

POWER, DUTY, AND FACIAL INVALIDITY

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ABSTRACT

The Constitution is primarily about power, the capacity of government actors to change legal rules and legal relations. It is also to some extent about the duties of government actors and institutions, and imposes on them obligations that it is wrong not to fulfill. These two functions of constitutional rules, setting out powers and imposing duties, are distinct from one another, and it is important not to confuse them. The provisions of the Constitution that grant and limit the power of Congress are concerned exclusively with power and do not create duties. They therefore are not the source of the obligations that Senators and Representatives have to ensure that their legislation is consistent with the Constitution. Members of Congress do have obligations of that kind, but those obligations come from their role as legislators, and because of that role are flexible and not absolute. There are circumstances in which a conscientious legislator may vote for legislation that the legislator believes to be partly unconstitutional. By contrast, the constitutional provisions that grant authority to act conclusively, such as the provisions that empower the courts, do bring with them unqualified obligations to follow the law. Power and duty interact differently depending on the kind of power involved. Because the obligations of legislators concerning the constitutionality of legislation are flexible, they do not support the inference that legislation is necessarily valid or invalid on its face and not as applied. But the text of the First Amendment, understood as dealing solely with the power and not the duty of Congress, does strongly suggest that it makes rules valid or invalid as such, so that all invalidity is facial invalidity. The well-established phenomenon of as-applied invalidity, and the severability of valid from invalid applications, can be explained consistently with this reading of the First Amendment. Severability happens when Congress has implicitly or explicitly provided a fallback rule that is valid as such and that replaces the primary rule that is invalid on its face. The First Amendment operates at the level of rules and not applications.

Attention to text earns only professional scorn in constitutional law. But when one among many constitutional limitations is literally directed against lawmaking, might the text perhaps embody a reason that even realists can respect?¹

Analysis of the Constitution's conceptual apparatus generally must be found in the interstices of arguments concerning its substance. Whether religious practitioners are constitutionally entitled to exemptions from generally applicable laws is a point of heated conten-

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1 Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163, 1175 (1970).

tion.² Entangled with it is the question whether and when legislative rules are valid as a whole, invalid as a whole, or valid in some, but only some, of their applications. The conceptual issue, often put as the distinction between facial and as-applied invalidity, appears in many contexts. An improved understanding of the problem would illuminate a number of constitutional provisions and would help provide a better account of the tools with which the Constitution operates.

Important and powerful recent work by Professor Nicholas Rosenkranz seeks to resolve the question of facial and as-applied invalidity. According to Professor Rosenkranz, constitutional provisions produce rule-level or application-level validity and invalidity depending on their addressee. If a provision is directed to the legislature, the way the First Amendment is, it operates on rules as such, not their applications separately. Provisions directed to the executive operate at the level of application.

Reading the First Amendment and other constitutional provisions as giving commands to government actors, and so asking who has violated the command, is quite natural. But it puts constitutional rules into a fundamental legal category in which, I will argue, many of them do not belong. Many constitutional rules, and in particular, the rules that govern the legislative authority of Congress, are about power and not duty. Strictly speaking, it is not possible to violate them. Failure to comply with such a rule produces not a wrong, but a nullity.

The First Amendment, other affirmative limits on legislative power, and the grants of power impose no duties. The question of facial and as-applied invalidity, therefore, cannot be resolved by asking about compliance or non-compliance with their commands. Another implication of this conceptual point, perhaps more surprising, is that the powers and limitations are not the source of legislators' obligations concerning the constitutionality of their legislation. Those obligations, I will argue, come from elsewhere in the Constitution and are not as absolute as may be thought. A conscientious legislator sometimes can support legislation that is, in the legislator's view, unconstitutional and so void.

While analysis under the category of duty cannot account for rule-level and application-level invalidity, a reading of the First Amendment's text that assumes it to be wholly about power can do so. Ac-

² See, e.g., *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 885 (1990) (discussing whether exemptions from generally applicable laws should be granted to religious practitioners).

ording to that reading, all rules (though not all statutes) are valid or invalid on their face as far as the First Amendment is concerned. When a rule is invalid on its face, the question is not exactly whether it is severable, but rather whether Congress has explicitly or implicitly provided a fallback rule that produces some but not all of the same results.

Part I of this Article elaborates on two basic distinctions. The first is between the manifestations of the principle that unconstitutional rules are void. Sometimes, that principle applies to rules as such, so that they are invalid as rules, or on their face. Sometimes, the principle applies to some applications of a rule but not others, so that the rule is invalid only as applied to some circumstances. The second distinction is between rules that deal with legal obligations or duties and rules that deal with actors' capacity to change the legal situation or powers. The remainder of the Article analyzes problems posed by the former distinction in light of the latter.

Part II discusses the bearing on facial and as-applied invalidity of the duties that the Constitution imposes on governmental actors. It introduces two more distinctions that categorize constitutional rules. The first is between constitutional rules that deal with juridical acts, such as legislation and adjudication, and the less common rules that deal with physical acts, such as the Fourth Amendment's restrictions on searches and seizures. Within the category of juridical acts, Part II distinguishes between two kinds of rules concerning power. The first kind grants or restricts power, such as legislative power, and are then applied by someone else, such as the courts. The second kind give some institution, quintessentially the courts, power to resolve a dispute conclusively, in a way that must be accepted even if it is based on legal error.

With those distinctions in place, Part II addresses the problem of facial validity in light of the duties of government decision-makers. It argues, perhaps surprisingly, that in general, the grants and limits of federal legislative power, like the Commerce Clause and the First Amendment, do not create duties at all. They grant and restrict power and do nothing else. As a result, no argument about facial validity that rests on the derivation of duties from such provisions can succeed. Legislators do have duties with respect to the constitutionality of legislation, I will argue, but those duties arise from other provisions of the Constitution and are qualified, not absolute. Because they are qualified, they also do not support an inference that grants and restrictions of power operate at the level of rules.

Government decision-makers do have absolute duties to apply the law honestly when they are applying the law, that is, when they are

exercising power conclusively to resolve a dispute. As a result, courts have an absolute obligation to follow the law, as do Senators when they sit in impeachment trials. But most exercises of legislative power are not conclusive, and leave to later decision-makers, including courts, the question of the constitutionality of legislative rules.

Some provisions of the Constitution are directed to physical and not juridical acts, and pose distinct questions about facial and as-applied validity. Part II concludes that provisions like that do limit the power of Congress but do not impose duties on Congress. As limits on power, they operate at the level of application and in general do not make legislative rules invalid on their face.

Part III is specifically about the First Amendment, understood as being wholly a restriction on the power of Congress. It argues that the text does support the claim that the First Amendment makes rules as such valid or invalid, and does not operate on applications. Although that form of invalidity is most consonant with the text, long-standing practice seems to assume that the Constitution produces both facial and as-applied invalidity. Part III proposes a solution to this difficulty based on the general category of which ordinary severability is one instance: legislative fallback rules, which replace rules or combinations of rules that are invalid at rule level. The results usually described as as-applied invalidity can be understood as facial invalidity combined with the identification of a fallback rule. Facial invalidity, by contrast, occurs when a rule is invalid as such and no valid replacement is available. The Article concludes by suggesting that this way of thinking about rule-level invalidity can better explain the situations in which it appears and can enhance the standard explanations for its appearance.

I. RULES AND APPLICATIONS, POWER AND DUTY

A. *Rules and Applications*

Legal rules are generalizations, identifying the situations in which they apply and prescribing some legal consequence of the occurrence of those situations. An import duty identifies acts of importation of certain goods and attaches to those acts an obligation to pay the duty. A criminal law identifies conduct and makes it a crime. Rules thus govern, but are distinct from, their applications. Rules are also distinct from the enactments that create them. A single act of Congress may contain hundreds or thousands of rules, with each rule applying to a large number of possible occurrences.

Under the Constitution, the federal government's power to make and alter legal rules has limits. Probably the most fundamental limit comes from the principle that federal power exists only when the Constitution grants it. Hence, the absence of a grant of power produces a limitation. The Constitution also imposes affirmative limitations on powers that the federal government otherwise would have but for the limitation in question. For example, Congress has the power to levy taxes, duties, imposts, and excises.³ If the clause stopped there, Congress could impose a duty of one percent ad valorem on oil imports that arrive east of the Mississippi River and two percent on those that arrive west of the river. But duties, imposts, and excises must be uniform throughout the United States.⁴ The geographically varying duty would be unconstitutional.

A geographically varying duty would be unconstitutional even though there is nothing impermissible about a one- or two-percent tax on oil imports as such. A tax at either level, if applied uniformly, would be within Congress's power. The non-uniform duty is thus an example of a legal rule that is unconstitutional at the rule level. Non-uniformity is a feature of the generalization, not of any one of its applications; it arises only when the applications are compared to one another. In order to know whether any application is permissible, it is necessary to know the content of the rule that produced it. Not only is such a tax unconstitutional at the rule level, it is unconstitutional only at the rule level. Any of its applications could be produced by a different rule that was constitutional.

