

THE INTERSECTION OF NATURAL RIGHTS AND POSITIVE CONSTITUTIONAL LAW

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IN his article, *Constitutional Positivism*,¹ Fred Schauer makes a number of intriguing observations about the possible relevance of natural law to constitutional adjudication. He identifies the natural law position as holding that

law itself, just like the content of many laws, is derived from fundamental conceptions of morality. As a result, legal systems (and perhaps even particular laws) unfaithful to those moral conceptions are exemplars of erroneous derivations from first moral principles and are therefore not genuinely legal at all.²

Against this view stands legal positivism which holds that

laws and legal systems satisfying certain sociological criteria count as laws and legal systems, regardless of their moral content. Hence the central positivist claim [is] . . . that the existence of law is conceptually distinct from its moral worth.³

As a conceptual description of law, Professor Schauer endorses constitutional positivism,⁴ although he in no manner denies that moral reasoning might be relevant to adjudication in some legal system or even every existing legal system.

In this brief essay, I wish to describe what I see to be the unavoidable connection between natural law—or, more accurately, natural rights—and the positive law that is the subject of constitutional adjudi-

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1. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993).

2. *Id.* at 799.

3. *Id.* at 800-01.

4. Elsewhere he identifies his position as "presumptive positivism." See Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 674-79 (1991).

cation. This connection would exist whether or not there is a conceptual distinction between natural and positive law of the sort that Schauer maintains. Because of this connection, judges in a world in which legal positivism is "true" should act, on occasion, as though the natural rights approach is correct. And if this is true then, I maintain, the natural rights position, in some important sense, is correct. Finally, I will take issue with Professor Schauer's intimation that the appropriate domain of moral reasoning is limited largely to constitutional adjudication and to the Supreme Court of the United States.⁵

I. THE MORAL IMPLICATION OF A PERCEIVED DUTY TO OBEY THE LAW

My thesis is really quite simple. While it may be true—as Professor Schauer argues—that we can distinguish conceptually between what the law "is" and what it "ought to be," between "law," on the one hand, and "justice," on the other,⁶ this distinction establishes less

5. Because Professor Schauer offers so much of his analysis as suggestive and concludes that "[t]here are no answers here," my thesis may not actually be inconsistent with his claims. But I think it is inconsistent with at least some of the impressions his presentation evokes.

6. Dworkin's criticism of this central claim of positivism is considered by Schauer. He responds that:

If Dworkin is right . . . the only hope for those who would be morally disturbed by the results that Justice Thomas would reach is to try to get better judges, for the task of trying to get Justice Thomas to lower his moral sights by focusing only on some putatively narrower range of materials is, as a descriptive matter, a complete nonstarter.

Schauer, *supra* note 1, at 824. In his later writings, however, Dworkin has made clear that he limits the range of interpretation to that which is "internal" to the particular legal system in question. That is, Hercules does not attempt to enforce only just laws, but to find interpretations of the law that would make it the best law it can be in light of all other decisions, statutes and other authoritative legal pronouncements. In sum, Hercules' task is to rationalize the authoritative legal directives from within his legal universe. Having accomplished this Hercules has stated what the law "is." Nonetheless, this law—even so interpreted—may still be unjust.

So while I may agree with Schauer that "the constitutional positivist can study and identify constitutional law as such without approving of it morally, and without feeling any part of the enterprise," *id.* at 806, I agree with Dworkin that to *do* constitutional law even a positivist must learn how to think *as though* he believed in the constitutional enterprise.

Schauer himself attributes something like this internal point of view to constitutional scholars and particularly natural law scholars when he asserts that "the typical American constitutionalist thinks that the American constitutional tradition is generally worthy," *id.* at 805, and that "there is a tendency from a natural constitutional law perspective to think that a good deal of the American constitutional tradition has been morally tested and found worthy." *Id.* To the contrary, natural law—and especially natural rights—thinking has always been primarily a radical philosophy and for that reason opposed. See, e.g., 2 JEREMY BENTHAM, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM 489, 491-94 (John Bowring ed., 1962) (1838). The basic conservatism of the American judiciary has led it to reject, not embrace, natural law as positing a "brooding omnipresence in the sky." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.,

than meets the eye. To understand why, we must consider an interpretation of the natural law-positivist debate that nowadays is dismissed as mundane: "that the natural law position is *merely* a claim about language and about the criteria for proper use of the word 'law'. . . ."⁷ Though this semantic interpretation of the natural law-positivist debate may be well known and boring, it has a significant moral implication that is widely overlooked. This implication derives from the widespread belief that there is at least a *prima facie* moral duty to obey the law.

