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WHAT ARE CONSTITUTIONS, AND WHAT SHOULD (AND CAN) THEY DO?

By Larry Alexander.

1. Introduction.

A constitution is, as Article VI of the United States Constitution declares, 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 questions regarding how and by whom constitutions should be interpreted? These are the issues that I shall address.

I proceed as follows: In Section II, I take up law's principal function of settling controversies over what we are morally obligated to do. In Section III, I relate law's settlement function to the role of constitutional law. In particular, I discuss how constitutional law is distinguished from ordinary law. I also discuss the role of constitutions in establishing basic governmental structures and enforcing certain moral rights. In Section IV, I address the topic of constitutional interpretation, and in Section V the topic of judicial review. Finally, in Section VI, 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.

2. Law and the Settlement of Moral Controversy.

What is the principal function of law —all law? I would argue, and have argued, 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.