Rule-level invalidity is not the only form of unconstitutionality for federal enactments. Some applications are contrary to the Constitution without regard to the rule that produces them. Congress may not tax exports.⁵ No federal tax may be applied to a transaction that constitutes an export, no matter what rule calls for the imposition of the tax. The ban applies both to a rule that taxes only exports and one that taxes all exchanges of some named commodity, including, but not limited to, exports. Unlike the non-uniform import duty, a duty on all transactions could constitutionally be applied to some of its applications, those that taxed imports.

³ U.S. CONST. art. I, § 8 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

⁴ *Id.* ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . .").

⁵ *Id.* art. I, § 9 ("No Tax or Duty shall be laid on Articles exported from any State.").

Whether any particular constitutional provision produces rule-level or application-level unconstitutionality can be a matter of considerable importance. One leading example involves the Free Exercise Clause and the problem of religious exemptions from generally applicable statutes. Under *Sherbert v. Verner*, any time a statutory rule burdened the exercise of religion, the burden had to be strongly justified.⁶ In *Employment Division, Department of Human Resources v. Smith*, the Court took another approach, finding that general and neutral rules could apply when they had the effect of burdening religious exercise, with or without a strong justification.⁷ According to the former case, the Free Exercise Clause produced application-level unconstitutionality but would make an entire rule unconstitutional only if all of its applications were separately inconsistent with the clause. Under *Smith*, by contrast, general and neutral rules are not subject to application-level review, but rules that single out religious exercise are unconstitutional as such.

Professor Nicholas Rosenkranz has recently presented an innovative and powerful approach to the Constitution's text that is designed to determine which constitutional provisions operate at rule level and which operate at application level.⁸ According to Rosenkranz, the crucial move is to identify the government actor to whom the provision is addressed.⁹ Sometimes, that will be obvious because the addressee will be the subject of the normative sentence, as Congress is the subject of the First Amendment.¹⁰ When the Constitution speaks in the passive voice, however, it is necessary to infer the addressee.¹¹

According to Professor Rosenkranz, only provisions addressed to Congress affect the validity of legislation, and those provisions all

6 374 U.S. 398, 406–08 (1963) (noting that only a compelling state interest justifies substantial infringement of appellant's First Amendment rights and recognizing that where a statute burdening religious rights was upheld, there was a countervailing strong state interest).

7 494 U.S. at 885–89 (holding that a general law that is not directed against religion may regulate an act of religious exercise without regard to whether the government's interest in the law is compelling).

8 Nicholas Quinn Rosenkranz's article titled *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) [hereinafter Rosenkranz, *Subjects*], was followed by his companion article titled *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011) [hereinafter Rosenkranz, *Objects*], both exploring these issues.

9 Rosenkranz, *Subjects*, *supra* note 8, at 1214 ("Thus, a constitutional claim is necessarily a claim that some actor has acted inconsistently with the Constitution.")

10 *Id.* at 1235 (noting that the First Amendment's explicit subject is Congress).

11 The clauses that speak in the passive voice "are easy to identify," but "the actors to whom they apply are not." Rosenkranz, *Objects*, *supra* note 8, at 1011.

produce only rule-level invalidity.¹² Those provisions impose duties on the legislature that must be complied with in the act of legislation, and the act of legislation necessarily involves decisions about rules as such in advance of any application. Because Congress must be able to comply with its duties, it must be possible to determine at the time of legislation whether the duty has been complied with.¹³ The First Amendment, Professor Rosenkranz's leading example, imposes a duty on Congress. It produces rule-level—also known as facial—invalidity, and only rule-level invalidity.¹⁴

Application is the job of the executive, so application-level invalidity arises when, and only when, the executive violates a duty imposed on it. Unlike legislation, executive application takes place after rules are made and is retail, not wholesale. On this score, Professor Rosenkranz offers the Fourth Amendment as a paradigmatic case. It forbids unreasonable searches and seizures; searches and seizures are undertaken by executive officers, so the Fourth Amendment applies to the executive.¹⁵ Like other rules governing the executive, it operates one instance at a time.¹⁶ The Fourth Amendment and similar provisions are not addressed to and do not limit Congress, so they do not make statutory rules invalid either as rules or as applied. In assessing an arguably unreasonable search or seizure, any statute that purports to authorize it is not unconstitutional but simply irrelevant.¹⁷

Professor Rosenkranz categorizes constitutional rules by their addressee and understands the Constitution to impose obligations on those it addresses. His argument in support of rule-level invalidity re-

12 Rosenkranz, *Subjects*, *supra* note 8, at 1235–38 (“If Congress has violated the Constitution by making an impermissible law, then it has violated the Constitution at the moment of making the law.”).

13 *Id.* at 1238 (“But if Congressmen are to be charged with the profound responsibility to support the Constitution, it must be that constitutional tests applicable to legislative action are ones that conscientious congressmen could theoretically apply. And so, if Congress is the subject, then the appropriate doctrinal test must be one whose inputs are available at the moment of enactment, *on the face of the statute*.”).

14 *Id.* at 1235–37 (explaining that violation of the First Amendment occurs at the moment that Congress enacts a statute and that a violation is visible on the face of the statute).

15 *Id.* at 1241 (“It is the President who violates the [search and seizure] clause of the Fourth Amendment, by executing an unreasonable search.” (emphasis omitted)).

16 *Id.* (“[T]he [Fourth Amendment] litigation will very much turn on the defendant’s specific facts—what exactly was searched, and when, and where. Here the enforcement facts do not postdate the constitutional violation; here the enforcement facts *are* the constitutional violation.”); *id.* (“[A] constitutional claim under the first clause of the Fourth Amendment is never a ‘facial’ challenge, because it is always and inherently a challenge to executive action.” (emphasis omitted)).

17 *Id.* at 1240 (“The act of Congress did not violate the Fourth Amendment; the act of the President did.”).

lies on a standard principle of the logic of obligation: ought implies can. Obligations assume a capacity to comply with them. Congress must be able to comply with the command of the First Amendment. For Congress to be able to comply with it, that command must provide guidance about the decisions Congress makes. Those decisions are about rules and not applications separately. Although Professor Rosenkranz regards constitutional provisions as imposing duties on their addressees, he also regards those provisions that apply to Congress as determining which purported acts of legislation are genuinely effective and which are void. His argument thus moves from duties to powers, and so combines two fundamentally distinct legal conceptions. The distinction between power and duty is basic to the Constitution and to the argument I will present.

B. *Power and Duty*

Legal rules, frequently, are imperatives. They identify possible conduct as forbidden, required, or permitted. Criminal law, for example, mainly imposes prohibitions. Rules of that kind impose duties, and someone who violates such a duty is a wrongdoer. Violations of duties generally give rise to some consequence, such as criminal punishment or a civil remedy, such as damages.

Analytical jurisprudence identifies four characteristic positions that a person may occupy with respect to a rule of this kind.¹⁸ Perhaps the most fundamental is that of a potential actor who is obliged to comply with the rule. That person has a duty.¹⁹ The position opposed to a duty, that a potential actor may have is usually called liberty or privilege. Someone who has no duty with respect to a possible action, but may decide whether to engage in it or not, has a liberty or privilege so to act.²⁰

Although duties are very important, private law in particular is often concerned with another characteristic position, that of the person who may be acted upon. A leading example is the position of a

18 For the classic exposition of the concepts and their relationships, see generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917), and Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

19 Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 165 (1919) ("If we determine that A *must* conduct himself in a certain manner he has a *duty* to B, and B has a *right* against A."). Corbin undertook to make Hohfeld's work more accessible shortly after Hohfeld died, at a comparatively early age, in 1918.

20 *Id.* ("If we determine that A *may* conduct himself in a certain way he has a *privilege* with respect to B, and B has *no-right* that A shall not so conduct himself.").

property owner with respect to a potential act of trespass. Others are forbidden to trespass and have a duty in that respect. The owner has the position that is said to correlate with the others' duty, called a right or, in more technical usage, a claim-right.²¹ Completing the symmetry is the position of someone to whom no duty runs with respect to another's possible conduct. Such a person has no right, or a no-right.²² No-rights correlate with liberties or privileges and are the opposite of rights.

Imperatives do not exhaust the universe of legal rules. Another kind of rule gives rise to another set of four characteristic positions. This second set is about capacities to alter existing legal arrangements.²³ Contractual capacity, which can be used to create duties and rights that did not exist before, operates with respect to this second kind of rule. The ability to produce such a change, for example by making a contract, is called a power.²⁴ As with the first category, there are two positions described from the standpoint of a potential actor, here a potential arrangement-changer: power and disability.²⁵ A minor whose contractual capacity is limited has substantial disability concerning contracts that an adult may enter into.