While modern legal positivists may deny—as they must if they wish to preserve the value-neutral use of the term "law"—that there is such a duty of obedience, this denial is simply beside the point. For, so long as speaker and listeners both *believe* that law carries with it at least a *prima facie* duty of obedience—that law *qua* law binds in conscience—then how we use or define the term law is not an arbitrary or value-free matter. The conclusion that a particular course of action is required by law will carry with it the perception that this action is, in a real sense, morally obligatory—at least *prima facie*.

Schauer himself professes neutrality about the issue. He asserts that "nothing about legal positivism entails any attitude whatsoever about obedience to law."⁸ This claim holds, however, only if law is a strictly value-neutral concept. Only then would the mere fact that something is a valid law carry with it no duty of obedience. When, however, the popular perception that law does carry with it a duty of obedience is taken into account, then asking what counts as law, and thus as *binding* law (as opposed to positivist law *simpliciter*), is no longer a value-neutral inquiry.

Consider this example: A duly enacted statute requires that people own, possess, and are proficient with handguns.⁹ If the fact that this statute was duly enacted says nothing about whether a citizen is bound in conscience to obey it, as Schauer maintains, then the positivists are correct in asserting both the conceptual *and operational* separation of law and justice. If, on the other hand, the fact that this statute was duly enacted *means* in the relevant community of discourse that people "ought" to obey it, then, at least *prima facie*, a person would be

dissenting).

7. Schauer, *supra* note 1, at 799 (emphasis added).

8. *Id.* at 806 n.18.

9. *Cf. Alaska Votes to Bar Towns from Regulating Guns*, N.Y. TIMES, June 6, 1982, § 1, at 27 (describing Kennesaw, Georgia's ordinance requiring a head of household to own and maintain a firearm).

thought to be acting wrongly not to do so and, significantly, it may then be considered justified to coerce this person to so act.

Thus, in a particular community of discourse, the positive meaning of a statute is not limited to what actions it directs (e.g., "own, possess, and be proficient with a handgun"), but implicitly includes the further proposition that "one has a moral obligation (at least *prima facie*) to own, possess, and be proficient with a handgun and can be sanctioned justly for disobedience." Consequently, as an operational matter, we—meaning both participants in and those observing the legal system in question—must ask whether this further proposition is true.

If some person—say a sheriff—files a complaint and seeks legal sanctions¹⁰ against a person who has failed to possess a handgun, is this complaint valid? More specifically, is it valid merely because the alleged conduct violates a legally enacted statute? Or must considerations of justice or rights be brought to bear so as to decide whether it is in fact justified to coerce a person to perform these actions? Positivists cannot use the term "law" both ways.¹¹

If this example appears farfetched, there may be a tendency to dismiss it as something of a throw-back to the old debates about whether Nazi-inspired German law was really law. Today, these debates may seem limited to extreme or radically pathological legal situations, and consequently they are sometimes said to teach us little about law in basically just legal systems. But in formulating this hypothetical statute I really had a far from farfetched example in mind: drug prohibition.

Is it morally justified to send someone to the penitentiary or to seize all her assets (and possibly to kill her for resisting any such ef-

10. I use the term sanction, because I wish not to limit the category of forcibly extracted legal relief to punishment. Monetary damages and injunctive relief raise the same type of moral questions.

