said, lay down the ground rules for governance. They "constitute" the government. They set up structures, offices, and lawmaking procedures. Constitutions such as the U.S. Constitution and the Canadian Charter also entrench "rights."

When a constitution promulgates the structures, offices, and procedures for governance—the rules about how laws are to be made, how offices are to be filled, and which level of government and which officials within government are to have jurisdiction over which matters—the constitutional provisions in question are similar to assembly instructions that accompany gadgets or toys that we buy. They are instructions for "how to assemble a government." But if

this is how we should conceptualize the structural provisions of the constitution, how should we conceptualize those provisions constitutionalizing certain rights?

As I see it, there are three, and only three, possibilities here. First, the constitutional authors might be creating rights or making certain rights more determinate by means of rules granting various specific liberties and immunities. Second, the constitutional authors might not be creating or specifying rights through rules but might instead be incorporating real moral rights as they exist in the moral realm[10]—that is, making certain real moral rights legally as well as morally binding on the government and enforceable by the judiciary. Third, the constitutional authors might be inventing or creating rights but without translating them into determinate rules. I shall take up the implications of these three possibilities in turn.

The first possibility—creating a right, or making an existing right determinate, through a determinate rule—is unproblematic and unremarkable. In the U.S. Constitution, the so-called right against self-incrimination was most likely meant by the authors of the Fifth Amendment to be no more than a rule granting defendants an immunity from being compelled, on pain of contempt, to testify in court.[11] It was an invented right, as there probably is no corresponding moral right against self-incrimination. And the scope of this invented right was coterminous with the rule that embodied it.

Likewise, some scholars believe that the "freedom of speech" referred to in the First Amendment was meant to be a determinate rule forbidding Congress from requiring licensing of speakers and publishers—that is, a determinate rule against prior restraints.[12] If there is a general right of free expression, on this view, the First Amendment was making determinate and constitutionalizing only a portion of the more general right. And the rights against takings of property without just compensation[13] and impairing the obligations of contracts[14] might be

rulifyings of portions of a more general moral right against upsets of legitimate expectations engendered by law.

Other rights, such as the right in the First Amendment to petition the government, might be seen as rules that are corollaries of the type of governmental structure created by the Constitution—a representative democracy—and not as moral rights that pre-exist that structure.[15]

Let me now turn to the second possibility for constitutionalizing rights, namely, incorporating by reference real moral rights. Ronald Dworkin, for example, believes that this is what the authors of the U.S. Constitution were doing when they wrote into the Constitution a right against cruel and unusual punishments, a right to equal protection, a right to the free exercise of religion, and other rights.[16] There are three aspects of such an enterprise worth careful consideration.

First, if one is going to incorporate real moral rights into a constitution, then one is going to have to subordinate those rights to the various rules setting up the structure of the government and also subordinate them to decisions regarding their content that are supposed to be legally authoritative—that is, that are supposed to settle the question of what the content of those moral rights is for purposes of the legal system.[17]

Let me elaborate briefly on this point about subordinating moral rights. Within morality, moral rights are not subordinate to human institutions and human decisions. Rather, the contrary is the case. Human institutions and decisions are subordinate to moral rights. Were moral rights incorporated into a constitution without making them subordinate to other aspects of the constitutional regime, then they might completely overturn that regime.[18] For there is never any guarantee that a constitutional structure is consistent with moral rights as they really are. After

all, the constitutional structure is an artifact produced by human beings possessing fallible moral beliefs.

Moreover, because the content of real moral rights is controversial, incorporating real moral rights into a constitution would make the content of constitutional law—and thus all law—incapable of being authoritatively determined. For the content of real moral rights cannot be settled by any institution's decision regarding that content, whether it's the decision of the legislature or the decision of the Supreme Court. Therefore, incorporation of real moral rights into a constitution will undermine the settlement function of law unless it is understood that those rights are legally (if not morally) subordinate to some institution's determination of their content. Were that not true, decisions of the legislature and the Supreme Court regarding moral rights would fail to be *law* in the eyes of those who disagreed with the decisions because they would see those decisions as inconsistent with real moral rights.[19]

So, the first point about incorporating real moral rights is that they must be subordinated to constitutional structures and to authoritative determinations of their content. The second point about incorporation of real moral rights is related: A decision must be made regarding which institution's *view* of real moral rights should be treated as authoritative for purposes of the legal system. To narrow the focus to the usual suspects, should the legislature's view of real moral rights be authoritative, or should the authoritative view be that of the courts?

Keep in mind that everyone—the legislature, the courts, and the people themselves—is subject to the requirements imposed by real moral rights. So the question is never whether the legislature is *morally* free to disregard real moral rights, or whether the courts are *morally* free to do so. The question is whose view of what those rights require should be the authoritative view within the legal system.

Some democrats believe that the legislature's view should be authoritative.[20] However, because the legislature is always subject to the constraints of real moral rights, and can always tailor its legislation to the requirements of real moral rights as it perceives them whether or not those rights are incorporated into the constitution, it is pointless to incorporate them unless one plans to make them judicially enforceable against the legislature (whether or not the legislature is able thereafter to override that determination). I repeat—constitutionalizing real moral rights only makes sense alongside judicial authority to determine their content and enforce them against the legislature. That is not because courts are superior to legislatures when it comes to determining the content of moral rights; rather, it is because legislatures are already supposed to make their legislation consistent with real moral rights, whether or not constitutionalized. Incorporating those moral rights as legal rights but then making the legislature's view of their content legally supreme over the view of the courts thus accomplishes nothing. (I take no view here on whether courts *are* superior to legislatures in determining the content of real moral rights.[21] I tend to be skeptical of either institution's ability in this regard, though no more skeptical than I am of law faculties' or philosophy departments' ability.) But, as I said, if courts are *not* superior to legislatures in determining the content of real moral rights, either epistemically or motivationally, it makes no sense to constitutionalize those rights. They apply to the legislature whether or not they are constitutionalized.