Again, there are two positions described from the standpoint of one who may be acted upon. Those two are opposed to one another and each correlates with a position described from the standpoint of one who may act. Someone whose positions are subject to change by another has a liability that correlates with the relevant power.²⁶ (A liability is not necessarily a bad thing; the capacity to receive a bequest is a liability to the operation of a testamentary power.)²⁷ If one person has no power to change some legal position of another's, then the person whose legal position is not subject to alteration has an

21 *Id.* at 167 ("Right [is defined as] . . . [a]n enforceable claim to performance (action or forbearance) by another.").

22 *Id.* at 168 ("No-right [is defined as] . . . [t]he legal relation of a person (A) in whose behalf society commands nothing of another (B) . . .").

23 *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 130 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Duties and their opposite, liberties, describe positions with respect to ultimate conduct. Powers commonly are exercised antecedently, so as to create, abolish, or modify duties and liberties or other powers.").

24 Corbin, *supra* note 19, at 168 ("Power [is defined as] . . . [t]he legal relation of A to B when A's own voluntary act will cause new legal relations either between B and A or between B and a third person.").

25 *Id.* at 170 ("Disability [is defined as] . . . [t]he relation of A to B when by no voluntary act of his own can A extinguish one (or more) of the existing legal relations of B.").

26 *Id.* at 169 ("Liability [is defined as] . . . [t]he relation of A to B when A may be brought into new legal relations by the voluntary act of B.").

27 *Id.* ("[L]iabilities are not always disadvantageous to the possessor . . .").

immunity from change by that other person with respect to that position.²⁸

The consequence of non-compliance with the first kind of rule, as noted, is mainly a matter of the law of remedies, broadly understood.²⁹ All that the rules about duty say is that the violation of a duty is a wrong.³⁰ Non-compliance with the second kind of rule is different in both its substance and the applicable terminology. If someone who lacks the power to grant an item of property purports to make the grant, nothing happens. The supposed grant is a nullity, a legally void undertaking.³¹ The second kind of rule provides criteria by which to judge the validity of attempted legal acts; acts that fail those criteria are ineffective to change legal positions.

Rules about power thus might be said to have their remedy built in, except that the term remedy is inapposite. A remedy is designed to undo, prevent, or otherwise respond to a wrong.³² But an attempted exercise of power that is ineffective is not, in general, a wrong because it is not a breach of duty.³³ A sixteen-year-old who misunderstands the legal capacities of minors and unknowingly makes a void contract usually has done nothing wrong and is not subject to any remedy or sanction. Nevertheless, the contract is void. For the same reason, it is misleading to say that rules about power are violated when they are not complied with. Someone who desires to make a will, but accidentally picks up and signs a document that is not a will, has not complied with the law of wills in some jurisdictions, but can

28 *Id.* at 170 (“Immunity [is defined as] . . . [t]he relation of A to B when B has no legal power (has disability) to affect some one or more of the existing legal relations of A.”).

29 *See, e.g.,* HART & SACKS, *supra* note 23, at 137–38 (noting that the law of remedies governs consequences of violations of primary duties).

30 *See, e.g., id.* at 130 (“A private duty is an authoritatively recognized obligation of a private person not to do something . . .”); *id.* at 136 (distinguishing between the content of obligations and the consequences of violating them, and noting that primary rights, the correlative of duties, must not be confused with remedial rights of action).

31 *See id.* at 134 (“Power law, it will be seen increasingly, presents distinctive remedial problems. The characteristic sanction of an empowering arrangement is the *sanction of nullity*.”).

32 *See id.* at 136 (arguing against the confusion between primary duties and the remedies for violating those duties, maintaining instead that the law of remedies must be understood in light of the law of primary obligations, and not vice versa); *see also id.* (noting that the point of sanctions is to bring about compliance with primary obligations).

33 *Id.* at 133 (“Generally speaking, however, people who have private powers have a liberty to exercise them or not as they see fit.”). However, some purported legal acts are both void and wrongful. *See, e.g.,* VA. CODE ANN. § 20-38.1 (2013) (prohibiting certain types of marriages, including bigamous marriages); *id.* § 20-40 (enacting punishments for persons entering into a prohibited marriage); *id.* § 20-45.1 (making a prohibited marriage void). Therefore, under the law of Virginia, people who are married have a duty not to purport to marry again and a disability from actually doing so.

be said to have violated that law only in a strained sense.³⁴ Such a person clearly has not committed a wrong.

The two kinds of legal rules can be combined. Of considerable importance in this Article is the fact that there can be duties with respect to the exercise of powers. A contract for the sale of real estate creates a duty for the seller to exercise the power to transfer the real estate to the buyer. Failure to do so is a wrong and may give rise to a remedy, including specific performance.³⁵ The fact that the duty may be breached demonstrates that it is distinct from the power to which it applies; if the contract of sale by itself effected the transfer, no remedy would be necessary.

Contracts of sale create affirmative duties to exercise powers. Perhaps surprising is the fact that a party may be subject to a prohibition with respect to the exercise of a power, a prohibition that does not invalidate the exercise. A standard example is an agent with apparent authority who has private instructions from the principal. If the agent exercises that authority contrary to the instructions, say by selling an asset below the minimum price set confidentially by the principal, the sale generally will be valid, and the principal will be bound to the buyer.³⁶ The agent will have committed a wrong, and the principal usually will be entitled to a remedy against the agent.³⁷ An exercise of power thus can be both valid and wrongful.

The analytical categories can be used to describe the positions of official as well as private actors.³⁸ When Article I, Section 8 of the Constitution begins, “Congress shall have power;”³⁹ the ordinary and analytical usages converge: Congress is thereby given the capacity to

34 See, e.g., VA. CODE ANN. § 64.2-403 (2013) (requiring that wills must be signed); *id.* § 64.2-404 (relaxing some formalities, but not the requirement of a signature, when the proponent of a will proves by clear and convincing evidence that the decedent intended to make a will).

35 See 3 DAN B. DOBBS, DOBBS' LAW OF REMEDIES 299–300 (2d ed. 1993) (stating that specific performance is generally available for breach of contract to convey real estate).

36 See WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 182–83 (3d ed. 2001) (claiming that a principal is bound when an agent with apparent authority enters into an agreement in violation of secret instructions from the principal).

37 See *id.* at 146 (discussing the remedies available to a principal when an agent sells or destroys property against the instructions of the principal); *id.* at 144 (“It is not at all inconsistent for an agent to be clothed with a certain power, but, at the same time to be under instructions and thus under a duty to his principal that he shall not use the power in a particular proscribed way.”).

38 HART & SACKS, *supra* note 23, at 135 (stressing that Hohfeld’s work was designed mainly to express the positions of private people with respect to one another, and maintaining that the position of immunity was of little importance as between private people but of great importance with respect to the relations between private people and official actors).

39 U.S. CONST. art. I, § 8.

alter the legal rules that determine others' positions. By passing a law forbidding the counterfeiting of federal securities, for example, Congress can create a duty that did not exist before. The Constitution also contains duties, such as the President's obligation to take care that the laws are faithfully executed.⁴⁰

Central to American constitutional law is the principle that constitutional rules about power, like private-law rules about power, provide criteria for the validity of purported changes in the law. In general, an act of Congress that is contrary to the Constitution's rules about congressional power is legally ineffective. That principle is a necessary condition for judicial review as practiced in this country, and the Supreme Court relied on it in *Marbury v. Madison*.⁴¹ That is not the only possible arrangement. The Constitution could make acts of Congress valid whether or not they comply with it, while imposing on legislators a duty to ensure compliance.⁴² That duty would be enforced by some sanction, including political sanctions by the voters or legal sanctions such as impeachment of the President for signing unconstitutional legislation.

Judicial review as usually practiced does not seek to enforce any duties that legislators may bear concerning the constitutionality of their enactments. Rather, it operates by treating unconstitutional enactments as legal nullities, like purported contracts made by people who lack contractual capacity. That does not rule out the possibility that legislators also have duties with respect to those powers, but it does underline the point that *Marbury*-style judicial review does not depend on the existence of such duties.

Professor Rosenkranz's argument concerning facial and as-applied invalidity, however, does depend on the claim that the Constitution imposes duties on its addressees and that the nature of those duties has important implications for the question of rule-level and application-level invalidity. The next Part of this Article takes up the question of official duties and their implications for that question.

40 *Id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

41 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) (noting that the Constitution defines and limits the power of the legislature and grants the Supreme Court the power to review the validity of congressional actions).

42 *See* THE FEDERALIST NO. 78, at 466–67 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (maintaining that the Constitution did provide for judicial review of acts of Congress, rejecting the possibility that the legislature would be the final judge of the constitutionality of its enactments). As discussed below, such a power could be combined with a duty to exercise it in good faith.

II. CONSTITUTIONAL DUTIES AND RULE-LEVEL INVALIDITY

Discussions of the Constitution routinely mix the vocabularies of power and duty. The principle that unconstitutional statutes are nullities is a principle older than *Marbury*, and Professor Rosenkranz is joined by the Supreme Court in referring to violations of the Constitution.⁴³ This Part discusses the relevance of constitutional duties to the problem of rule-level and application-level invalidity.