11. Although natural law theorists can and do. When Aquinas questions whether an unjust law is really a law, he is perfectly willing to identify the subject of this inquiry as a "law" for purposes of determining whether it is a *law*. See Thomas Aquinas, *On Natural Law*, in READINGS IN PHILOSOPHY OF LAW 3, 7 (John Arthur & William H. Shaw eds., 1984) ("Human law has the nature of law in so far as it partakes of right reason But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence."). For a natural law theorist, the difference between a "law" and a *law* is that the latter binds in conscience while the former does not. See *id.* at 11 ("Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience"). Other legal cultures have it easier. They have one word that is limited to enacted rules (e.g., *Gesetz*, *loi*, *ley*, *zakon*, *torveny*) and another that also includes principles of justice (e.g., *Recht*, *droit*, *derecho*, *prava*, *jog*). See George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 980-82 (1981).

forts) for possessing or selling marijuana or cocaine solely because these drug “laws” have been properly enacted? (Was it just to do the same to people who brewed beer or distilled whiskey during the first prohibition?) Apparently, many people believe that laws should be obeyed. Else why would the many persons who think that criminalizing drugs—marijuana in particular—is such a bad idea stand by so quietly as today’s heretics¹²—drug users—are herded into the brutality of modern prisons? They acquiesce because “the law” is doing it.

Suppose the home of a person who grows large quantities of marijuana for sale is invaded by armed robbers who attempt to seize the grower’s cash. Would the illegal grower be justified in forcibly resisting the invasion? Of course. Now suppose that this same home is invaded by armed D.E.A. agents who attempt to seize the cash, the marijuana, and the grower herself. Would she be justified in forcibly resisting the invasion? Most believe and would answer “of course not.” Should D.E.A. agents be killed by a grower defending herself, she would be prosecuted for murder and no one would object.¹³ Why not? For many, the answer is that the agents were operating “under color of law.”

If all this is correct, then despite the fact that we can distinguish conceptually between the law and morals—between the requirements of the Controlled Substances Act and its justice—it is not true that the term “law” is used in a morally neutral way. In fact, the term “law” is used precisely to decide that the marijuana grower is not a victim of injustice whose rights have been violated but is instead a murderer who has violated the rights of another. If so, then deciding what to call a law is also not a morally neutral activity. If the label law is to engender so serious a consequence, then at some point in the labeling process, justice or rights must be taken into account before a decision that some enactment is a genuine *law* is made. Before we conclude that an enactment is a law that persons may be killed to enforce, we require nothing less than a reliable institutional defense of that law as just.¹⁴ And this

12. See GEORGE H. SMITH, *ATHEISM, AYN RAND, AND OTHER HERESIES* 233 (1991) (comparing the punishment of drug users with Augustine’s doctrine of “righteous persecution” that was used by the Spanish Inquisition to punish Christian heretics).

13. While this commentary was being edited, this hypothetical was brought to life by the Texas gun fight between agents of the Bureau of Alcohol, Tobacco and Firearms and the Branch Davidian religious sect (or “cult” if we wish to express our disapproval). Very few (outside of Texas) have asked whether the law the A.T.F. agents were attempting to enforce was just or even whether it had actually been violated.

14. So while it may be true as a conceptual matter that “one whose job partly involves law application *could* do that part of the job without having to engage in any moral reasoning whatsoever,” Schauer, *supra* note 1, at 802, and that “positivist judges, were they so inclined, could in

is where natural rights meet constitutional adjudication.

II. ENFORCING THE IMPLIED WARRANTY OF LEGITIMACY

For nearly everyone, the fact that a particular item of food—say a sausage—is offered for sale *means* that it is wholesome.¹⁵ Merely offering the sausage for sale is an assertion made by the seller that it is free from disease, unless the seller makes some expression to the contrary. The Uniform Commercial Code reflects this conventional understanding by implying in every contract of sale a warranty of merchantability.¹⁶

The implication of the analysis of Part I was that by offering an enactment as a “law,” a legal system is impliedly warranting the merchantability of the enactment. “Merchantability” in this context means that the law is sufficiently consistent with justice so as to create a *prima facie* duty of obedience in the citizenry. This duty of obedience means both that citizens are bound in conscience to obey the law and that they may be coerced to some extent to secure their obedience or punished for their disobedience.

