

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.) The Constitution 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 intended meanings of the constitutional authors, and the people accept these new judicial "amendments" as fundamental law, then we will have had several constitutional revolutions.

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 then is 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? If so, then a constitutional crisis perhaps awaits.

7. 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. The second is the danger 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 controversial nature of morality's content would undermine law's settlement function.) The third factor 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." The fourth is that interpretation of rules is recovering the meaning intended by the rules' authors. The fifth is that courts are probably better equipped than other governmental actors for interpreting rules. The sixth is that constitutionalizing real moral rights through incorporation implies judicial review. 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 equipped 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 (since incorporation implies judicial review); it is also a reason to minimize the use of standards and 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.