As the exposition of the analytical categories above suggests, duties are especially common with respect to physical actions, like trespass. Rules about power, by contrast, are wholly about juridical acts, like making a contract.⁴⁴ The main question here concerns putative duties with respect to the exercise of powers, or the purported exercise of powers, which is to say, with respect to juridical acts. The Constitution, to some extent, does, however, concern itself with physical acts. The contrast between the two appears from two constitutional provisions that often provide examples in this context, the First and Fourth Amendments. The former is concerned with Congress's actions in the legal realm, while the latter is partly concerned with enforcement officers' physical acts such as entering a dwelling. Because the distinction between juridical and physical acts is salient with respect to the distinction between powers and duties, this Part will address separately those constitutional provisions that apply only to purported exercises of power and those that apply to physical actions.

A. *Power, Duty, and Official Acts That Change Legal Relations*

The Constitution is overwhelmingly concerned with granting and limiting power, and constitutional doctrine is very largely concerned with provisions that grant legislative power to Congress and those that limit congressional power, such as the First Amendment. Just as Article I begins by vesting legislative power in Congress, Article III begins by vesting the judicial power of the United States in the federal courts. Both legislative and judicial power can change legal relations. Congress can make previously innocent conduct criminal, and a

⁴³ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (holding that statutory provisions governing Public Company Accounting Oversight Board, taken together, "produce a constitutional violation").

⁴⁴ The word "juridical" is somewhat ungainly, but "legal" has a confusing connotation. A "legal" act implies that the act in question is lawful, as opposed to being concerned with the physical world. Juridical acts are accomplished with physical acts, such as signing a will or saying, "I accept," but the two are distinct. Many physical acts have no consequences for legal positions.

court can enter an injunction that similarly makes previously permissible conduct the crime of contempt.

Legislative and judicial powers are not parallel, however, in one respect that is crucial here. Legislation that is beyond enumerated federal power or contrary to an affirmative restriction thereon is, in general, invalid. The courts' judgments, by contrast, are binding even when they rest on error concerning the applicable law, including the Constitution. If one thinks of Congress as making constitutional judgments when it legislates, those judgments are thus far less binding than the courts' determinations on similar questions.

In this respect, the grants of legislative and judicial power differ in the way in which they identify legally effective exercises of the power involved. To be valid, a purported exercise of legislative power must meet two conditions. First, it must come from the individuals who constitute the legislature. Second, an act of the lawful legislators must also conform to the constitutional provisions granting and limiting power. Because of the second criterion, validity depends on substance. Whether a purported judgment of a court is binding, however, depends only on whether the individuals claiming to issue the judgment are indeed judges. If they are, then within broad limits, their determinations are binding without regard to those determinations' substantive conformity with the legal rules on which they are based. Courts are final in a way in which legislatures are not.

That point about different kinds of government power, I will argue, has important implications for the duties that different government officials have with respect to the Constitution. Those different duties, in turn, have implications for the question of rule-level and application-level validity. The duties of legislatures, which I will suggest do not come from the relevant substantive provisions like the First Amendment, are not such as to imply that legislative rules are either valid or invalid as such. This Part of the Article deals first with the duties of legislators concerning the constitutionality of legislation and then discusses the contrasting duties of officials whose decisions are final.

1. Exercises of Legislative Power

To say that Congress violates the Constitution when it adopts an unconstitutional statutory rule can simply be a way of saying that the rule is void because it is inconsistent with superior law. But violation is more commonly used to describe an act inconsistent with an obligation or a duty. Professor Rosenkranz, in identifying Congress as the wrongdoer and deducing consequences from that identification,

relies on the constitutional duties of legislators with respect to legislation.⁴⁵ I will argue that while such duties exist, their source is not in the power-granting or power-limiting provisions and that their content is flexible. Legislators do not have an absolute obligation to vote against legislation because it is unconstitutional. The non-absolute nature of their duty counts against the argument that invalidity must be at rule level.

The first step, perhaps shocking, is the argument that the Constitution's rules about the power of Congress do not impose duties at all.

a. The First Amendment and Other Provisions Governing Congressional Authority

The First Amendment very likely limits the power of Congress without imposing any duties. Even if the First Amendment does impose duties, the system of federal power in the main does not. In particular, the principle that federal legislative power is enumerated limits Congress's ability to change legal relations but does not create duties.

The First Amendment is an imperative: "Congress shall make no law," it begins.⁴⁶ It is readily interpreted as a command. Commands create duties, if the person giving the command has the power to do so. And if the Constitution speaks as it purports to, in the name of the sovereign people, it can impose any duty on their agents that the people wish.

The people can indeed do that, but as the sovereign, they can do even more. They can issue a performative, a statement that makes itself true because of the authority of the person who utters it. Article I's Vesting Clause works like that.⁴⁷ When it says that legislative power shall be vested, it is not ordering Congress to give itself power, it is giving power. And when the First Amendment says that Congress shall make no law, it can mean, Congress is hereby made incapable of creating a legal rule. If that is what it means, then Congress indeed can make no law of that description. It may pass a statute, but the statute will be void and hence, in a sense, no law will be made.

⁴⁵ See e.g., Rosenkranz, *Subjects*, *supra* note 8, at 1221 (identifying Congress as the "culprit" when an unconstitutional statute is passed).

⁴⁶ U.S. CONST. amend. I.

⁴⁷ *Id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

That the First Amendment at least limits power in this fashion is well established. One reason that it is so well established is the parallel between the First Amendment, which concerns the laws Congress makes, and the affirmative grants of power, which do the same. One very prominent grant by its terms enables Congress to “make all laws which shall be necessary and proper” to achieve the end it sets out.⁴⁸ When the Constitution says that Congress may make certain laws, it gives power. The natural inference is that when it says that Congress may not make certain laws, it limits power.

More difficult is the question whether the First Amendment also imposes a duty on Congress not to pass statutes that are inconsistent with it and so, to some extent, ineffective in creating new legal rules. It may, but I think that it does not. To limit power and impose a duty, it would have to use the word “law” in two distinct senses, one meaning valid legal enactment, the other meaning invalid statutory rule. Both can indeed be called a law, but using both senses at once takes economy to an extreme. The reading according to which “law” means valid law also has the virtue of making the First Amendment parallel with the grants of power. Unlike the First Amendment, they have a grammatical form that cannot be taken as a command to Congress. They simply give authority. If the First Amendment is their opposite, it too is only about power.

Text coincides with analysis here. The power-granting provisions produce nullity for purported acts of legislation beyond their scope. They have no words that explicitly suggest duty, as the First Amendment does. Any duty that they produce is implied. But if they do include a duty, it is a quite fine-grained one. It would not be correctly expressed by saying that Congress is obliged not to legislate beyond the enumeration; Congress is unable to do that and can only seem to do that by passing a statute that is, to some extent, ineffective. If there is a duty, it is an obligation not to pass statutes that enact inoperative rules that are inoperative because they are beyond enumerated power. Duties of that form do exist; acts by officials that are under color of law but void can be wrongful.⁴⁹ It takes careful drafting to

⁴⁸ *Id.* art I, § 8 (“[Congress shall have power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁴⁹ *See, e.g.*, Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006) (providing private civil relief for acts under color of law). The distinction between acts under color of law, which generally will be done by public officials acting in excess of their official power and privilege, and genuinely authorized official acts, is the solution to the supposed paradox exemplified in *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913). The paradox

accomplish that goal, however. A duty not to make rules that are unconstitutional and legally effective would never be violated because the legislature cannot do that. Rational constitution-makers who wanted to convey the subtle message concerning acts under color of law but nevertheless void would do so explicitly.

Even if the First Amendment is not only about power, the grants mean that there are limits on congressional power with no accompanying duty.⁵⁰ One way or another, then, the Constitution, to a large extent, limits congressional power without imposing any duty not to attempt to exercise the authority that the legislature does not have. That feature of the system has important consequences. For one thing, it counts against Professor Rosenkranz's argument concerning facial invalidity. That argument relies on a congressional duty with respect to the powers of Congress. As indicated, I do not think that the provisions concerning powers create such duties, and in any event, at least some of them do not.

Insofar as the constitutional rules governing Congress's powers are only about power in the analytical sense and not about duty, the inference they support is substantially weaker than the one on which Professor Rosenkranz relies. If the provisions about power impose duties, then the logic of normative reasoning requires that Congress know whether it is complying with them at the time of enactment. By contrast, although Congress has reason to know about the extent of its powers, that reason is not so absolute. A legislature that knows, at the time of enactment, whether its statutes will be treated as valid, can do its job more effectively. But legislatures inevitably face uncertainty about the effect of their work, including uncertainty about how their enactments will interact with one another. Constitutional uncertainty based on possible invalidity at the time and level of application is just one more form of uncertainty, and it is entirely possible that the Con-

poses the question, how can an act be both official, and so subject to a prohibition that applies only to government actors, and unlawful because unauthorized and so not the official act of the government? *Id.* at 287. The answer is the category of acts under color of law, which are neither wholly private nor actually authorized.

