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 that constitutionalize 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 — 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 question of how much constitutions should be entrenched against change —and for that matter, the question of how much sub constitutional laws should be entrenched against change—is an important, complex, and controversial matter. I call it the problem of legal transitions, and it finds constitutional expression 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 the symposium “Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change

In speaking of “real moral rights” or of “the moral realm,” I am referring throughout 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 meta ethically modest and neutral among several meta ethical positions.

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. 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. 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. Something similar might be said of the rights against takings of property withoutjust compensation and againstimpairingthe obligationsof contracts: the constitutional provisions protecting these rights might be said to be rules that make determinate (and constitutionalize) portions of a more general moral right against upsets of legitimate expectations engendered by law.