Legal Theory, 6 (2000), 241–251. Printed in the United States of America

RIGHTS AND RULES:

An Overview

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Prior to recent decades, the United States Supreme Court often invoked the political question doctrine to avoid deciding controversial questions of individual rights.[1] By the 1970s and 1980s, standing limits traced to Article III's case-or-controversy language had replaced the political question doctrine as the favored justiciability device.[2] Although both political question and standing doctrines remain tools in the Court's arsenal of threshold decision making,[3] in the last decade the Court has turned with increasing frequency to the distinction between facial and as-applied challenges to perform the gatekeeping function. However, although there is a considerable body of scholarship concerning the conventional justiciability doctrines, scholars have only recently begun to address the range of questions implicated by the Court's approach to the relation between constitutional rights and challenged legal rules—and they have generally focused on narrow doctrinal questions about the proper treatment of discrete rights such as abortion, free exercise of religion, and freedom of speech. The

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Drafts of these papers were presented at the October 1999 Conference on Rights and Rules at Columbia Law School. That conference was made possible by the generosity of the Samuel Rubin Program for Liberty and Equality Through the Law.

1. For a flavor of the former view, see Baker v. Carr, 369 U.S. 186, 266–330 (1962) (Frankfurter, J., joined by Harlan, J., dissenting). For the modern view, *see id.* at 208–37 (opinion of the Court) (holding that an equal protection challenge to state legislative apportionment did not present a political question).

2. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to low and moderate income plaintiffs claiming that town's exclusionary zoning practices denied them housing); *id.* at 519 ("Standing has become a barrier to access to the federal courts, just as 'the political question' was in earlier decades.") (Douglas, J., dissenting).

3. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (holding that a challenge to the Senate's use of a committee to hear testimony for judicial impeachment presented a political question); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying standing to environmentalists suing the Secretary of the Interior to require consultation regarding the environmental impact of overseas projects).

papers in this issue of *Legal Theory* and the next view these issues in a broader jurisprudential context.

Two puzzles exemplify the importance of the relation between rights and rules. The first is the question when the courts will entertain a challenge to a statute or other legal rule on its face as opposed to as applied to some particular set of facts. Although the Court often states that the overbreadth doctrine—permitting a litigant to challenge a putatively unconstitutional law even though her own conduct is not constitutionally privileged—only applies to free speech cases,[4] other cases appear inconsistent with this narrow limitation.[5] Since the Court's 1992 partial reaffirmance of *Roe v. Wade*[6] in *Planned Parenthood v. Casey*,[7] the Justices have expressed pointed disagreement on this question,[8] most recently in the 1999 case of *City of Chicago v. Morales*,[9] which invalidated Chicago's gang loitering ordinance on its face.[10]

The second puzzle concerns the question when, if ever, a litigant has a constitutional right to an exemption from a generally valid rule of law. In *Employment Division v. Smith*[11] (the peyote case) the Court held, with respect to free exercise of religion, that the answer is never. Congress disagreed and passed the Religious Freedom Restoration Act ("RFRA"),[12] which the Court in turn invalidated in *City of Boerne v. Flores*.[13] Important doctrinal questions remain open, however. Did *Boerne* invalidate RFRA as applied to the federal government as well as the states? What is the constitutional status of the state RFRAs that have been enacted or that are now under consideration around the country?[14] Should *Smith* itself be reexamined, as several Justices have urged?[15] Does *Smith* reflect some deep structural prin-

4. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

5. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 271–76 (1994); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859 n.29 (1991).

6. 410 U.S. 113 (1973).

7. 505 U.S. 833 (1992).

8. *Compare* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., concurring in the denial of certiorari) (criticizing "dicta" in United States v. Salerno, 481 U.S. 739 (1987), on the grounds that it "'does not accurately characterize the standard for deciding facial challenges,' and 'neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.'") (quoting Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236, 238 (1994) *with Janklow*, 517 U.S. at 1180 (Scalia, J., dissenting from the denial of certiorari) (disagreeing with the "head-snapping proposition" that the *Salerno* standard never was the law).