⁵⁰ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Although it is not a grant of power with an implicit non-grant and accompanying limitation, but explicitly states a limit, the limit that it explicitly states is the one that results from non-grants of power. It is not like the First Amendment, which is in the form of an imperative. The Tenth Amendment thus cannot be read as an explicit directive to Congress not to exercise powers not granted to it. As a statement that ungranted powers are not available, it makes explicit statements about power, not duty.

stitution accepts it as the price of protecting liberty when laws are applied.

This implication of my argument may seem minor compared to another consequence, which indeed may seem to be a *reductio ad absurdum*. From the First Congress to this day, Senators and Representatives have been deeply concerned with the constitutionality of their acts. That concern has not been just practical; they routinely discuss a felt obligation not to legislate in a manner inconsistent with the Constitution.⁵¹ Whether Presidents are similarly bound when they sign or veto legislation is a matter of dispute, but the position that they are is both venerable and very much alive today.⁵² Yet if I am right, the substantive provisions that grant and limit power usually, and perhaps always, impose no such duty. One might well think this consequence unacceptable, and an argument that produces it hence wrong.

But my reading of the provisions that govern congressional power, such as the First Amendment and Article I, Section 8, implies only that those provisions impose no duty on Congress. Congress may have duties that arise from other provisions that relate to the constitutionality of its legislation. I think that it does, but that those duties do not absolutely forbid a conscientious Senator or Representative

51 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829–1861, at 192–94* (2005) (containing many examples of congressional debates on the constitutionality of proposed legislation, debates premised on the assumption that unconstitutional legislation should not be adopted). As Currie notes, the terms in which Congress discussed an issue were often the same terms in which the courts would later assess the same question. For example, when Congress discussed its power to legitimate the Wheeling Bridge, which obstructed navigation on the Ohio River, it presaged the arguments that the Justices would use when a divided Court upheld the statute. *Id.* Before the statute was adopted, the Court had held that the Wheeling Bridge was an unlawful obstruction of interstate commerce in *Wheeling Bridge I*. *Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge I)*, 54 U.S. (13 How.) 518, 537 (1852). The Court sustained the legislation legitimating the bridge in *Wheeling Bridge II*, finding that it was no longer an unlawful obstruction. *Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge II)*, 59 (18 How.) U.S. 421, 432 (1856).

52 Presidents have been criticized for signing bills that contain provisions that they believe to be unconstitutional while saying that the executive will not carry out the unconstitutional parts. *E.g.*, Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 90 (2007) (explaining how Presidents have been criticized for signing bills that contain provisions that they believe to be unconstitutional while saying that the executive will not carry out the unconstitutional parts). *But see* Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113, 115–16 (2007) (explaining that the practice of signing bills that the President believes to be unconstitutional has defenders); William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 307–08 (2011) (arguing that signing unconstitutional laws is justified on practical, not formalistic, grounds).

from voting for legislation that is beyond the power of Congress in that member's judgment. I will turn now to the source and content of those duties of legislators concerning legislation.

b. The Duties of Members of Congress to the Constitution

This Part sketches an account of the duties that members of Congress bear with respect to the constitutionality of their enactments. Although the topic is of profound importance, and although the existence of some such duties is taken almost for granted, the question has received surprisingly little careful attention from scholars.⁵³ Because the territory is so unfamiliar, my argument here is necessarily tentative.

The Article VI oath requires that Senators and Representatives promise to support the Constitution.⁵⁴ But identifying the oath's meaning takes some thought. The Constitution itself sets out quite broad purposes, such as providing for the common defense.⁵⁵ Supporting the Constitution, however, does not entail military service. Indeed, members of Congress are not allowed to hold any federal office, and that bar is not limited to civilian public service.⁵⁶ Support must consist of something more specific than helping out with the document's broad purposes.

Article VI itself provides the central example, and so makes possible reasoning by analogy. It makes federal law hierarchically supreme relative to state law and binds the judges in every state to respect that supremacy by following federal law when it conflicts with state law.⁵⁷ The Supremacy Clause assumes that the function of judges is to decide cases in accordance with law, and hence that they need to identify the law applicable to those cases. Because it is so much

53 William Baude's article concerning the veto is an exception. *See* Baude, *supra* note 52, at 310 (giving a similar analysis of the President's obligations in that they center on the President's duty to take care that the laws be faithfully executed and to preserve, protect, and defend the Constitution, without having to deal with the duties of legislators, who take an oath that differs from the President's and have no role in the execution of the laws).

54 U.S. CONST. art. VI (explaining the promise that is required of members of Congress to support the Constitution).

55 *Id.* pmb. (explaining that the Constitution was ordained and established to "provide for the common defence").

56 *Id.* art. I, § 6 (stating that no person holding any office under the United States may be a Senator or Representative).

57 *Id.* art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

about the power of government, the Constitution provides criteria by which to decide whether a purported legal rule is valid or not. It thereby, to some extent, tells judges how to perform their official function. For judges, then, to support the Constitution is to accept the document's prescriptions for the performance of their official function.

The Supremacy Clause is targeted specifically at state judges (though it applies to most federal judges too), whose judicial office and obligation to perform that office derive from state law.⁵⁸ The official duties of federal officials derive from federal law, including the Constitution itself. For an official, an oath to support the Constitution entails an obligation to perform the functions of the office properly. Senators and Representatives thus have the obligations that automatically come with legislative office along with any other obligations that the Constitution attaches to that office. By promising to support the Constitution, they accept those obligations. That fact by itself does not say what those obligations are. They are different from those of judges, for example, because Senators and Representatives generally do not perform the judicial function of conclusively applying to parties legal rules that primarily bind those parties and not the courts themselves.⁵⁹

While Senators and Representatives must, of course, comply with any duties that the Constitution imposes on them, if I am correct, the rules about congressional power do not, in general, create duties. For that reason, an account of federal legislators' duties with respect to those power-granting and power-limiting rules must come not directly from those rules themselves, but from the other possible source, the nature of the legislative office as the Constitution establishes it. Legislators do not implement the law, and so they do not have the duty of judges, to apply the proper legal rules, or of executive officers, to perform the implementation functions assigned to them by those rules. Legislators make law, and exercise broad discretion in doing so. They are chosen to do that because the voters have confidence in the principles that will guide that discretion. The implication borders on a commonplace: the job of legislators is to make

58 *Id.* art. VI (explaining that Article VI addresses the judges "in every state"). Although most federal judges exercise their office in a state, not all do. Now that circuit riding is so rare, the Justices of the Supreme Court generally do not. This is not to say that the Justices are not bound to prefer the Constitution to state law. State judges are mentioned because they, unlike the Justices, have obligations as officers under state law, obligations that are trumped by the Supremacy Clause when they conflict with federal law.

59 *See id.* (explaining that Senators perform a function of that kind when they try an impeachment and operate under a special oath when they do).

good laws. In doing so, of course, any one legislator will be called on to make compromises, because others will have different principles and different judgments about how to implement those principles.

Most of the time, that means that a legislator's function is simply to exercise good-faith judgment about the public interest as the legislator sees it. That obligation is quite subjective. The Constitution itself, however, may well supply a more objectively defined goal. It provides criteria by which to judge the validity of sub-constitutional legal rules, and obliges judges (if no other officials) to follow those criteria and, if necessary, to disregard purported sub-constitutional rules. It is set up to keep unconstitutional enactments from being implemented as if they were valid. When an unconstitutional enactment nevertheless is implemented, something has gone wrong.

A conscientious legislator should count such an occurrence as a bad consequence, one to be avoided, all other things being equal. That does not imply, however, that a legislator has an absolute obligation to seek to prevent that consequence. On the contrary, the same reasoning that leads to that obligation implies that legislators count it as a cost to be weighed against benefits. Just as the Constitution is designed to prevent the implementation of unconstitutional rules, it does not take all possible steps to prevent that result. It puts decisions in the hands of fallible human beings confronting often difficult questions. Judges and other implementing officials make mistakes, and the Constitution does not tell them always to err on the side of finding unconstitutionality. It accepts errors in the opposite direction, in which an unconstitutional rule is implemented. So does the position according to which legislators too have an absolute obligation not to enact unconstitutional rules. Even if that obligation is absolute, it will be carried out by legislators who make mistakes, and sometimes will err, thinking that an unconstitutional proposal is constitutional.

In dealing with the possible implementation of unconstitutional rules, the Constitution seeks to prevent, but nevertheless accepts, human error. A conscientious legislator should do the same, and be prepared to accept possible error in the pursuit of the public good. For the legislator, the relevant errors come when an unconstitutional rule is implemented despite its unconstitutionality. Suppose that a Representative is voting on a bill, one provision of which is in that Representative's view, wholly unconstitutional but that is believed to be valid by others. If the bill is passed and the provision is implemented, an undesirable consequence will have followed from passage. But if the bill has other important benefits, the Representative can support it in good conscience. That is exactly what the ratifiers

of the Constitution did, accepting a risk (a near certainty) that some unconstitutional rules would be followed, in order to achieve goals that were worth that price.