So if real moral rights are to be incorporated into a constitution, they must be subordinated to the constitutional structures and to some institution's determination of their content. And therefore an institution must be chosen that will have the authoritative say regarding that content, though incorporation of real moral rights strongly implies that the chosen authoritative institution will be the courts. The third thing to note about incorporating real moral

rights is that there is no guarantee that the moral realm as it actually is will contain the specific moral rights referred to in the constitutional text. There may not be any moral right of equality,[22] or of freedom of expression,[23] or of freedom of religion.[24] Or those rights may just be aspects of some moral right that is not named in the constitution. Or the correct moral theory might be a consequentialist one, like utilitarianism or egalitarianism, in which the only moral "right" is that all actions conform to the consequentialist norm. If constitutional authors wish to constitutionalize real moral rights, they had better be certain that the rights they name *are* real moral rights. But, of course, they cannot be certain.[25] They might be better off just telling the courts to enforce against the legislature whatever moral rights there actually are without attempting to name them. For in naming moral rights that do not exist, they might lead the courts to be more confused about what rights there are than had they left moral rights unnamed.

I have now discussed two of the three possibilities constitutional authors might have in mind in constitutionalizing rights. They might be creating specific rights in the form of determinate rules that define the rights, such as a rule forbidding judicially compelled incriminating testimony or a rule forbidding requiring a license to speak. Or they might be attempting to incorporate by reference real moral rights rather than defining those rights through determinate rules or creating them. The third and final possibility is that in constitutionalizing a right, the constitutional authors are inventing or creating the right, but without giving it any determinate form—that is, without embodying it in a rule or set of rules. Rather, the right is supposed to function as a principle or value, with weight, not as a specific rule such as the rule against requiring a license to speak.

There is only one problem with this third possibility, but it is a doozy. This possibility is in truth an impossibility. One cannot, however hard one tries, create a right that is not

coterminous with a determinate rule. If there is nothing in the world pre-existing the constitution to which this right refers—if this right comes into being only by virtue of its being mentioned in the constitution—then its contours and weight cannot be assessed nonarbitrarily, as there is nothing in the world that would make any such assessment true. The courts would be making it up were they to declare that such a constitutional right applied or did not apply, outweighed the government's interest in its legislation or did not outweigh it.

I shall give one illustration of the problem that will stand in for every possible illustration. Suppose that we wish to create a right that does not exist in the moral realm—say, a right to fine art. We do not, however, specify through determinate rules just what the right entails: Does it entail government funding of art, and if so, how much, and how balanced against other governmental resource needs? Does it entail a legally enforceable obligation of talented artists to produce such art, and if so, how is this obligation to be balanced against artists' right to liberty? And may government suppress fine art that threatens public order, and if so, of what magnitude must the threat be? Suppose instead of resolving these questions through detailed determinate rules, we simply say that we will let the courts resolve these questions. Well, how will the courts resolve them other than according to judicial preference? There is no right to fine art in the moral realm which they can consult. When they resolve these questions, then, there will be no criteria available to determine if their resolutions are correct or incorrect. We were making up the right, and they will be making up its contours in deciding cases rather than looking to independently existing contours that could render their decisions right or wrong. They will be in the position of one who is told that a nonexistent creature—say, a unicorn—has a horselike body and a horn on its head, but is then asked to give its height, weight, color, and speed. One would protest, "This is an invented creature, and its inventor hasn't given me this

information—so how would I know?" The same applies to invented rights not embodied in determinate rules.

My point is this: Rights that do not exist in the moral realm can only be created through and fully embodied in determinate rules. The enactment of nondeterminate "principles" that are supposed to function as weighty considerations cannot create rights and their weights if those rights and weights have no pre-enactment existence. Put differently, there are no *legal* principles, legal norms that are neither determinate rules nor references to preexisting *moral* principles. If incorporation of actual moral principles is not what the enactment of legal principles represents, can legal principles be created merely through enactment? The answer is "no." For there is no way to "create" by an act of human will a real principle, namely, a norm that is not a determinate rule with a canonical formulation but is instead a norm that possesses weight.[26]

To see that this is impossible, assume there is, in the moral realm, no free speech principle. Now, put yourself in the position of the lawmaker who wishes to create, say, a free speech principle. How can he accomplish this (again, keeping in mind that there is no such moral principle for him to refer to and incorporate by reference). He could, of course, write out a set of instructions for how to apply the "principle," but in that case he will merely have reduced it to a rule with canonical form that is either applicable or inapplicable but lacks weight. And I see no way that lawmakers can create weight, except by issuing instructions for how the principle applies in every conceivable case—which is not only impossible, but if possible would just be the enactment of a weightless rule, albeit an infinitely lengthy and complex one.

If I am correct, then direct enactment of legal principles is not an option. If lawmakers believe that they are enacting legal principles, they are mistaken. If, for example, there is no free

speech principle in the moral domain available for incorporation in the legal domain, then enacting a free speech principle is an impossibility, and lawmakers who believe *that* is what they are doing must be doing something else.[27]

If legal principles cannot be created directly by enactment, perhaps they can be created indirectly. Indeed, indirect creation is precisely the account given by Ronald Dworkin, whose description of legal principles I am employing. For Dworkin, legal principles are not enacted as such. Rather, they arise out of those legal rules and judicial decisions that *are* directly enacted.[28]

Legal principles—again, legal norms that lack canonical form and have the dimension of weight—are those principles and their weights that "fit" (would justify) a sufficient number of legal rules and decisions and that have a sufficient degree of moral acceptability. Put differently, legal principles are those principles that are the most morally acceptable of the principles that are at or above the requisite threshold of fit.

On Dworkin's account, legal principles may turn out to be less than morally ideal. That is, legal principles will not be moral principles. For legal principles, unlike moral principles, are constrained by the requirement that they fit the legal rules and decisions, at least to a certain degree. That is why Dworkinian legal principles are not just moral principles consulted by judges. (Dworkin's argument for legal principles, which relies on the notion of fit, both synchronic and diachronic,[29] actually implies that legislatures and constitution drafters no less than judges should be bound by legal principles.)

Now over a decade ago, Ken Kress and I wrote an article attacking Dworkin's account of legal principles.[30] The article was long and complex, and I shall give only a very abbreviated version of it here. The nub of the argument, however, was that (1) the moral acceptability axis would dictate whatever threshold of "fit" correct *moral* principles will satisfy and thus make

legal principles identical to moral ones, and (2) Dworkinian legal principles, if not identical to moral principles, would be quite unattractive norms by which to be governed.