9. 119 S. Ct. 1849 (1999).

10. *Compare id.* at 1858 & n.22 (plurality opinion) (stating that facial challenges are authorized where a law is alleged to be unconstitutionally vague and going on to question the applicability of *Salerno* to cases originating in state court) *with id.* at 1869–71 (Scalia, J., dissenting) (asserting *Salerno*'s applicability to the challenged ordinance).

11. 494 U.S. 872 (1990).

12. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1993)).

13. 521 U.S. 507 (1997).

14. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 n.6 (1999) (collecting statutes and bills).

15. *See* City of Boerne v. Flores, 521 U.S. 507, 544–45 (1997) (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

ciple about constitutional rights, or is its rationale confined to free exercise claims?

These puzzles may be related in ways that courts and commentators have not fully recognized. How can constitutional law require that litigants challenge laws only in their particular applications, while simultaneously rejecting the very idea of an unconstitutional application of a general law? Moving beyond questions of American constitutional doctrine, the proper relation of rights and rules raises questions at the heart of the jurisprudential conflict between positivism and its rivals.

Most of the papers collected here take as their point of departure a two-part thesis recently advanced in Matthew Adler's article, *Rights Against Rules*:[16] (1) As a descriptive matter, American constitutional law is pervasively "rule-dependent." Constitutional rights do not shield acts (such as burning a flag or ingesting peyote) but instead provide protection against some kinds of rules or reasons (such as a law banning "flag desecration" as opposed to arson or a law banning "ritual peyote use" as opposed to "peyote use"). (2) Rule-dependent rights of this sort are not themselves moral rights but are at best derivative of moral rights. The best moral account of the rule-dependent cast of American constitutional law treats a constitutional right as nothing more than a legal right to have a court invalidate or revise unconstitutional rules.[17]

None of the papers (except Adler's own) fully accepts the account just given. The disagreements take three principal forms. First, some of the papers challenge the descriptive accuracy of the claim that American constitutional law is pervasively rule-dependent. Second, some of the papers point to the complex ensemble of considerations relevant to determining the proper remedy for a constitutionally invalid rule of law. It is argued that courts cannot simply invalidate rules without taking account of practical and institutional factors. Third, to varying degrees, all of the papers grapple with a basic normative question: Given the capaciousness of the constitutional language and our practices concerning rights, what is the best understanding of the relation between constitutional rights and regulatory rules? Although the division is hardly exact, the four papers that appear in this issue focus on the first two questions, while those that will appear in the next focus on the third.

In *Religious Liberty and the Moral Structure of Constitutional Rights*, Christopher Eisgruber and Lawrence Sager accept a reformulated version of Adler's claim: The scope and content of rights, they contend, are nearly always sensitive to the reasons offered by government for their infringement. Eisgruber and Sager characterize constitutional rights as lying on a spectrum. Some rights, such as equality, are especially sensitive to governmental reasons for action. At the other end of the spectrum are rights that are justified principally in terms of preserving a large sphere of autonomy

16. *See* Matthew Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998).

17. *See id.* at 91–132.

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to individuals. In their view, free speech is an example. So too, they think, are intimate personal relations. Their claim is not that the content or scope of such rights in no way depends on the government's reasons for infringing them, but that the focus of any sensible search for the limits of rights at this end of the spectrum will be on what is valuable to the individual more than on the government's reasons for regulating.

Elsewhere, Eisgruber and Sager have defended a conception of free exercise of religion that, like the Supreme Court's, focuses on equality—although their notion of equality is broader than the Court's. As they put the point here, "the range of activities which might be important to people for religious reasons is so broad and so varied, and hence so capable of conflicting with other people's interests, that it is simply not plausible to suppose that religious conduct is presumptively immune from government regulation." Accordingly, they conclude that free exercise of religion belongs near the rule-dependent end of the spectrum.