This reasoning implies that a conscientious Senator or Representative could not vote for legislation in the hopes that a provision that legislator believed to be unconstitutional would be implemented. To do so would count as a benefit what the Constitution counts as a cost and so would not be the proper performance of the legislative function. But legislation is about trade-offs, and a good to be achieved by a constitutional provision may well justify the harm inflicted by an unconstitutional one that is implemented when it should not be.

This conception of congressional duty regarding the constitutionality of legislation vindicates the Senators and Representatives over the decades who have voted for legislation despite constitutional doubts. It is consistent with a practice in which Senators and Representatives are genuinely concerned about the constitutionality of the legislation before them but do not feel an unqualified obligation never to support any bill with any unconstitutional, or possibly partly unconstitutional, provision. Without conducting an inquiry into Congress's behavior through history, I will suggest that it is at least as consistent with this account of congressional duty as with the account that has an absolute obligation.

Understood as qualified and not absolute, the obligation to avoid creating invalid rules that might be treated as valid does not imply that the Constitution's provisions about congressional power operate at rule level. The qualified obligation is designed for situations of uncertainty and requires legislators to make good-faith judgments about competing considerations. That obligation is consistent with constitutional rules that make some legislation invalid as applied, the operation of which, therefore, cannot be perfectly predicted by legislators at the time they legislate. The possibility that some applications may be invalid is, by itself, no problem, provided that they are treated as invalid. The possibility that an invalid enactment may erroneously be treated as valid is a consideration for legislators to weigh, but it is not a result that must be avoided come what may. This qualified obligation is one that conscientious members of Congress can comply with even if they do not know for certain the constitutional status of their legislation when they legislate.

2. Exercises of Final Decisional Authority and Constitutional Duty

While arguing that legislators have a qualified obligation concerning constitutionality, I have also argued that judges have an absolute obligation. Judges' function entails applying the law; the Constitution sometimes provides the applicable rule and always constrains the sub-constitutional law, and so judges must always apply the Constitution if they are to support it as they promise. That contrast invites the question whether an important concept is at work in the distinction between legislators considering their powers and judges deciding cases. I will argue that there is, that the judicial function is a leading example of a more general category of governmental function, and that constitutional provisions that establish such functions confer a conceptually distinctive form of power.

This Part of the Article begins by elaborating on the distinction between courts and legislatures by way of understanding the different kinds of constitutional rules that empower them. It then discusses the justification for the principle that final decisional authority brings with it an absolute duty to exercise that authority in accordance with the law being applied and concludes by seeking to identify other contexts in which the Constitution gives final decisional authority and an accompanying absolute duty.

Judicial power is the power to be wrong. Judgments bind whether or not they rest on correct determinations of fact and law. Because the function of adjudication is to provide final resolution of disputes, the outcomes of adjudication must be respected without regard to their correctness. As Justice Jackson said, the Supreme Court of the United States is not final because it is infallible; it is infallible only because it is final.⁶⁰

Although courts' authority does not rest on the substantive correctness of their decisions, purported judicial acts nevertheless must comply with the law, including the Constitution, in an important sense. Legal rules identify individuals as judges, constitute courts out of judges, and establish the jurisdiction of courts.⁶¹ Those rules must

⁶⁰ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").

⁶¹ *See, e.g.*, U.S. CONST. art. III, § 1 (explaining how Article III vests the judicial power of the United States in the federal courts); *id.* (referring to the fact that courts are composed of judges); *id.* art. III, § 2 (setting out the potential jurisdiction of the federal judiciary); *id.* (dealing with the jurisdiction of the Supreme Court); *id.* (explaining how the Appointments Clause of Article II governs appointments of federal judges and other officers).

be relied on by non-judicial actors, including executive officials who enforce judicial decrees when necessary. In order to perform their function, the United States Marshalls must be able to distinguish judges from imposters, and legal rules make that distinction.

With respect to judicial power, the relevant constitutional rules identify an authoritative decision-maker. Matters are more complicated with respect to Congress. Some rules identify the individuals who make up the legislature. Those rules are applied by other actors, private and official, who must know whether purported acts of Congress really come from Congress. Those rules in general provide necessary but not sufficient conditions for legal effectiveness. In order to be valid, duly adopted statutes must also be consistent with the provisions granting and limiting federal legislative power. Those provisions, too, are applied by others, for example, by the courts in conducting judicial review. Judicial and legislative powers are thus asymmetrical in this respect because the courts have power to act finally whereas Congress, in general, does not.

That asymmetry in function helps justify an asymmetry in duty. The principle that judges have an absolute obligation to apply the law to the best of their ability may seem obvious, but the obvious often is so for a good reason. Courts are central to the enforcement of the law. To say that judges may decide for themselves whether to enforce the law would be to drain the legal rules of their mandatory character in a crucial context and turn them into mere admonitions.⁶² That same reasoning applies analogically whenever some official or institution has the last word in applying a legal norm. Consider the age requirement for membership in the House; Representatives must be at least twenty-five years old.⁶³ The qualifications of Representatives are conclusively assessed by the House.⁶⁴ If its members have no obligation to look to the age requirement in resolving an eligibility contest, then the age requirement has no legal consequences whatsoever, and Representatives may in conscience simply disregard it. It is one thing to say that not all legal rules are judicially enforced; the role of the

62 That is not to say that legal norms are mere admonitions if they are not judicially enforced at all. It makes perfect sense to say that someone other than the courts is charged with enforcing, or following, a legal rule. According to the position I am urging here, when that happens, someone else will have an uncompromising obligation to enforce or comply. The unreasonable arrangement is one in which the courts are charged with finally applying the law in order to enforce it, but have no obligation to apply it.

63 U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years")

64 *Id.* art. I, § 5 (explaining that each house of Congress is the judge of the elections and the qualifications of its own members).

House and Senate as election judges proves that the Constitution works that way. But a constitutional rule that binds no one violates the basic principle of pragmatics that provisions are included in order to make a difference.

As this reasoning demonstrates, Professor Rosenkranz poses a profound question when he asks, to whom are constitutional provisions addressed?⁶⁵ Although not all of them create duties, so that not all of them can be violated, different constitutional rules do have different relationships with different addressees. Rules about legislative power tell members of Congress what they are capable of doing but generally do not tell them what they are required to do. Those same rules, addressed to the courts, produce a different effect because they interact with the courts' obligation to decide according to law. As addressed to private people, the rules about power have yet another relationship with their audience. They figure in the process by which private people determine their own legal obligations, rights, powers, and liabilities. In doing so, private people are subject to the possibility that a court will finally interpret their legal positions in a way that the private person believes to be erroneous but that will nevertheless be binding.

With that great power of conclusive decision-making comes the great responsibility to exercise it according to the law. One possibly paradoxical result of the interpretation presented here is that power generally does bring duty with it but that power-creating and power-limiting provisions generally do not. The Commerce Clause, for example, does not impose on Congress a duty to exercise the power it grants in any particular way, precisely because it grants only a limited power. Purported legislation in excess of that power is, pro tanto, void and hence, no exercise of power at all. Duties arise only when a decisional power makes it possible for an actor, like a court, in a sense, to out-run the Constitution, for example, by holding valid a statutory provision that is invalid for lack of granted power. A court does have power to decide a case on an incorrect legal premise, and therefore has an obligation to get the premise right.

In this connection, I have so far discussed the Constitution's provisions concerning the powers of Congress, its provisions identifying the individuals who together make up that body, and the rules performing a similar function for the courts. The latter but not the for-

⁶⁵ Rosenkranz, *Subjects*, *supra* note 8, at 1240–41 (arguing that the President and not Congress violates the Fourth Amendment because the Fourth Amendment's command is implicitly directed to the executive, in contrast with the First Amendment, which addresses its command to Congress).

mer, I have suggested, convey power to act conclusively. Each house's power to judge elections, by contrast, and the Senate's power to try impeachments, involve final authority and hence a binding obligation to follow the law. This observation raises the question; where else does the Constitution adopt that strategy?

Although I will not attempt to answer that question systematically, two aspects of the Constitution are worth discussing here because they involve possible conclusive decisional authority in Congress and hence the absolute duties that accompany such authority. The first has to do with Congress's internal decision-making process. Like the composition of the legislature, that topic is treated at some length by the Constitution.⁶⁶ Those procedural rules might operate as criteria for the validity of the laws that Congress produces. Under that approach, courts would assure themselves that federal laws they were called on to apply had been adopted in conformity with the applicable procedures, or at least those prescribed by the Constitution itself. In general, the courts do not do this. According to the Supreme Court's "enrolled bill doctrine," a form of finality operates in this context.⁶⁷ When the Speaker of the House and presiding officer of the Senate present an enrolled bill to the President, their certification is treated as conclusive by the courts. The judiciary will not entertain the argument that the enrolled text was not the text voted on,

66 *E.g.*, U.S. CONST. art. I, § 7 (stating the constitutional requirements for both a bill to become law and the presidential veto).