With respect to the first point, suppose a jurisdiction has a number of legal rules and judicial decisions on the books that are morally infelicitous or even iniquitous. Moral principles would tell us to follow only those legal rules and decisions that were morally sound or to follow unsound legal rules and decisions only when doing so is warranted according to correct moral principles—in other words, follow moral principles.

It might be objected that if we ignored legal rules and decision that were morally infelicitous, various bad things would happen. People who relied on infelicitous rules and decisions would have their expectations, on which they may have relied in costly ways, dashed. Coordination with others would become more difficult and costly. And so on.

But notice that if those costs are morally cognizable, which is plausible, then *application of correct moral principles will have taken those costs into account*. Put differently, if a morally incorrect legal rule or decision is enacted, that changes the facts in the world to which *correct* moral principles apply. So it may be morally correct to follow a legal rule that it would have been morally better not to have enacted *ab initio*.

Therefore, the moral acceptability axis will always dictate a threshold of fit that is precisely what following correct moral principles would produce. And that means that *unless the threshold of fit is determined independently of moral acceptability, legal principles will turn out to be identical to moral principles*.

The alternative of the threshold's of fit being independent of moral acceptability is quite unattractive, however. Any threshold less than one hundred percent looks arbitrary. But more importantly, if the threshold is independent of moral acceptability, legal principles will be

normatively unattractive. For on this accounting, legal principles will lack the determinacy virtue of legal rules and decisions—they will have all of the indeterminacy of moral principles (because they can be ascertained only by recourse to morality and will therefore be as controversial as morality)—and they will lack, as well, the moral correctness virtue of moral principles (because they must fit morally incorrect legal rules and decisions). They will be neither determinate and predictable nor morally correct. They will have nothing to recommend them as norms, and thus there will never be any reason to consult them.

If a norm is not a norm of morality, and if it is not determinate and cannot coordinate behavior, then it has no normative virtues. And if a norm lacks normative virtues, then I would argue it does not exist as a norm. Indirectly enacted Dworkinian legal principles do not satisfy this existence condition.

Robert Alexy's conception of legal principles is very similar to that of Dworkin.[31] On his conception, principles have no specific canonical form, and they have the dimension of weight.[32] When they conflict, one principle can outweigh the other in the circumstances of the case at hand, but the outweighed principle continues to exist and may outweigh the other principle in different circumstances.[33] (When rules conflict, however, then one rule is either invalid altogether or at a minimum invalid in the circumstances of conflict and thus modified.[34]) Alexy conceives of legal principles as values to be optimized—realized to the greatest extent possible consistent with their weight vis-à-vis the weight of competing values, including the value of following democratically enacted rules.[35] (Alexy departs from Dworkin, who distinguishes principles from collective goals [policies], by treating both as principles, the realization of which is to be optimized.[36])

How do principles become part of the law on Alexy's account? Alexy nowhere suggests that, as Dworkin contends, legal principles emerge from the mating of legal rules and legal decisions with moral principles—that is, that they are the most morally acceptable principles that "fit" (to an unspecified degree) with the extant legal rules and decisions.

That leaves on the table the possibility that legal principles are posited by lawmaking acts intended to bring those principles into the law. Again, there are two ways principles might be deliberately made part of the law. First, lawmakers might wish to incorporate real moral principles into the law, either in legal standards, or as necessary or sufficient conditions for legal validity. Second, lawmakers might wish to create principles and enact their own creations. To repeat what I said earlier, real moral principles incorporated into standards are hemmed in by rules and subordinated to those rules and to judicial decisions regarding the content of the moral principles. They are thoroughly domesticated and incapable of undermining the settlement function of law—although they do nothing to further it. However, incorporating real moral principles as necessary or sufficient conditions of legal validity without subordinating those principles to posited rules and judicial decisions does undermine law's settlement function.

In any event, Alexy provides ample evidence that incorporation of real moral principles is not what he is envisioning in the positing of legal principles. For example, he mentions the possibility of positing morally obnoxious principles, such as the "principle" of racial segregation.[37] Obviously, that is not a real moral principle, a principle that true morality contains. Nor is the principle, cited by Alexy, of the "maintenance and support of the manual arts,"[38] likely to be a real moral principle rather than at most a relevant consideration under some general moral theory. In still other passages, Alexy speaks of *enactment* of a principle.[39] I conclude, therefore, that Alexy views legal principles and their weights as capable of being

created by deliberate enactment (as opposed to being *incorporated* from an independent moral realm).

If I have read Alexy correctly, then his position is subject to my earlier critique of the direct enactment of legal principles. Weight cannot be enacted. There may be *moral* principles that have that dimension; that would depend on whether the best moral theory is one in which there is a plurality of principles that are not lexically ordered. And a complex *rule* with a number of qualifications and conditions on its application may mimic the dimension of weight. But real weight—and hence legal principles—cannot be enacted. Both direct and indirect enactment of principles with weights are impossibilities. Therefore, there are no legal principles. And if that is true, then when courts purport to decide cases by alluding to principles and their relative weights, they are making it up. There is no independent realm of legal principles and their weights to which they can be referring.

Well, you might ask, what about legal *standards*—legal norms that are not determinate rules? Do standards not require judges to fill in their requirements? I would answer that standards do require judges to fill in their requirements, but fill them in by consulting reasons that pre-exist the legal system, most notably, moral reasons. A standard essentially instructs the judge to do what is morally best within the space left open by legal rules. Standards do *not* create the reasons on which judges are to rely in fleshing them out.

III. Constitutional Interpretation

I have argued that constitutional provisions creating governmental structures are like assembly instructions for toys and gadgets. They are assembly instructions for creating a government. Constitutional rights provisions, I have argued, can be of two types: determinate

rules creating the rights, or incorporation by reference of real moral rights. Finally, I have argued that creating rights other than through determinate rules is an impossibility.