By contrast with Adler, however, for Eisgruber and Sager, recognizing the rule-dependent cast of a constitutional right does not lead to the conclusion that it is a mere derivative of a moral right. In their view, the right to equal respect on the basis of religion is very much a moral right. This conclusion brings them back to a point with which they begin: In general, it is quite plausible, indeed intuitively appealing, they contend, to describe many rights against rules as moral rights to a certain kind of respectful treatment by the government.

Early in their essay, Eisgruber and Sager distinguish between mechanisms designed to implement constitutional rights—such as the First Amendment overbreadth doctrine—and the rights themselves. To the extent that Adler's descriptive account rests on claims about mere doctrinal implementations, they contend, it does not describe the deep structure of constitutional rights. In *The Heterogeneity of Rights,* Michael Dorf begins with a still bolder disagreement with Adler's descriptive account. Dorf denies that the rule-dependence of much of constitutional law reflects any deep truth about the nature of constitutional rights. For example, it would be perfectly consistent, he argues, to treat free exercise of religion as act-shielding while treating freedom of speech as rule-dependent, or perhaps even vice versa. Although a certain conception of the rule of law may lead judges to favor rule-dependence generally, the weight to be given to rule-of-law values, and the weight of countervailing considerations, will vary from context to context.

Dorf next turns his attention to the doctrinal issue of facial challenges. He argues that knowing whether a given right is understood as a right against rules or conduct-shielding is not a sufficient basis for knowing whether, and under what circumstances, a court should strike down a rule infringing that right. The key to these questions, Dorf contends, is severability. He writes: "When *P,* whose own conduct *C* could be proscribed by a variety of valid laws, challenges *L* as unconstitutional, the courts sometimes presume that *L* consists of two severable parts: L_U, the law in its unconstitu-

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tional applications; and L_V, the law in its valid applications." *P*'s facial challenge to *L*, therefore, should only succeed if there are constitutional, statutory, or pragmatic grounds why a court may not presume the severability of *L*'s valid and invalid applications. These grounds will be present to greater or lesser degrees depending upon the nature of the right and the nature of the rule infringing the right. Rights, Dorf argues throughout, are profoundly heterogeneous.

Emily Sherwin also places severability and related mechanisms such as the narrow interpretation of statutes and as-applied adjudication at the center of her treatment of rights and rules. The central and powerful insight of her *Rules and Judicial Review* is that these supposedly modest doctrines do not merely underenforce laws; they enforce different laws. As she writes, "the effect of a saving construction is similar to that of a decision to uphold a statute as applied or to sever provisions of the statute: it alters the original legislation."

The question whether to replace the unconstitutional law *L* enacted by the legislature with the constitutional law *L′* is nominally one of statutory interpretation, but it will rarely be answered by inquiring after the actual intent of the legislature. Courts must often decide for themselves between using some mechanism that in effect replaces *L* with *L′* or simply invalidating *L* in toto. Sherwin argues that before adopting the former tactic, courts should ask whether *L′* functions effectively as a rule—whether it furthers or frustrates the legislature's likely purpose in enacting *L*. In one of Sherwin's examples, *L* imposes residential rent control and prohibits conversion of rental property to other uses. If a court were to find the conversion prohibition invalid, she notes, it would make little sense to enforce the rent control provision on its own, because that course will likely decrease the supply of affordable rental housing, whereas *L* was designed to have the opposite effect.

Nevertheless, Sherwin recognizes that the determination whether replacing some *L* with some related *L′* will further or retard *L*'s purposes is a pragmatic question that courts will often be ill equipped to make. Thus, the sounder course will often be facial invalidation, returning the question of what rule to adopt to the legislature. To be sure, the regulatory void that ensues may entail delay and disruption, costs that must be counted against facial invalidation. In the end, Sherwin's paper stands as a warning against the simpleminded assumption that respect for legislative supremacy points to a one-size-fits-all approach to the choice between facial and as-applied litigation.