67 *Field v. Clark*, 143 U.S. 649 (1892), explains this doctrine. It states,

The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. . . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

Id. at 672.

Professors Adler and Dorf, discussing the issues raised in *Field*, suggest that some constitutional provisions may be "perspectival" in the sense that "the content of some constitutional norm, from the perspective of one actor, might be different from its content viewed from another perspective." Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1178 (2003). Although they often will produce similar consequences, the ideas of perspectival provisions and final decisional authority are different in that the former is about the content of the provision being applied, while the latter is about the authority of the officer or institution applying it.

or that the proper procedures were not followed. If the enrolled bill doctrine is sound, the Speaker and President of the Senate have an unqualified obligation to enroll only those texts that have passed in compliance with applicable constitutional and congressional rules. If they did not, there would again be a legal rule that bound no one.

In general, however, congressional exercises of power are not final in the way that a judgment is final. Private people and courts are free to decide whether Congress's purported laws satisfy the Constitution's criteria for validity. That may not be the case, however, with respect to one very important power. Article I, Section 8 concludes by giving Congress power to make all laws that are necessary and proper to carry into execution its other powers and those of other federal officers and departments. Whether one legal rule is necessary and proper to carry out some purpose is a question of means and ends, a question that very often requires practical judgment. Whether the First and Second Banks of the United States were useful for carrying out federal powers that involve the transfer of funds, for example, depended on the effectiveness of other ways of moving money, such as state banks. That was a question of practical judgment, not legal interpretation.

M'Culloch established the principle that when courts assess the constitutionality of legislation adopted under the Necessary and Proper Clause, they defer to Congress's practical judgments.⁶⁸ Certainly, there is good reason for them to do that. Senators and Representatives are chosen in part because of their acumen in public affairs. The wisdom, learning, and uprightness recited in federal judicial commission may or may not include good policy judgment. If the Constitution itself requires such deference, then it confers on Congress a degree of finality. Finality brings duty with it, so if others owe Congress that deference, Congress owes the country and the Constitution its best judgment on those questions of means and ends. Senators and Representatives also owe their constituents sincerity in this inquiry: they should invoke the power when, but only when, they regard it as a means to an end, not an end in itself.

Whether the Constitution itself requires that courts defer to Congress's means-ends judgments is a difficult question. Also difficult is the question whether Congress has any duty to ensure that its legislation is consistent with the Constitution if the courts decide to give it

⁶⁸ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420–21 (1819) (stating that judicial consideration of the Necessary and Proper Clause should not diminish the right of Congress to use its discretion in enacting laws executing the constitutional powers of the government).

deference but do not do so because the Constitution requires them to. If such deference is required by the Constitution itself, then with respect to this particular power, Professor Rosenkranz's analysis is applicable even if most powers have no duty with them: exercises of power under the Necessary and Proper Clause are valid or invalid as rules, not as applied to particular cases. The means-end relationship is between the rule and the goal, not between specific applications of the rule. *M'Culloch* upheld the Bank of the United States in all of its operations, not only when it acted as the federal government's fiscal agent.⁶⁹ The question was whether the Bank was useful, not whether every transaction that it engaged in was useful.⁷⁰ As Professor Rosenkranz explains, Congress acts prospectively and generally, so its decisions about necessity and propriety are general and prospective and thus about rules. If those decisions are entitled to deference, the deference applies to a decision about a rule, which should stand or fall as such.

B. Physical Acts of Government Agents and Congressional Power

The vast bulk of constitutional provisions are about juridical acts. Congress engages in a juridical act when it passes a statute, a court performs such an act when it issues a judgment, and the President does so when he makes a treaty. Not only the provisions that grant and limit power, but the more numerous provisions governing the staffing and procedures of institutions are in the service of those institutions' ability to engage in juridical acts. A few constitutional rules, however, may be interpreted as governing physical actions. A search or seizure is a physical act, for example.⁷¹

⁶⁹ *Id.* at 436.

⁷⁰ It is easy to become confused on this issue and ask, for example, whether the statute at issue in *United States v. Lopez*, 514 U.S. 549, 551 (1995), could have been applied to possession of a gun that had moved in interstate commerce or to an act of possession that somehow affected interstate commerce. The Constitution, however, does not give Congress power to regulate conduct that affects interstate commerce or objects that have been transported from one state to another. Instead, it gives Congress power to regulate commerce, and to make laws necessary and proper to carry out that power. Regulation of conduct that affects interstate commerce may or may not be so necessary and proper, depending on the end Congress is seeking and the relationship between that end and the means of regulating conduct that is not itself interstate commerce. If Congress has made a judgment about means and ends that is entitled to deference, that judgment will be about the rule that Congress has adopted, and the deference should apply to the rule as such, not application by application.

⁷¹ U.S. CONST. amend. IV (explaining that the Fourth Amendment secures the right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures).

A physical act is not, as such, an exercise of power, so it is natural to think that rules that concern physical acts impose duties. The Supreme Court has found that the Fourth Amendment imposes a duty on individuals who act under color of federal law, a duty that can be enforced through damages and injunctive proceedings.⁷² Professor Rosenkranz identifies some constitutional rules, including the Fourth Amendment, as susceptible to violation only by the executive. Such rules, and only such rules, give rise to as-applied unconstitutionality in his system.⁷³ Rosenkranz's reference to violation, and his analysis more generally, strongly suggest that he, too, regards provisions that deal with physical acts by executive officers as imposing duties (and perhaps creating correlative rights).

As the Court recognized in *Bivens*, there is another approach to the Fourth Amendment, one that prevailed for many decades. According to that approach, the Constitution does not itself create duties. Rather, it limits the reach of official privilege and thus sometimes puts government officers in the legal position of private persons without the license to invade private rights that officers often have. In conducting a lawful search and seizure, federal officers may use force and damage private property without incurring damages liability. Lawful searches and seizures are privileged. The Fourth Amendment takes that privilege away from unreasonable searches and seizures. An unreasonable search may be a tort, and if it is, the officer who conducts it will not have the defense of official privilege.⁷⁴

That traditional understanding is readily explained in terms of governmental power, even though the constitutional rules involved deal with physical acts. One way to express the principle that the Constitution is fundamentally about power is to say that its basic function is to identify acts that are on behalf of the government, distinguishing them from those that are not. Rules granting and withholding legislative power perform that function by determining whether a purported act of legislation is truly legislation, and thus truly on be-

72 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (“[A] federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”).

73 Rosenkranz, *Subjects*, *supra* note 8, at 1240–41 (arguing that it is the President who violates the first clause of the Fourth Amendment by exercising an unreasonable search and that a constitutional claim under this clause is an “as-applied” challenge).

74 *See Bivens*, 403 U.S. at 390–91 (“In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals.”).

half of the government. If a private person signs a document purporting to be an enrolled bill, nothing will happen because that person is not the President. The constitutional rules identifying someone as President and conferring on that individual the power to sign bills into law identify purported official acts that are truly official and exclude those that are not. Just as a juridical act by someone who is not an official at all is ineffective, so is such an act by someone who is an official but whose power does not extend to that act. Neither officials nor private persons can exercise power they do not have; the difference is that officials have some power, while non-officials have none at all.

A similar distinction applies with respect to physical acts such as searches. Agents of the government are privileged to engage in conduct, such as breaking down doors, that would be wrongful if done by private people. Official privilege, of course, is available only to those who act on behalf of the government. Private people, and officers of the government engaged in private acts, do not have this privilege. A provision like the Fourth Amendment can ensure that an unreasonable search will not be eligible for governmental privilege by providing that it is not to be treated as being on behalf of the government. So understood, the Fourth Amendment is like the grants and limits of power in that it identifies acts that are and are not official. The difference is in the nature of the acts involved: to say that a juridical act is or is not official is to grant or limit power, while to say that a physical act is or is not official is to make available or to withhold official privilege.

So understood, the Fourth Amendment limits the privileges available to government officers without itself imposing any duties.⁷⁵ It thus operates as a limitation on the power of the legislature that produces application-level invalidity. This analysis accords with Professor Rosenkranz's in that it associates as-applied unconstitutionality with constitutional provisions that apply to the physical acts of government officers. It differs from his approach in that it does not require that such provisions impose duties on officers and so does not condition unconstitutionality on a constitutional violation by an officer.

⁷⁵ Although the Court in *Bivens* concluded that the Fourth Amendment does impose a duty, and does create a cause of action, this was in addition to, and not a substitute for, the Amendment's function as a limit on privileges. *Id.* at 391–392 (“[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.”).