So what do these points suggest is the proper way to interpret constitutions? Let us consider first the interpretation of structural provisions. Consider what the constitutional enterprise *is* in this regard. We have asked the constitutional authors to tell us how we should construct our government. How should the legislative branch be structured and chosen? How should the other branches be structured and chosen? What should be the respective powers of the federal and provincial governments? And so on. And the constitutional authors have communicated their resolutions of these issues to us through symbols—marks on pages in the case of written constitutions. It would make sense, would it not, to interpret those symbols as meaning what the constitutional authors intended them to mean—that is, by reference to the constitutional authors' intended meaning. After all, we charged them with the task of producing governmental assembly instructions, and these symbols were meant by them to convey what they had produced. It would be decidedly odd to have one group write assembly instructions but then to take the symbols it used and "interpret" those symbols as if they had been produced by some other group with different intended meanings. Why should we read the Canadian Charter or United States Constitution as if they were written in English if we do not care about the intended meanings of their actual authors? Why not imagine that the marks on the pages are not English but are in some special code that means what we would like it to mean? No mark or sound has any inherent meaning. Marks, sounds, and other symbols used by someone or some group to communicate their ideas to others have only the meanings those who produce them intend them to convey. And although for any set of symbols produced by one author with a given intended meaning, we can always treat those symbols as if they were produced by a different author with a

different intended meaning, doing so with constitutional provisions makes the whole process of authoring them and adopting them bizarre. When I read assembly instructions for a toy or gadget, I try to discern what those who wrote them intended, not what someone else might have intended by those symbols, much less what I would have intended. Looking for the authors' originally intended meaning is the only thing that makes sense when it comes to constitutions' structural provisions.

Now someone might object that I have overstated my case. They might argue that interpretation of structural constitutional rules can properly depart from the authors' intended meaning so long as the symbols in the constitution can bear an alternative meaning. But this is a confusion on several levels.

First, and to repeat myself, giving some people the job of coming up with structural rules but then disregarding the meanings *they* intended their chosen symbols to convey seems quite bizarre and verges on unintelligibility.

Second, it is a mistake to imagine that a given set of symbols can bear only a limited number of meanings. Any symbol can convey an indefinite number of meanings. And even if we artificially decree that a certain set of symbols must be treated as if it were English—and no set of symbols itself declares what standard language, if any, it is in—words and phrases in English can bear an indefinite number of meanings, again depending on the intentions of their users and the understandings of those intentions by the audience. At some point in time the word "bad" came to convey the meaning "good," as in "That's a really bad car you're driving." At some point in time "He's a really cool cat" came to refer not only to the tabby by the air conditioner but to a jazz musician in sweltering New Orleans. Symbols, languages, codes,

idiolects—they can convey any meaning so long as the intended meaning is understood by its audience.

Moreover, it's only the intended meaning of its authors that gives a constitutional text its unity, so that the Canadian or American constitution in one book is the same constitution as that in another book, and the same as that in the national archives. What I mean is this: If a constitution contains an ambiguous word or phrase, and we can resolve the ambiguity either by reference to the authors' intended meaning or by reference to other possible meanings (meanings someone other than the actual authors could have intended to convey), then the different possible interpretations represent different constitutions. For suppose the ambiguous word or phrase in English has no counterpart in, say, Italian. Rather, there is a separate Italian word for each of the possible meanings. In that case, when translators translate the constitution into Italian, if they resolve the ambiguity differently from one another, they will produce Italian versions that are *symbolically* different one from another. The only thing that makes a given set of symbols the same text as a different set of symbols is that they have the same authorially intended meaning.

Someone might object to my assertion that seeking the authorially-intended meaning of structural rules is the only thing that makes sense of the enterprise of asking some group to author them. She might claim that I have conflated the Constitution as a set of structural rules drafted and ratified by identifiable people at a specific time in history with "The Constitution" that is our fundamental law. The latter refers not to the specific instructions communicated to us by their drafters/ratifiers but to our *practice* of constitutional argument. Within that practice, we might invoke the intended meanings of the actual authors. But we might also invoke the plain meaning of the text, historical developments, morality, prudence, and so forth. Each

argumentative modality is part of our constitutional practice.[40] Originally intended meanings occupy no preferred position among such modalities.

Now there is a sense in which this claim is true, and there is a sense in which it seems deeply confused. It is true that one can find constitutional arguments framed in all of these ways, and one can find as well Supreme Court opinions that exhibit this modal diversity as well.

Nonetheless, each modality corresponds to a different constitution. The originally intended constitution is different from the textualist one, which is in turn different from the historical and moral ones, and so on. If rendered in Italian, each would be symbolically distinct. So different modalities entail different constitutions.

But then, when a litigant invokes one modality in argument and her opponent invokes another, what exactly are they arguing about? To answer "the Constitution" is wrong on the modalities account, as there are different constitutions, not *the* Constitution. They appear to be arguing past each other and thus not in fact disagreeing. They are each engaged in "the practice" of constitutional practice and cannot be said to be disagreeing about *that*.[41]

So what, then, is the argument about on the modalities account? Perhaps it is not an argument over what *the* Constitution means but is rather an argument about *which* constitution the Supreme Court should endorse as *the* Constitution. Perhaps—although those endorsing the modalities approach tend not to see it as one in which litigants offer up alternative constitutions from which the Supreme Court is to choose. For one thing, if the Court does, as it must, choose one to resolve the case, that choice is not supposed to establish the supremacy of that modality in any other case. All of the losing constitutions are supposed to remain available for use in future cases.

More importantly, on what basis is the Court to choose among the modalities? There is no meta-modality to govern choice among the modalities. Any choice among them will thus be an exercise of judicial will and nothing more.

There is only one "modality" that makes sense of the enterprise of drafting and ratifying a constitution. Seeking any "meaning" other than the meaning that the actual drafters/ratifiers intended to convey through whatever symbolic medium they employed renders the project of constitution making quite bizarre. We might as well make anagrams out of the letters in a constitution (though in what language?)!

When it comes to the Constitution's structural rules, therefore, those rules have a fixed meaning , the meaning their authors intended by them at the time they were promulgated. Any other interpretive approach is tantamount to reauthoring the structural rules. The "dead hand" of the authors' original intended meaning must control lest the enterprise of designing a constitutional structure be upended.