The final paper in this first set addresses the rulelike quality of rights themselves. In *The Generality of Rights*, Frederick Schauer begins by setting out the legal realist argument that rights are necessarily too abstract to decide concrete cases. For many of the realists, Schauer observes, the proper study of law focuses on particulars. He associates this view with a conception of rights as outcomes: *X* has a right, in the realist account, if *X*

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wins the case. Schauer offers a competing conception of rights as prescriptive: To say, as in constitutional discourse, that *X* has a right is to identify a reason why *X* should prevail in some conflict with the state.

In stating reasons that abstract beyond the particulars of any individual case, rights are general or rulelike—for Schauer associates rules with generality.[18] It is just this generality, Schauer argues, that enables rules to play an important affinity-creating and identity-shaping role in our constitutional politics. Persons who disagree about fundamentals are united in their shared right to privacy or free speech, regardless of what they do or say with those rights. "Without going anywhere near the implausible claim that rights are all of what we are," Schauer concludes, "one can still venture that rights are some of what we are, and for some people may be much of what they are."

In raising broad jurisprudential questions about the nature of rights, Schauer's essay serves as a bridge to the second set of papers. Although Schauer himself does not make the point, his essay may also have implications for the doctrinal puzzles that occupy Eisgruber and Sager, Dorf, and Sherwin. If Schauer is right, then it would seem, so is the *Smith* decision, because a right to exceptions from neutral rules for religiously motivated conduct is a poor candidate for a general right, focusing as it does on the particular circumstances of the claimant. Accepting Schauer's view would also tend to lead one to favor facial over as-applied adjudication for the same reason: A successful as-applied challenge leaves the challenged rule in place for most other individuals, while a successful facial challenge affirms the litigant's community with all rights-holders. Nonetheless, as all of the papers collected here caution, the proper approach to these questions cannot be derived from any single consideration.

The articles by Matthew Adler, Larry Alexander, Linda Meyer, and Heidi Hurd will appear in the next issue of *Legal Theory*. Adler's article, entitled *Personal Rights and Rule-Dependence: Can the Two Coexist?*, articulates and defends a more general version of the view regarding rights and rules that was set forth in his earlier work *Rights against Rules*. *Rights against Rules* focused upon a particular kind of legal rule—a conduct-regulating rule backed by sanctions—and upon constitutional challenges to the duties and sanctions that such a rule creates. It also, implicitly, relied upon a particular conception of a "personal constitutional right."

Adler now suggests that constitutional doctrine is generally rule-dependent: that a constitutional challenge under the Bill of Rights, whether it challenges a sanction, a duty, or some other type of unwanted treatment, typically (if not invariably) asserts the existence of a discriminatory, overbroad, poorly motivated, or otherwise invalid rule. And he argues that the rule-dependent cast of constitutional doctrine is inconsistent with the view

18. *See* Frederick Schauer, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 17–37 (1991).

that constitutional claimants possess "personal rights"—however a "personal right" is conceptualized.

More precisely, Adler's article attempts to show that the following two theses are inconsistent: (1) the Rule-Dependence Thesis, namely, that constitutional doctrine sometimes entitles a constitutional claimant to judicial relief only if a discrete legal rule, with a particular kind of scope, language, or history, is in force; and (2) the Personal Rights Thesis, namely, that a constitutional claimant legitimately secures judicial relief only if she can identify a governmental action that invades her "personal rights."[19] What is a "personal right"? A "personal right" is more robust than the mere legal power to secure relief from a reviewing court; for example, anyone sanctioned pursuant to a sufficiently overbroad law regulating speech has the legal power to secure a judicial invalidation of the rule and therewith his sanction, but it is not true that anyone sanctioned pursuant to an overbroad law suffers the infringement of his "personal rights."

