

seeking the authorially intended meaning, is the only option in a constitutional 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.

Moreover, I am not denying that discerning the originally intended meaning of a constitutional rule will often be difficult. It will often 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, or did not intend the rule to apply, or possibly had no intention 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. 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, whether constitutional or subconstitutional.⁴⁴

5. 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? Can judicial review be justified, and if so, on what assumptions?

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. 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.

First, to the extent that 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