Well, how do these remarks about interpreting structural rules bear on the interpretation of constitutional rights? If the rights are embodied in determinate rules, then what I have said about interpreting structural rules applies equally to interpreting rules creating rights. If those rules are given meanings as if they had been authored by someone other than their actual authors, someone who did not mean by them what their actual authors meant by them, then the constitutional rights will have been amended by the courts. If the rules meant on day one what their authors meant by them—and, to repeat, it would be an odd enterprise to have some group come up with rights-creating rules but then assign meanings to those rules that are different from the authors' intended meanings—then the rules continue to mean the same thing on day two and

day three and today. Any "living tree" or other approach is as inapplicable to rules specifying rights as it is to rules structuring the government.

What about constitutional rights that represent incorporation by reference of real moral rights? Well, with such provisions, interpretation begins and ends with discovering that the authors intended to refer to real moral rights. Once the courts get into the business of spelling out the content of those rights, they are no longer interpreting the constitution but doing moral philosophy. It would be inapt to describe this enterprise as "living tree" or any other kind of interpretation because it is not interpretation at all. And based on what I said earlier about incorporating real moral rights and making them judicially enforceable, there is room to doubt that the rights mentioned in the U.S. Constitution or Canadian Charter were invitations to the courts to consult moral reality and apply their findings as fundamental law.

The final possibility, the creation of rights other than through determinate rules—that is, through the promulgation of legal principles—is, to repeat, an impossibility.

Therefore, if a court is interpreting a constitution, it is interpreting *rules* laid down by those authorized to do so and is seeking their authorially intended meaning. Originalism, in the sense of seeking the authorially intended meaning, is the only option in a system that does not allow judicial amendment.

This is not to say that the courts should never engage in first-order moral reasoning. Even if we put aside the incorporation of real moral rights, even the most determinate set of constitutional rules will undoubtedly leave some matters open; that is, there will inevitably be a realm consisting of standards rather than determinate rules. Moreover, the courts will have to implement even the determinate constitutional rules through development of their own doctrines, and in doing so they will have no choice but to consult first-order moral and prudential reasons.

Nevertheless, their doing so will be hemmed in by the rules laid down by the constitutional authors.

I also should not be taken to be denying that discerning the originally intended meaning of a constitutional rule will often be difficult. Often it will be difficult for the authors themselves, when faced with a rule's application that was not in mind at the time of the rule's promulgation, to distinguish whether they intended the rule to apply but now regret that they did, did not intend the rule to apply, or possibly had no intent at all with respect to the matter. In other words, it will be difficult, even aided by ordinary norms of conversational implicature, for the authors themselves, as well as their interpreters, to determine what meaning they intended in some range of cases. And it will likewise frequently be difficult for the authors themselves, as well as their interpreters, to distinguish what is implied *in* their rules from what is implied *by* their rules but not in them.

Despite these difficulties in determining authors' intended meanings, determining those meanings is what *interpreting* legal directives issued by legal authorities *is*. Anything else is not interpretation and substitutes some fictitious author for the authors who have the authority to make law, constitutional or subconstitutional.[42]

IV. Judicial Review

What do these observations about law, constitutions, structures, rights, and interpretation suggest regarding the practice of judicial review, particularly the strong and much mooted form of that practice that makes constitutional decisions by the highest court authoritative for all other officials?[43] Can judicial review be justified, and if so, on what assumptions?

First, to the extent the constitution consists of *rules*, there is surely a case for making courts' interpretations of those rules supremely authoritative within the legal system. A

democratic legislature is in almost all conceivable circumstances inferior to a court when it comes to interpreting legal rules, including constitutional rules. The question is not whether the will of a current democratic majority should be subordinated to the will of a nondemocratic body. *That* question has already been answered in the affirmative by the adoption of a constitution. No matter how democratic the composition of its authors and ratifiers, their rules are not those of current democratic majorities. (And even states like Great Britain without formal constitutions have unwritten "constitutional" rules defining Parliament, its operation, and its powers that even Parliament cannot override.) The only question is which institution is better able to interpret the constitutional rules correctly; and in the case of a written, consciously created constitution, courts seem to be better constructed to get the meaning of rules right. This is true whether the rules are rules about structure or rules creating and elaborating rights. For their meaning is a matter of historical fact, what their authors' intended meaning was. And ascertaining historical facts is right in the wheelhouse of courts.

Even if the desideratum for rules is that their meaning not be controversial—after all, their function is to settle controversy and avert its costs—frequently authorially-intended meanings will not be clear to everyone and will thus leave matters unsettled unless authoritatively interpreted. The hope then is that even if the constitutional authors' intended meaning is not clear enough to avert controversy, the courts rendering of that meaning will be.

If a constitution contains standards, matters are different. Standards tell a decisionmaker to do "the right thing" within a decisional area cabined by rules. There is no reason to assume that courts are necessarily better reasoners about morality and policy than legislatures or the executive. However, I see no reason of democratic principle against leaving the authoritative fleshing out of standards to courts. Although Jeremy Waldron disagrees,[44] the question for me is

what mix of democratic and nondemocratic institutions is most likely to "do the right thing." If courts are epistemically and motivationally superior to legislatures in fleshing out standards, then good constitutional design will give that task to them.

In any event, even if a constitution were all rules and no standards, courts would have to consult moral and other practical considerations in designing doctrines to implement those rules. For, as Mitch Berman and others have pointed out,[45] judicial enforcement of a constitution's rules will require creation of doctrines—rules—regarding burdens of proof and other similar matters. These doctrines could themselves be contained in constitutional rules, but often they are not.[46]

So courts are likely to need to resort to moral and prudential practical reasoning in fleshing out (rulifying) constitutional standards and in constructing doctrines for implementing both constitutional rules and constitutional standards. If courts are not superior to democratic legislatures in such first-order practical reasoning, then perhaps the judicially-created doctrines for fleshing out constitutional standards and for implementing constitutional rules and standards should not be finally authoritative within the legal system but should be subject to legislative overrides. Again, the principal reason would be one of relative competence, not Waldron's one of democratic right.