Rights against Rules implicitly understood the concept of "personal rights" in moral terms and in terms of individualized remedies: Some unconstitutional governmental action violates *P*'s "personal rights" if and only if a judicial remedy for *P* alone is morally justified. Adler's current article considers a much wider range of plausible conceptions[20] of "personal rights": (1) Interest Theories of rights, which stipulate that a personal rights-holder must at a minimum be *harmed* by an unconstitutional government action, and which then typically add additional prerequisites for personal rights holding, e.g., suffering a morally distinctive type of harm; (2) Choice Theories of rights, which link personal rights to choice and liberty rather than to harm and welfare; (3) a Hohfeldian Theory of rights as claim-rights; and (4) a Dworkinian Theory of rights as "trumps." Adler devotes most of his efforts to showing that the Rule-Dependence Thesis and the Personal Rights Thesis are inconsistent, given an Interest Theory of rights or a Choice Theory of rights. He then argues, more compactly, that the inconsistency also holds true on a Hohfeldian or Dworkinian Theory. In short—insofar as constitutional doctrine is rule-dependent—the function of reviewing courts is not to vindicate the personal rights of claimants but rather to repeal or amend constitutionally invalid rules.

19. Adler explains that the inconsistency between the Rule-Dependence and the Personal Rights Theses does not depend upon the extent to which doctrine is rule-dependent. The claim, rather, is that *insofar* as doctrine is rule-dependent, the Personal Rights Thesis is untrue. Thus, the Rule-Dependence Thesis is framed as the claim that doctrine is "sometimes" rule-dependent even though "[n]ot just some but many—maybe most—unconstitutional scenarios [states of affairs in which judicial relief is authorized] are rule-dependent."

20. However, Adler continues to focus on personal rights understood as a species of moral right. He seeks to show that the Personal Rights Thesis and the Rule-Dependence Thesis are inconsistent where the relevant constitutional criteria are moral criteria—as is arguably true of the equal protection clause, the due process clause, the free speech clause, and other provisions of the Bill of Rights.

In *Rules, Rights, Options, and Time*, Larry Alexander is sympathetic with the view that constitutional doctrine is typically if not invariably rule-dependent, and that reviewing courts are engaged in the repeal or amendment of constitutionally invalid rules. But he identifies a serious puzzle that results from this view. Alexander illustrates the puzzle by focusing on the case of a flag burner who can challenge his sanction pursuant to certain rules (e.g., a rule prohibiting "the public burning of the American flag") but not others (e.g., a rule prohibiting "burning objects on city streets and sidewalks"). The puzzle emerges once the following two premises are added to the basic proposition that reviewing courts adjudicating a given constitutional case are concerned with the validity or invalidity of the rule applied to the claimant, rather than with the privileged or unprivileged status of the action performed by the claimant. The first additional premise is that a rule is constitutionally valid or invalid in virtue of its effects, not its social meaning. The second additional premise is what Alexander calls "optionality": Most states of affairs are neither constitutionally required nor constitutionally prescribed, but constitutionally permitted. Indeed, Alexander shows that a judicial focus on rules *entails* optionality. Consider cities A and B, where A prohibits flag burning while B prohibits public burning.

> If the unconstitutionality of A's rule means that Johnson [the flag burner in city A] escapes punishment, it must be because B's rule is not constitutionally required. For if B's rule were constitutionally required, then leaving aside questions of notice, the court in A could just order A's officials to punish everyone who burns an object in public, including Johnson. . . . If Johnson is entitled to escape punishment, it must be the case that B's law is . . . constitutionally optional.

Optionality means that legislators can legitimately switch back and forth between valid rules, at least if the legislators lack an unconstitutional purpose in doing so. But it then becomes possible to construct cases where one actor can successfully challenge his treatment pursuant to a given rule, but another actor cannot challenge his treatment pursuant to a different rule *even though*—in the latter case—the past or future pattern of effects produced by legislative "switching" will be the same or worse as in the first case. For example, imagine that city A has had its flag-burning law in effect for the past year and that the law is due to expire in the near future; that city B has had its public-burning law in effect for the past year, during which time the only public burnings have in fact been flag burnings; that a new administration has just been elected in city B; and that the new administration will shortly repeal the public-burning law. Then the person who presently performs an act of flag burning in A but not B will have a successful constitutional challenge, despite the fact that the past and future effects of the rules in the two cities are just the same. Alexander illustrates this point—that the effects produced by invalid rules may be no worse than the

https://doi.org/10.1017/S1352325200063011 Published online by Cambridge University Press

effects produced by constitutionally valid rules, plus legislative switching—with a series of provocative hypotheticals. Alexander does not conclude that the view presented in *Rights against Rules* was incorrect, but he does assert that the case for a rule-dependent view of constitutional adjudication is seriously incomplete until the puzzle he has here identified is resolved.

