Some democrats believe that the legislature's view should be authoritative. 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 those rights are 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. 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.) Nonetheless, 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. 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, or of freedom of expression, 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. 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 would be the case if they had 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