Of course this implicit assertion could be denied. A legislature could attach a rider to its enactment saying that “this statute does not create any duty of obedience in the citizenry. Nor does its enactment actually justify the use of force to secure compliance with its dictates.” That legislation carries no such expressed disclaimer and that such a disclaimer would be considered absurd,¹⁷ underscores the power of the

some systems get away with an amoral conception of their task,” *id.*, we may well ask what exactly these jurists have accomplished when they apply positive law in this amoral way. We know that, by their own admission, they have done nothing to suggest that the laws they are applying are just.

15. By wholesome, I mean only that a sausage is fresh and untainted by disease. I am not suggesting that eating sausages is good for one’s health or that grocers implicitly warrant that this is true.

16. See U.C.C. § 2-314(1) (1990):

Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

Of course, the imposition of such a warranty on every seller who does not expressly disclaim it does more than impute to the seller an assertion that the goods in question are fit for the purpose for which they are expected to be used. It also imputes to the seller an assumption of legal responsibility should this fail to be the case.

17. Even so-called nonbinding “resolutions” are passed by Congress precisely because it is thought that their enactment does create a duty of obedience even if it does not justify enforcement of this duty. The whole point behind the passage of nonbinding resolutions is to provide a

implied warranty of legitimacy or justice created by every enactment.

In this regard, the controversy between positivists and natural law theorists can be conceived as a truth-in-labeling debate. Natural law theorists accuse positivists of "bait-and-switch." What we label a law is supposed to be strictly value-neutral, until the U.S. Marshals order you to "open up in the name of the law" and then beat down your door with a sledgehammer. Only then do we discover that purportedly value-neutral enactments have been replaced with official commands that one supposedly has a moral duty to obey.

But whence comes this legitimacy? Let us consider sausages. Consumers do not themselves inspect for wholesomeness each sausage they purchase. Nor, if they ever stopped to consider the matter, do they really believe that each and every sausage is inspected by the manufacturer or by health officials. Rather the tacit belief is that the *process* by which sausages are made is such as to produce sausages that are free of contamination. And this process includes both procedures for making sausages and periodic inspections of some sausages so produced to see if the procedures are being followed.

In the case of food, the tacit assertion by the seller is probably something like the following: "By offering these sausages for sale, I assert that I have purchased them from a reputable manufacturer who in turn has tacitly asserted to me that it uses procedures that are adequate to assure that virtually every sausage produced is suitable for human consumption." Similarly, a legal system is asserting the following about its enactments: "By offering this enactment for consumption and adherence by citizens, and by authorizing officials to use force to compel obedience to its requirements and to apprehend and punish those who fail to comply, we assert that the process by which this enactment was made is adequate to assure that virtually every enactment produced is just."

Of course, both of these assertions could be accepted on faith. Indeed they are. Most people neither know nor care to know how sausages or how laws are made. But it is perfectly appropriate to ask in each case whether the assertions are, in fact, true. Are the procedures followed by the sausage manufacturer such that wholesome sausages are the invariable result? Are the procedures followed by the legal system such that just laws are the invariable result? Or to relax the severity of the assertion a bit: Are the procedures followed by the legal sys-

moral reason for someone to act as the legislature would wish.

tem reliable enough to justify the presumption of legitimacy that attaches to what is labeled “law”? Of course, this question is inherently constitutional (with a small “c”).¹⁸

At this juncture in the discussion, two schools of American constitutional thought emerge. Judicial skeptics—sometimes called judicial conservatives—believe that the processes followed by the legislative and executive branches—including, importantly, the fact that members of both are popularly elected—are sufficient to engender confidence in whatever emerges from the process and that judicial review is unlikely to improve upon this process. In sum, as compared with the institutional alternatives, when it comes to making just laws, in legislatures they trust.

Legislative skeptics—sometimes misleadingly called judicial activists—believe in a principle that, in another context, has been phrased “trust, but verify.” That is, while some deference may be due to the process that produces enactments, we know enough about the tremendous weaknesses of these processes—including the weaknesses of popularly-elected representative government (as distinct from “democracy”)¹⁹—to require that when challenged the outcomes of these processes be reviewed to see if they are truly wholesome or just. While legislative skeptics may trust the legislative process enough to allocate to it the responsibility to initiate and draft the enactments that may eventually bind as laws, they do not think we are justified in labeling legislative enactments “laws”—with all that term connotes in this community of discourse—until a meaningful examination for wholesomeness is conducted by some other institution that is less affected by the

18. This question also accepts Schauer’s view that the telling issue separating theorists may be not whether there are such things as natural rights, but whether “empowering the judiciary to locate and enforce them will produce a morally worse state than declining to so empower the judiciary.” Schauer, *supra* note 1, at 819-20. This debate can be located within the liberal conception of the rule of law.