Linda Meyer directly challenges Adler's claim that the rule-dependent cast of constitutional doctrine and the existence of personal rights are inconsistent. In her article, *Are Constitutional Rights Personal?*, she contends that personal, moral rights *can* be violated by the application of certain kinds of invalid rules—as long as "personal rights" are properly understood in terms of respect and dignity, not in terms of protected choices or goods. Each individual has a personal, moral right to respect from others or, equivalently, a right that others not act in a way that causes her "dignitary harm." Which actions produce dignitary harm? That depends on the practices or norms that exist within the community to which the actor belongs. But it is true within any community, or at least within ours, that an action can produce dignitary harm to a victim, and thereby violate her personal rights, quite apart from causing a tangible setback for her or a particular kind of mental state. "[W]hen a norm is violated, if that norm is one directed at, or for the benefit of, another person, the violation is a dignitary harm, even if the victim experiences no mental anguish at all." For example, if "I flunk a student because he disagreed with me in class, [and it] turns out he would have flunked anyway, [n]onetheless I have wronged him"; similarly, if "a police officer calls a suspect 'scum' and 'dirtbag' and arrests him because he 'has an attitude,'" and "[i]t turns out that the suspect is guilty of several unsavory crimes, [t]he suspect has nonetheless been wronged."

Meyer argues that rights to respect can be violated by a statute—that a statute can "insult" certain persons, i.e., produce dignitary harm for them—just as respect-rights can be violated by private persons or by individual governmental officials. She suggests that the flag burner who is sanctioned pursuant to a law prohibiting "flag burning" *does* have a valid, personal claim—a moral and constitutional claim—to judicial relief, even if his action is also an action of arson: "Prosecuting a defendant for speaking freely is itself disrespectful, regardless of whether or not the defendant is guilty of some other offense, just as *Brown v. Board* taught that separate but equal treatment can be disrespectful regardless of any tangible difference in resources." In effect—and by contrast with Adler and Alexander—Meyer thinks that a rule can be morally and constitutionally invalid in virtue of its social meaning. Her paper can be seen as showing that rule-dependence and the existence of personal constitutional rights *are* reconcilable on an expressivist account of constitutional rule-validity. Further, Meyer attempts to demonstrate that respect-rights can ground a distinction between the two familiar types of rule-dependent challenges, namely "facial" challenges and "as-applied" challenges. On Meyer's account, a facial challenge asserts that

"the statute is itself an insult because it is intended to disrespect a group of its citizens, either through its plain language, through sneaky preplanned discriminatory enforcement, or by intentionally cutting a wider swath so as to mask its discriminatory intent." An as-applied challenge asserts that "while the statute itself is not disrespectful, its application to the particular plaintiff and its activities is."

Heidi Hurd, like Linda Meyer, criticizes the view that constitutional courts are concerned to repeal or amend invalid legal rules rather than to protect the claimant's personal rights. But her criticism is quite different from Meyer's. Meyer argues that the application of a certain kind of rule (an "insulting" rule) to an actor can violate his personal rights, even if the action itself is not morally permissible and therefore not constitutionally protected. Hurd argues that, if a given action is morally permissible, then the actor should have a legal liberty to perform the action regardless of the validity or invalidity of the rules applied to him. Morality requires a legal regime that leaves us free to perform actions that we have a moral right to perform, and precludes a legal regime (such as the one presented in *Rights against Rules*) that allows the state to sanction morally permissible actions as long as it does so using valid rules.

The bulk of Hurd's article, entitled *Moral Rights and Legal Rules: A Natural Law Theory*, is devoted to showing that the following four questions should all be answered in the negative.