Finally, what if a constitution refers to pre-existing moral rights, notwithstanding the perils of incorporating morality to which I have alluded? As I said, if that is what a constitution does, then this would imply that such moral rights are to be enforced by the judiciary. After all, the legislature and executive are always supposed to make their actions consistent with moral requirements, whether or not those requirements are also found in the constitution. So explicitly referring to pre-existing moral requirements in a constitution signals not merely that such

requirements bind the government but also that they are to be enforced by the courts. Whether or not it is wise as a matter of constitutional design to make courts the moral censors of government action is a question about which reasonable minds can disagree. (A body with the responsibility of hearing individual moral complaints about proposed and enacted legislation and advising the legislature on the legislation's moral propriety might be a better design than judicial enforcement of the judicial view of that propriety.) Moreover, judicial moral oversight can vary from de novo consideration to highly deferential review. And once more, the issue for me is not one of democratic right but rather one of wise political design.

V. Constitutional Change, Organic or Otherwise

Constitutions usually provide for their own amendment. And when they are amended, we can describe that as an organic change in the constitution, a change authorized by the constitution itself.

Constitutions change in ways other than organic ones. One of the most obvious of these is through decisions by the highest legal authority—in the U.S., the U.S. Supreme Court—that misinterpret some constitutional provisions. Because law's function is to settle what we are obligated to do—or so I have claimed—when there is disagreement over the *law's* meaning, it is important that the law provide a means of settling *that* dispute. So any constitution whose provisions' intended meanings are at all disputable should designate some institution as having the authority to settle disputes over those meanings.[47]

When the highest legal authority misinterprets the intended meaning of a constitutional provision, we now have a conflict between the constitution itself and the authoritative interpretation of it. Which is "supreme law"? Although some disagree,[48] the better view is that the authoritative interpreter's interpretation settles what we are obligated to do. What is more

vexing, however, is what the authoritative interpreter should do when it comes to believe its interpretation of the constitution was mistaken. This is the issue in U.S. constitutional law of whether the Supreme Court should always, never, or sometimes follows its own constitutional precedents that it now regards as mistaken. My own opinion is that "sometimes" is the correct answer, and the Court should overrule its own constitutional precedents only if it (1) believes them to be erroneous and (2) believes that overruling them will not create a great deal more mischief than leaving the incorrect precedent intact. (Overruling a mistaken decision upholding the constitutionality of paper money would produce disastrous consequences;[49] overruling *Roe v. Wade* [50] would not, the plurality in *Casey* notwithstanding.[51])

It is also possible that the highest legal authority's mistakes regarding the constitution's intended meaning—or its deliberate refusal to seek the intended meaning and its substitution of a "meaning" it prefers for the intended meaning—will meet with public approval and will be accepted by the public as fundamental law, much in the way the public accepts the constitution qua the originally intended meaning. The public's acceptance as fundamental law of those deviations from the originally intended meaning will result in the constitution's having been changed nonorganically.

In other words, it is always possible for there to be some sort of bloodless constitutional revolution. Constitutions are fundamental law only if they are accepted by the people as fundamental law. And the people may wake up tomorrow and begin accepting as fundamental law some new instrument. The U.S. Constitution was not an organic continuation of the Articles of Confederation. (The constitutional convention that produced it was itself created under the authority of the Articles of Confederation, but the convention was not authorized to produce a new constitution, only to amend the Articles.) It was just run up a flagpole, and the people

saluted. If they had not saluted, the Constitution would have no more authority today than do the original Articles of Confederation or the Constitution of the Confederate States of America.

Therefore, if justices depart from the authorially intended meanings, and the people accept these new judicial "amendments" as fundamental law, then we will have had several constitutional revolutions.[52] Several new constitutions, superficially resembling but actually different from one another, will have come into being through successive judicial "amendments" and popular acceptance of those "amendments." But the real question is then whether the people are actually aware of what is going on. Is their acceptance itself dependent on their belief that the courts are not amending the constitution from the bench but are interpreting it?[53] And if so, then a constitutional crisis perhaps awaits.

VI. Conclusion

I have argued that thinking about what constitutions should and can do is best facilitated by attending to the following factors. The first is the settlement function of law and its requirement of determinate rules as opposed to standards. Another is the dangers of incorporating by reference real moral rights and the need to "domesticate' those rights within the legal system by subordinating them to the rules regarding constitutional structures and processes and to the determinations of their content by those who possess the final legal authority within the system. (Otherwise, morality would run roughshod over the rules constituting the government, and the controversiality of its content would undermine law's settlement function.) A third is the impossibility of legal principles—legal norms directly or indirectly created by lawmakers that are not canonical rules but are values with some degree of "weight." A fourth is that interpretation of rules is recovering the rules' authors' intended meaning. A fifth is that courts are probably better equipped than other governmental actors for interpreting rules. A

sixth is that constitutionalizing real moral rights through incorporation implies judicial review. And finally, the moral reasoning required for courts to flesh out constitutional standards, to formulate doctrines for judicial enforcement of constitutional rules, and to resolve the meaning of any real moral rights that have been constitutionalized does not offend any putative right to make such decisions legislatively. However, if the legislature is better epistemically and motivationally to do such moral reasoning than are the courts, that is a reason not to incorporate real moral rights into the constitution (incorporation implying judicial review), a reason to minimize the use of standards, and a reason to make judicial doctrines fleshing out standards and implementing constitutional rules (as opposed to interpreting them) subject to legislative override. When strong judicial review extends beyond ascertaining authorially-intended meanings, its epistemological and motivational justification is at best controversial.

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[1] See U.S. Const., art. VI: "This Constitution ... shall be the supreme Law of the Land ...."

[2] See, e.g., Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules & the Dilemmas of Law* (Durham, NC: Duke University Press, 2001), 11-25; and Larry Alexander "'With Me, It's All or Nuthin'': Formalism in Law and Morality," *University of Chicago Law Review* 66 (1999): 530 [hereinafter "Formalism"].

[3] Spike Lee is an American movie director, one of whose movies was entitled "Do The Right Thing." I am playing off this title, although the movie itself was not about law.