19. Schauer provides a graphic example of this weakness in his characterization of the public deliberation over the role of the judiciary raised by the published speeches of Clarence Thomas:

[P]ublic debate about natural law and its relationship to constitutional theory was likely to be as fruitful as a discussion of quantum physics on *Larry King Live*. Against the background noise of grinding axes, soundbites replaced analysis, inflammatory examples substituted for argument, and there was little concern about inconsistencies between the rhetoric deployed against Thomas and that deployed against Judge Bork only four years earlier.

Id. at 797. Legislative skeptics would expect as much. The only aspect of the legislative process that works less well are deliberations that are out of public view in which interest group influence can have free rein.

problems of interest²⁰ that we know to be pervasive in the legislative arena.

Legislative skeptics view courts as performing this function, not because they especially trust judges or because courts are perfect or unaffected by interest,²¹ but because, for many well-known institutional reasons, they are superior enough to legislatures to provide some independent assessment of legitimacy. And, for better or worse, in our hierarchical monopolistic legal system, courts are the only institution available to perform this crucial function.²²

Thus, legislative skepticism accords to courts the responsibility of assuring that *the quality has gone in before the name "law" goes on*. This job includes both the herculean task of interpreting the meaning of enactments so as to make them the best they can be, but also the task of seeing if the "best" is good enough. That is, the courts should assess whether even the best interpretation of an enactment is sufficient to justify a prima facie duty of obedience in the citizenry and to justify using coercion on those who fail to obey.

But what is the nature of this inquiry into legitimacy? Does it mean that every law must be morally right, in which case skepticism that judges (or anyone else) can make such a moral assessment leads to an attitude of strong deference to legislatures? It is at this juncture that natural rights theory parts company from (at least some) natural law theory.

Natural law can be viewed as encompassing all aspects of morality. That is, it entails an objective assessment of the propriety of *all* human action. It distinguishes vice from virtue. Whether I should waste my life gambling (or gamboling) or whether I should get an education and make something of myself is a question addressed by natural law. If all enforced law is to be evaluated from this perspective, as most critics of a natural law approach assume,²³ then two powerful objections immediately follow. First, courts are hopelessly incompetent,

20. Or that is affected by interests that are less likely to produce unjust outcomes.

21. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

22. See Randy E. Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, CRIM. JUST. ETHICS, Winter/Spring 1986, at 30 (describing the operation of a hypothetical polycentric legal order).

23. Even Aquinas did not go this far in a statement with a decidedly modern, if not liberal, ring:

Now human law is framed for the multitude of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to

even as compared with legislatures, to make such judgments. Second, allowing government to make such judgments would lead to a totalitarian or, at the very least, to an illiberal society. It is safe to assert that these two concerns motivate most criticisms of the idea that judges should be allowed to take the natural law into their own hands when reviewing legislation.

In contrast is the natural rights position. While this decidedly liberal approach grew out of the natural law tradition, it was and still remains distinct from it. Whereas the natural law approach can be characterized as the "morality of aspiration," the natural rights approach is more aptly characterized as the "morality of duty."²⁴ More precisely, natural rights theory deals not with the general morality of individual conduct, but with the legal protections each person requires to pursue happiness while living in society with others. Far from viewing individuals as atoms, the natural rights tradition views some persons as weaker than others and all individuals as invariably weaker than the group.

Natural rights define the moral space within which persons must be free to make their own choices and live their own lives. They are *rights* insofar as they entail enforceable claims on other persons (including those who call themselves "government officials"). And they are *natural* insofar as their necessity depends upon the (contingent) nature of persons and the social and physical world in which persons reside.²⁵

As is readily apparent, a natural rights approach is far less ambitious and moralistic than traditional natural law reasoning and consequently far less conducive to a totalitarian or illiberal regime. Indeed, natural rights are a necessary part of the antidote to such regimes. Yet a natural rights approach still would seem to be vulnerable to the charge that judges are incompetent to discern exactly what are the natural rights of all persons.