(1) Could a person have a moral right to do act A, but no moral right that lawmakers protect her in the doing of A? (That is, could a person have a moral right to do something that she legitimately has no legal right to do?)
(2) Could a person have a moral right *not* to do act A, but no moral right that lawmakers not require her to do A? (That is, could a person have both a moral right to refrain from doing an action and a legitimate legal obligation to do it?)
(3) Could a person have *no* moral right to do act A, but a moral right that lawmakers prohibit her from doing A? (That is, could a person have both a moral obligation not to do something and a legitimate legal right to do it?)
(4) Could a person have *no* moral right *not* to do act A, but a moral right that lawmakers *not* prohibit her from *not* doing A? (That is, could a person have both a moral obligation to do something and a legitimate legal right not to do it?)

Hurd considers and ultimately rejects two plausible arguments for propositions (1) and/or (2): an argument based on the legitimate overinclusivity of legal rules, and a "perfectionist" argument to the effect that government properly coerces us to perform supererogatory actions and refrain from performing suberogatory actions even though we have a moral right to do the opposite (i.e., even though refraining from a supererogatory action and performing a suberogatory action is morally permissible). Hurd also considers and ultimately rejects a libertarian and "weak liberal" argument for

https://doi.org/10.1017/S1352325200063011 Published online by Cambridge University Press

propositions (3) and/or (4). In short, as Hurd puts it, "The moral right to burn a flag . . . defines the proper contours of one's legal right to burn a flag."

Hurd allows that "[i]nasmuch as Adler and Alexander may never have been disputing *this* thesis, my argument may pass theirs in the philosophical night." But it would seem that—if the moral right to burn a flag does define the proper contours of one's legal right to burn a flag—the view of constitutional adjudication presented by Adler and provisionally endorsed by Alexander has indeed been fatally undermined. Consider, first, the case of a flag burner who performs a harmless action of flag burning and is sanctioned pursuant to a law that bars public burning. Adler and, provisionally, Alexander would say that the harmless flag-burner properly lacks a legal right to challenge his sanction: He lacks a statutory right (because his action is subsumed under the public-burning statute) and also a constitutional right (because that statute is constitutionally valid).[21] But—if Hurd is correct in denying the first of the four above-quoted propositions—then the harmless flag-burner should at the end of the day be legally free to perform his action, because the action *is* harmless and therefore one that the actor is morally free to perform. Consider, next, the case of a flag burner who performs an assaultive, destructive, or otherwise wrongful action of flag burning, and is sanctioned pursuant to a law barring flag burning. Adler and, provisionally, Alexander would say that this claimant's sanction should be overturned on constitutional grounds just because the law is invalid, i.e., even if no other, valid rule covering the claimant's action was in force. But in a case where no valid rule covering the claimant's action was in force, overturning the claimant's sanction pursuant to the flag-burning statute will (at the end of the day) leave him entirely free from sanction for his assaultive, destructive, or otherwise wrongful action of flag burning. In short, the flag burner will in that case have a legal right to perform an act of flag burning which he has no moral right to perform. If Hurd is correct in denying the third of the above-quoted propositions, he ought not possess this legal right. In short, Hurd's article raises deep issues about the connection between legal and moral rights that any proponent of a rule-focused view of constitutional adjudication must confront.

21. Hurd does not dispute that a statute or some other general legal rule can be morally valid even if it is overinclusive. Her view, rather, is that adjudicators are morally obliged to refrain from applying an overinclusive rule in cases where the actor's defiance of the rule was morally permissible. "[I]t may be the case that the best *rule* that a legislature can craft concerning the justified use of deadly force in self-defense contains a requirement of imminent peril"; but "if a battered woman has a moral right to use deadly force absent imminent peril . . . then she has a moral right that the law that requires imminent peril not be enforced against her by officials who are responsible for . . . prosecution, adjudication, and punishment. . . ." Hurd would thus agree with Adler and Alexander that the public-burning rule itself could be "valid" in the strongest possible sense (the moral sense) even though it subsumes some morally permissible actions.