[4] See "Formalism," *supra* note 2, at 530.

[5] After all, we have moral theories about the appropriate responses to moral wrongdoing. *See* id.

[6] Determinacy, required for settlement, entails that rules, no matter how ideally crafted, will inevitably diverge from what morality requires in a range of cases (the over and under-inclusiveness problem). In such cases, those subject to the rules will be faced with a choice between complying with the requirements of the rules and complying with the requirements of morality as they perceive those requirements. Settlement requires that they believe complying with the rules trumps complying with morality as they perceive it; and, as previously stated, morality itself suggests that there be settlement. Yet, if moral reasons are those reasons for acting that are always overriding, then it looks as if following rules when they appear to conflict with morality is to act against reason. If that is true, then rules cannot settle what we are morally obligated to do, which in turn means that settlement, however morally desirable, is not rationally achievable. This problem—we morally must seek but cannot morally achieve settlement—is nothing other than the perennial problem of law's normativity, or whether there can ever be an obligation to obey the law because it's the law.

I view the problem of law's normativity as part and parcel of law's settlement function. But in this paper I assume the settlement function is possible and put aside the paradox that it engenders. That paradox is given exhaustive (but inconclusive) treatment in *The Rule of Rules*, *supra* note 2, at 53-95.

[7] This view is relatively orthodox, but there are dissenters. For example, Michael Seidman believes a constitution's function is to *unsettle* matters. See Louis Michael Seidman, *Silence and Freedom* (Stanford: Stanford University Press, 2007).

[8] Even if a constitution has not been ratified according to its terms, if it is accepted by the people as the highest law (minus its ratification provisions), then it *is* the highest law.

[9] The question of how much should constitutions be entrenched against change—and for that matter, the question of how much subconstitutional laws should be entrenched against change—is a really important, complex, and controversial matter. I call it the problem of legal transitions, and it finds constitutional expressions in doctrines relating to takings of property, impairments of contracts, and deprivations of vested interests. It finds meta-constitutional expression in discussions over how easily amendable constitutions should be. For a general discussion, see "Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?" *The Journal of Contemporary Legal Issues* 13 (2003) (symposium). See also Alexander and Sherwin, *supra* note 2, at 151-56.

[10] I am referring throughout, in speaking of "real moral rights" or of "the moral realm," to a conception of morality that views it as independent of norms created by individuals or societies, as a matter of discovery rather than invention, as a set of norms that human norms seek to mirror and by which they can be criticized. I believe that such a conception of morality, sometimes referred to as "critical morality," is metaethically modest and neutral among several metaethical positions.

[11] See U.S. Const., amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself).

[12] See U.S. Const., amend. I ("Congress shall make no law . . . abridging the freedom of speech"); Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Belknap Press of Harvard University Press, 1960).

[13] See U.S. Const., amend. V ("[N]or shall private property be taken for public use, without just compensation").

[14] See U.S. Const., art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").

[15] See U.S. Const., amend. I ("Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

[16] See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 7-12.

[17] See generally Larry Alexander and Frederick Schauer, "Law's Limited Domain Confronts Morality's Universal Empire," *William and Mary Law Review* 48 (2007): 1579.

[18] Id. at 1595.

[19] Id. at 1595-96.

[20] See Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, New York: Oxford University Press, 1999).

[21] For an analysis of the competence of courts to decide moral matters, see Jeremy Waldron, "Judges as Moral Reasoners," *I-Con* 7 (2009): 2; Wojciech Sadurski, "Rights and Moral Reasoning: An Unstated Assumption—A Comment on Jeremy Waldron's 'Judges as Moral Reasoners,'" *I-Con* 7 (2009): 25.

[22] See Peter Westen, "The Empty Idea of Equality," *Harvard Law Review* 95 (1982): 537.

[23] See Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge and New York: Cambridge University Press, 2005).

[24] Id. at Ch. 8.

[25] Now I have said referring to actual moral principles is a risky business. One reason, already mentioned, is that moral principles, unless cabined, can overrun all positive law, including those decisions meant to settle their controversial content. However, another reason is that there is no

relation between the number of moral principles our vocabularies reveal and the number of moral principles there actually are. We have all sorts of moral principles as a matter of vocabulary. Thus, we can refer to freedom of speech, cruel and unusual punishment, equal protection, and so on. But suppose utilitarianism is the correct moral theory. There are no such "joints" in utilitarianism. Seeking to enact only a limb, we may have enacted an entire beast.

In short, if there are objective referents for our moralized enactments, there is no reason to assume that morality has the joints our terms reflect, or, if it does, that morality deems it morally permissible that it be carved at such joints.

[26] Again, real moral principles are themselves not human creations. See note 10 *supra*. I take no position here on whether real moral principles actually have weight, or whether instead they are complex algorithms whose complexity is taken for weight. (I lean heavily towards the latter position.)

[27] In a recent paper, Tara Smith argues that when lawmakers refer to "concepts" in their enactments, the meaning those concepts possess is not the list of things the lawmakers had in mind, nor is it the criteria the lawmakers were employing in constructing that list. Rather, the meaning of such concepts is the things in the world the concepts themselves pick out. So when the lawmakers use terms like "cruel," "speech," or "equal protection" in the laws they enact, correct interpretation requires looking not at what the lawmakers meant by those terms but at what sorts of things in the world are really cruel, speech, or equal protection. See Tara Smith, "Why Originalism Won't Die: Common Mistakes in Competing Theories of Judicial Interpretation," *Duke Journal of Constitutional Law and Public Policy* 2 (2007): 159, 189-92. I don't want to get into the deep waters of what concepts are and what the relationship is between words and concepts, between criteria and concepts, or among natural, artefactual, and fictional

kinds as they relate to concepts. (Is there an "objective" concept of, say, a unicorn or a table that possibly differs from users' criteria?) I want to restrict my comments here to the kinds of concepts that Smith uses as her examples. For one might be tempted to believe that *these* are what legal principles are: that is, legal principles are the normative concepts referred to in legal enactments.

Now I have conceded that real moral principles can be referred to in legal enactments and thereby be incorporated into the law, though I have also alluded to the risks of doing so. I shall return to this possibility momentarily.