Although I cannot fully respond to this concern here, let me begin a response by outlining the method of analysis that I have only started

abstain; and chiefly those that are injurious to others, without the prohibition of which human society could not be maintained. Thus human law prohibits murder, theft and the like.

Aquinas, *supra* note 11, at 11 (emphasis added).

24. See LON L. FULLER, *THE MORALITY OF LAW* 5-6 (1964) (distinguishing the two moralities).

25. This dependence, however, does not mean that such rights are "presocial." To the contrary, rights are only needed when persons live in society with others.

to develop elsewhere.²⁶ This method is not, strictly speaking, a pure natural rights approach to law,²⁷ but rather is a natural rights approach to constitutional adjudication. This is fitting given that Professor Schauer's thesis concerns constitutional positivism.

In brief, natural rights define the moral jurisdiction of each person to use certain physical resources (including her body) in the world.²⁸ While these rights can be stated very abstractly, in practice they must be determined or "posited" conventionally and, in our legal culture, have been so determined by common law adjudicative processes.²⁹ Thus, the common law principles of property, contract, tort, restitution, and agency (this list is not exhaustive of potential categories) provide the basic legal definitions of these natural rights. This is the work that judges have been doing for centuries.

Some, but far from all, government enactments restrict the exercise of these "rightful" liberties.³⁰ That is, they tell someone that they cannot engage in behavior that is otherwise rightful according to the laws of contract, property, tort, etc. When they do, they may be viewed

26. See Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987); Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615 (1991); Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: CONSTITUTIONAL INTERPRETATION AND THE NINTH AMENDMENT (Randy E. Barnett ed., 1993).

27. See *infra* note 34.

28. I describe and begin to provide a functional defense of this conception of natural rights in Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL'Y 62 (1992).

29. In this respect, Schauer provides a false dichotomy between a natural rights approach and "legal positivism, according to which law is not *derived necessarily from* fundamental moral principles, but rather is simply 'posited' by human beings and human institutions." Schauer, *supra* note 1, at 799 (emphasis added). Under a natural rights approach, legal rules are not "derived from" natural rights, but are derived by means of normal techniques of legal reasoning. The conventional rules and principles that result from this reasoning are then subjected to critical scrutiny to see whether they are compatible with relatively abstract natural rights. In this way, judges (or legislators) who respect natural rights must still "posit" the rules and principles we call law.

Legal positivism originally gained its name not from the fact that it acknowledged that law was "posited"—a claim about human law that Aquinas, for example, would have readily acknowledged—but from John Austin's theory that the law owes its obligatory nature or legitimacy to the "position" of the lawgiver as sovereign.

30. Of course, many such liberty-restricting statutes enacted during the past century purport merely to codify or systemize these common law principles. How are these efforts to be distinguished from rights infringements? Addressing this important issue would take me too far afield. Suffice it to say that most legislative interferences with liberty make no such claim. Instead they claim to override, not refine, these principles.

as “infringing” these persons’ natural rights.³¹ The fact of this infringement is morally significant in two ways.

First, it requires justification. That is, legislative will alone is not enough to justify such infringement. Such exercises of will must be both “necessary and proper” to the execution of some legitimate governmental power. To assure that such legislation is indeed necessary and proper, the onus falls upon those seeking to exercise these powers, when properly challenged, to show that they are in fact justified. And a neutral magistrate must adjudicate the claims.

Second, when government sustains its burden of proving that a rights infringement is both necessary and proper, natural rights do not forever after evaporate. These rights are inalienable and remain always in the background so that future claims of powers, as well as continued use of powers approved in the past, must still be necessary and proper. In sum, even when properly overridden, these rights are “retained by the people.”³²

According to this account, then, the existence of natural rights both helps to set the baseline definition of rightful conduct and places the onus of proof on those who would restrict the exercise of otherwise rightful conduct. To identify the background rights requires no greater talents of identification than are currently performed by judges in their private law capacity. And it places the burden on advocates of legislation to generate proof that their acts are justified. Judges then merely listen and evaluate what they hear.

So while Schauer is correct to claim that because “there *are* natural rights does not lead inexorably to the conclusion that it is the task of particular officials to identify and enforce them,”³³ there are institutional and, indeed, moral reasons why this conclusion may be warranted. Laws that violate the natural rights of a person do not bind that person in conscience and do not justify the use of coercion against that person unless it is shown that such exercises of power are necessary and proper.³⁴ Thus the enterprise of labeling enactments laws does lead, if

31. We may say that such enactments have violated natural rights as they have been defined by positive law, in which case we would be accepting the basic conceptual distinction between natural rights and positive law that is urged by Schauer.

32. U.S. CONST. amend. IX.

33. Schauer, *supra* note 1, at 809.

34. The fact that inalienable natural rights can be infringed permissibly if the infringement is shown to be both necessary and proper distinguishes this approach to constitutional adjudication from a purely libertarian natural rights approach to law. With the latter, *no* infringement of natural rights would be permissible.

not inexorably then plausibly, to the claim that it is the moral duty of each member of *every* branch of the lawmaking process, including courts, to scrutinize enactments purporting to be laws to see if they have the "moral" or rights-respecting qualities that such laws must have. And the more that legislators abstain from such scrutiny, the greater becomes the responsibility of judges to do so.

If this is correct, then Schauer's suggested "irrelevance of much of the traditional natural law/positivism debate to contemporary questions of constitutional interpretation"³⁵ is either wrong or highly misleading.³⁶ Moral inspection to ensure that natural rights have not been violated is, in Schauer's words, "necessarily part of every act of law identification (and therefore of law application), [so that] one whose job partly involves law application could not do that part without engaging in moral reasoning."³⁷

III. HOW LIMITED IS THE DOMAIN OF NATURAL RIGHTS IN ADJUDICATION?

I am now in a position to address Professor Schauer's contention that whatever inquiries into the justice of a law are warranted become increasingly inapplicable "the further one moves away from the morally soaked subject of constitutional law, and the further one moves away from (even within constitutional law) the Supreme Court of the United States."³⁸

Schauer claims that if moral reasoning by judges applies only within the limited domain of constitutional law and then only within the even more limited domain of Supreme Court adjudication, the distinction between law and justice that positivism advocates is descriptively important. Let us grant this point. Nonetheless, I think that the

35. Schauer, *supra* note 1, at 803.

36. As he himself points out immediately after the passage quoted *supra* in the text accompanying note 33, "at this point the debate between natural law theory and legal positivism returns to the arena." Schauer, *supra* note 1, at 809. Exactly.

37. *Id.* at 802. By moral reasoning, *I* (though not Schauer) mean determining that natural rights have not been unnecessarily or improperly infringed.

38. *Id.* at 824. He continues:

[I]f we think of the limited domain notion of law as treating text, precedent, and perhaps other authoritative materials as relatively distinct from other sources, then it is possible to imagine that the indications of those sources could be taken as at least presumptively controlling by some class of constitutional decisionmakers. And it is possible that these indications of law *qua* law would be more likely clearer for a larger percentage of decisions the further one gets from the Supreme Court.

Id. at 824-25 (footnote omitted).

argument as presented understates the size of the domain in which law and natural rights or justice intersect.

First, the intersection of law and justice is not limited to constitutional adjudication in the Supreme Court. Every law that affects the liberty of a citizen may potentially violate that citizen's natural rights. Therefore, every assertion of legal jurisdiction over the life of a citizen may be critically assessed (by someone) to see whether this is a just or an unjust interference with that citizen's rightful liberty. According to the linkage between natural rights and constitutional adjudication I am sketching here, whenever Congress enacts a statute that affects the liberty of a citizen and the President signs it, this law may be just or unjust and an "independent tribunal[] of justice"³⁹ should examine the statute to see if it is consistent or inconsistent with the natural rights of the citizen.