What I want to consider first is whether there are moral concepts that can exist apart from being part of morality as it actually is. For example, suppose, as I have argued elsewhere—see *supra* note 23—there really is no defensible principle of freedom of expression. Is there nonetheless an objective "concept" of freedom of expression to which a user of those terms could be referring? Or suppose the normative idea of equality is "empty." See, e.g., Westen, *supra* note 22. Is there nonetheless an objective "concept" of "equal protection"?

Of course, even if there are no objective moral concepts other than those picked out by correct moral theory, we can refer to incorrect moral *theories*. I may not believe utilitarianism is correct as a moral theory, but I can refer to it and apply it. What is important, however, is that I can do these things based on the criteria that I and others use to define utilitarianism. Apart from the criteria that define it, utilitarianism *as a false moral theory* has no other ontological status. There is no independently existing "concept" of utilitarianism sitting in some ontological warehouse waiting for someone to come along and refer to it.

So my view is that the one possibility that is open is that when lawmakers use a moralized term like freedom of speech or equal protection, they are either enacting a determinate

rule that is fixed by the specific criteria they have in mind, or they are referring to and incorporating actual moral principles. Legal principles, in other words, could just be actual moral principles referred to by laws.

[28] See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 81-130; Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), 176-275.

[29] Synchronic fit is fit with currently existing posited legal materials, such as the constitution, statutes, and administrative rules. Diachronic fit is fit with past legal decisions. Dworkin's legal principles must fit legal materials along both dimensions.

[30] Larry Alexander and Ken Kress, "Against Legal Principles," in Andrei Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press; New York: Oxford University Press, 1995), 279-328.

[31] See Robert Alexy, *A Theory of Constitutional Rights* (Oxford and New York: Oxford University Press, 2002).

[32] Id. at 50–54.

[33] Id.

[34] Id. at 49.

[35] Id. at 47–48, 80–81 n. 143, 86, 92.

[36] Id. at 66.

[37] Id. at 61.

[38] Id. at 81.

[39] *See*, *e.g.,* id. at 83.

[40] See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York and Oxford: Oxford University Press, 1982); Mitchell N. Berman, "Constitutional Theory and the Rule of

Recognition: Toward a Fourth Theory of Law," in Matthew D. Adler and Kenneth Einar Himma, eds., *The Rule of Recognition and the U.S. Constitution* (New York and Oxford: Oxford University Press, 2009), 269-94.

[41] Mitch Berman has recently argued that "the Constitution" is really our practice of constitutional argument. See Berman, *supra* note 40. But this "argumentative practice" conception of the Constitution seems to me to entail a category mistake. The fact that we argue about the Constitution's meaning does not mean that the Constitution is itself the practice of constitutional argument. To assert the latter would be to confuse the external perspective on what constitutional lawyers are doing—"they're *arguing* about constitutional meaning"—with the internal perspective of the participants themselves—"we're arguing *about* constitutional meaning." If Berman's view were correct, then when scientists argue about string theory or elementary particles, we would be justified in saying that string theory and elementary particles *are* argumentative practices. That would, however, be obviously absurd.

Berman has also recently argued that constitutional meaning is a matter of achieving reflective equilibrium among our various "constitutional intuitions," intuitions that are independent of our views about authorially-intended meaning. See Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: The Case of John McCain and the Natural Born Citizenship Clause* (forthcoming). I, however, deny that we have such independent constitutional intuitions of the type required by reflective equilibrium methodology. For the full argument against this position, see Larry Alexander, "Simple-Minded Originalism," (forthcoming).

[42] I should mention as well the famous "Kripkenstein" puzzle regarding how a quite limited momentary mental state—the mental state to which authorially-intended meaning refers—can

cover a limitless number of applications not present to the author's mind at the moment of communication. See Alexander and Sherwin, *supra* note 2, at 112-114. However that puzzle is to be resolved, it nonetheless seems to be true that we can justifiably assert that an author did or did not intend his promulgated norm to cover cases not present to his mind at the moment of the norm's utterance.

[43] See *Cooper v. Aaron*, 358 U.S. 1 (1958).

[44] See Waldron, *supra* note 20.

[45] See Mitchell N. Berman, "Constitutional Decision Rules," *Virginia Law Review* 90 (2004): 1; Kermit Roosevelt, "Constitutional Calcification: How the Law Becomes What the Court Does," *Virginia Law Review* 91 (2005): 1649.

[46] An issue of great importance, not to my knowledge discussed anywhere in the literature, is how to constrain courts from crafting implementing doctrines that undermine constitutional rules with which they disagree. For if courts must resort to moral reasoning in crafting implementing doctrines, and if courts believe the constitutional rules they are implementing offend morality, then they will be prone to craft doctrines that make application of such rules extremely difficult. For example, they may impose a very high burden of proof on litigants claiming that those constitutional rules have been violated. The lesson here is that constitutional authors would do well to protect their constitutional rules by also authoring implementing doctrines, thereby giving unfriendly courts less room to maneuver.

[47] See Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110 (1997): 1359. On most interpretations, the United States Constitution does not do this.

[48] See Michael Stokes Paulsen, "The Intrinsically Corrupting Influence of Precedent," *Constitutional Commentary* 22 (2005): 289; Gary Lawson, "Mostly Unconstitutional: The Case Against Precedent Revisited," *Ave Maria Law Review* 5 (2007): 1.

[49] See *Legal Tender Cases*, 79 U.S. 457 (1870).

[50] *Roe v. Wade*, 410 U.S. 113 (1973).

[51] See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843-901 (1992). One should compare the *Casey* plurality's treatment of *Roe* as precedent with the same justices' treatment of the precedent of *Bowers v. Hardwick,* 478 U.S. 186 (1986) in *Lawrence v. Texas*, 539 U.S. 538 (2003).

[52] See Frederick Schauer, "Amending the Presuppositions of a Constitution," in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995), 145-61.

[53] See Larry Alexander and Frederick Schauer, "Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence on Law and Acceptance," in Matthew D. Adler and Kenneth Einar Himma, eds., *The Rule of Recognition and the U.S. Constitution* (New York and Oxford: Oxford University Press, 2009), 175-92.