If the courts assume this role, then the inquiry will begin at the district court level. Unless the very same law has been upheld by the Supreme Court (which is unlikely⁴⁰) a district court judge is as obliged to consider the justice or rights question as the appellate court that considers her opinion and the Supreme Court, which considers the appellate court's opinion. In sum, if Supreme Court justices should engage in this sort of analysis in constitutional adjudication with regard to a federal statute, then so should every other federal judge. While still limited, the domain in which law and natural rights intersect has expanded.

Nor is the relevance of natural rights limited to the public law domain of constitutional adjudication. As I have described it, *within* constitutional adjudication judges must determine if the natural rights of persons have been infringed by specific enactments. But this leaves us with the obvious and difficult question, what are a person's natural rights?

As I explained above, the distinction between rightful and wrongful conduct has traditionally been the subject of the private law of contract, property, tort, agency, restitution, etc. Reasoning within each of

39. 1 ANNALS OF CONG. 439 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison). This phrase was used by Madison during his speech to the first House of Representatives defending the efficacy of a bill of rights on the grounds that such tribunals "will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive." *Id.*

40. The likelihood changes when we consider state legislatures enacting statutes, e.g., death penalty statutes, because such statutes of other states have been upheld previously by the Supreme Court.

these fields attempts to provide legal conceptualizations of abstract natural rights. Consequently, the legal rules and principles that emerge from such private law adjudication can and should also be subject to moral scrutiny.

For example, is imposing obligations to act or refrain from acting on persons without their consent a violation of natural rights and consequently unjust? Contract law principles generally counsel refraining from such impositions, while tort law attempts to describe the circumstances when such impositions of obligation are not unjust.⁴¹ In this way, common law adjudication of private law questions provides the following legal baseline against which a statute's constitutionality is to be assessed: has the statute restricted the *rightful* liberty of a citizen? When setting this baseline too, judges must take justice into account.

So judges—primarily state court judges—must take justice or antecedent natural rights into account in the domain of private law. The results of this process provide a baseline in the constitutional domain against which to assess when statutes are or are not infringing natural rights. At that juncture, the justice and necessity of this infringement of natural rights must then be assessed by state or federal judges. The domain in which law and natural rights intersect has grown quite large indeed.

What then is excluded? Any enactment that does not seek to limit coercively the rightful liberty of a citizen, either because there is no sanction attached to disobedience (a rare occurrence) or because the statute concerns the dispensation of benefits (a common occurrence) or because the statute regulates the internal operation of government itself⁴² (an even more common occurrence).

So in the end, although I maintain that the domain of inescapable intersection between justice and law is a good deal larger than Schauer intimates, I want to insist on the limited domain thesis myself. For, the fact that judicial scrutiny of enactments for their conformity with rights or justice is limited to those enactments that seek to restrict the exercise of rightful liberty contributes to the practicality of authorizing such scrutiny. It is simply not the case that such scrutiny would be

41. It is precisely for this reason that some who would expand greatly the number of legal obligations wish to eliminate the traditional distinction between contract and tort.

42. Where such statutes affect the liberty of persons they do so in the government's capacity of either employer or property owner. While these categories are hardly self-evident, inviolate, or unproblematic, they do represent a principled distinction between government regulation restricting rightful liberty and all other government enactments.

made of all, or even of much, legislation. So we can safely authorize it where it is both needed and appropriate. Moreover, the use of precedent by the Supreme Court and lower courts further reduces the need for unfettered case-by-case analysis. Once stricken, a similar statute is presumptively unconstitutional as well and the issue need not be considered *de novo*.⁴³

IV. SUMMARY

The analysis presented here can be summarized in three sentences: So long as obedience to law is perceived in some sense as obligatory, the intersection between positive constitutional law and natural rights is both crucial and unavoidable. And without some independent judicial scrutiny to see that the requisite quality has gone into an enactment before the name "law" goes on, the implied warranty of merchantability that necessarily accompanies all enacted legislation is but an empty and irredeemable promise. Finally, though broader than Professor Schauer intimates, the domain of this judicial scrutiny is still limited to a subset of all governmental enactments or orders—the ones that infringe a persons's rightful exercise of liberty.

43. For reasons pertaining to the presumption of liberty, I am more sympathetic with precedent when finding statutes unconstitutional than when finding them constitutional.