Limitations on congressional power that work this way do not imply that legislators have duties to avoid this form of invalidity. Such a duty would not accomplish anything, so there is no reason to attribute it to provisions that are already vindicated through nullity. Consider a statute authorizing Environmental Protection Agency enforcement officers to inspect certain business facilities during ordinary business hours. Very likely, the vast bulk of such inspections will be reasonable. Only in unusual circumstances will one be unreasonable. Those situations, being unusual, will not be readily identifiable in advance by a member of Congress. The most that Congress could do to guard against the possibility of an unreasonable search would be to add a proviso that only reasonable searches are authorized. That is true anyway. If legislators have an absolute duty not to enact statutes that can ever have unconstitutional applications, then they are obliged to draft that way. But such provisos are mere boilerplate and do not reflect the substantive judgments that legislators are elected to make; they just repeat the Constitution and tell enforcement officers and courts what they already know. A requirement that Congress include such nods to the Constitution would not add anything to the as-applied invalidity of the statutes in question. It would be pointless.

Under the account of legislator duties developed in this Article, a member of Congress could, in good conscience, vote for the inspection statute without the disclaimer of unreasonable searches. The practical difference between the statute with and without the disclaimer would be zero or very close to it. Either way, executive officers and courts will make their own judgments about the reasonableness of searches, uninfluenced by Congress's statements on the subject. The interest in avoiding actual results that the Constitution is designed to prevent would give hardly any reason to do no more than repeat the obvious. If it were at all costly, a conscientious legislator could leave it out.

III. THE FIRST AMENDMENT AS A RULE ABOUT RULES

Even if legislators do not generally have duties arising from the grants and limits of legislative power, and if the First Amendment in particular imposes no duties, there is good reason to believe that the latter operates with respect to rules and not their specific applica-

tions.⁷⁶ According to this reading, the First Amendment operates at rule level because it is directed to the content of rules and the decisions of legislatures. As I will explain, the text readily lends itself to that interpretation.

While the text suggests that the First Amendment makes rules as such valid or invalid, that reading may seem to be difficult to square with contemporary doctrine. Certainly, the Supreme Court's cases exhibit some rule-level invalidity, often under the label of overbreadth. But it is just as well established that some rules are invalid only as applied in some circumstances, not all. I will argue, however, that as-applied invalidity can be explained as a species of rule-level invalidity. That explanation depends on an account of severability, according to which, severance, too, operates at rule level. In this view, severance consists of replacing constitutionally impermissible norms with fallback norms that are explicit or implicit in the relevant legislation. Because it replaces one rule with another, this form of severance accommodates the assumption that the First Amendment invalidates rules in their entirety, not only in particular applications. This way of thinking about severance provides a formal reconciliation of a First Amendment that operates at rule level and outcomes that appear to include invalidity as applied. In addition, it helps explain why the First Amendment limits the rules that the legislature may adopt, even when some of the applications of those rules could be achieved constitutionally by another rule.

As Professor Rosenkranz stresses, the First Amendment refers to Congress. That might indicate only that it limits legislative power, which by itself would have no implications for the difference between facial and as-applied invalidity. The Fourth Amendment, I have argued above, limits legislative power but operates by picking out applications. Nevertheless, the reference to Congress points in the direction of a rule that deals with the output of the legislature. That output takes the form of rules, which in turn have applications. More important in this connection is that the text then says that Congress shall make no law. A law is a rule, a general norm that operates in concrete situations by picking out certain aspects of those situations and prescribing the consequences thereof. A ban on arson forbids specified actions that constitute setting fire to a structure, without regard to other aspects of those actions. As far as the law against arson

⁷⁶ The previous Part discussed the First Amendment, along with other provisions of the Constitution, that grant and limit federal legislative power. This Part is entirely about the First Amendment and does not address whether other grants or limitations operate at a rule level or application level.

is concerned, it is irrelevant whether the fire was set as part of a terrorist campaign or in order to protest inadequate fire safety regulation. Laws are abstract and general.

To say that certain laws are not to be enacted, or shall be void, is thus readily interpreted as blocking the validity of certain rules and not others. Considered as a law, and hence as a rule, the ban on arson would not be a law abridging the freedom of speech, even though some of the actions to which it applies constitute expression. The analytical categories relating to power can be adapted to express this distinction.

If one person is able to alter another's legal positions, the former has power, and the latter has liability to the exercise of power. When Congress has authority granted by the Constitution, it has power, and those subject to that authority have liability. The opposite of power is disability. A minor, with only limited contractual capacity, has substantial disability with respect to making contracts. The correlative of disability is immunity. Potential contracting partners of minors have substantial immunity from the exercise of the minors' contracting capacity. So, if Congress cannot effect some change in the law, it is subject to disability and others are immune from that change in their legal positions.

The standard categories are designed to describe results, not the rules that produce those results.⁷⁷ Under the Constitution, Congress can lack power and have disability either because it has no enumerated authority or because an otherwise-applicable grant of authority is subject to an affirmative limitation like the First Amendment. Affirmative limitations like the First Amendment produce both disabilities for Congress and immunities for private persons. Because disability and immunity correlate with one another, they go together, and neither is more fundamental than the other.

Although that is true of the categories themselves, they do suggest a way of conceiving the rules that produce those results. Just as duty is conceived from the standpoint of a potential actor, so power and disability are conceived from the standpoint of a potential juridical actor. Liability and immunity use the standpoint of the person whose

⁷⁷ Duties, liberties, powers, rights, and the other analytical categories "are simply characteristic *positions* which people have in authoritative directive arrangements. Put differently, they are the consequences of characteristic kinds of directions which people are given in such arrangements." HART & SACKS, *supra* note 23, at 128. In distinguishing disability rules from immunity rules, I am seeking to identify the different authoritative directive arrangements that give rise to the positions.

legal positions are potentially acted upon.⁷⁸ The First Amendment is concerned with one particular legal position: liberty to make decisions, for example concerning religious exercise. From the standpoint of the person who wishes to exercise religion or speak, the important question may be whether that conduct is permitted or not. If the conduct is subject to a prohibition, the content of the prohibition is likely to be of secondary importance. Someone who plans to deliver a fiery speech in public may well not care whether it is forbidden as an unlawful assembly, or as disturbing the peace, or as making excessive noise after 9 P.M.

For the individual subject to regulation, it would be useful if the Constitution were to describe kinds of conduct that could not be forbidden, could not be subject to adverse consequences, or could not be subject to adverse consequences without some strong justification. Such a description, unrelated to the criteria used by potentially adverse laws, would create a sphere of liberty protected against government control. It would limit zoning laws as well as laws about political demonstrations. I will call a constitutional norm based on such a description an immunity rule. Such a norm would, of course, have consequences with respect to the other analytical categories. An individual with immunity because of it would not have liability. If the norm were a limit on federal power, Congress would have disability and not power.

As Professor Rosenkranz shows, a constitutional immunity rule would pose a problem for members of Congress seeking to legislate in a manner consistent with the Constitution. If the Constitution also imposes a duty on legislators, they would not be able to comply with it in any useful fashion. Congress could include a boilerplate statement that the statutory rule is inapplicable when applying it would be unconstitutional. That would discharge the legislators' duty but would leave one to wonder why the Constitution imposed that duty.

By contrast, a constitutional limitation formulated from the standpoint of the legislature, describing rules that may and may not be validly enacted, could give legislators meaningful guidance that would actually affect their decision-making. If the First Amendment requires that rules that target expression be narrowly tailored to a compelling interest, Congress will know that it may adopt such laws

⁷⁸ See *id.* at 134–37 (discussing the characteristic positions of non-actors).

only when it is pursuing such an interest and will have good reason to be careful in its drafting.⁷⁹

A provision like the First Amendment, thus, might well adopt the standpoint of the legislator rather than the person subject to legislative power. It might provide descriptions of legal rules that are not consistent with it and thereby guide legislators in devising rules that are. A constitutional limitation that describes impermissible rules, and thus operates at the rule level and not at the application level, may be called a disability rule. Such a rule, of course, would negate power, produce immunity, and negate liability. Unlike an immunity rule, a disability rule readily could provide useful information to legislators, information that would enable them to comply with a duty or achieve their goal of valid legislation.

If the First Amendment contains only disability rules, then it always leads to facial invalidity. If it contains immunity rules, then it will sometimes lead to as-applied invalidity. If only immunity rules are to be found, the First Amendment will lead to facial invalidity only when it is possible to say that every application of a rule must necessarily run afoul of the immunity called for by the Constitution. This is the kind of facial invalidity contemplated by the Court's well-known and controversial statement in *United States v. Salerno*,⁸⁰ which says that facial challenges are difficult to sustain because they can succeed only if the party challenging the statute can show that every possible application of the rule is separately invalid.⁸¹

Current First Amendment case law can be accounted for only if there are at least some disability rules. A standard example involves flag-burning. Rules forbidding it are invalid as such, and hence invalid even when applied to conduct that permissibly could be punished pursuant to some other rule.⁸² Burning a stolen flag, for example,

79 Congress's reason for drafting this way need not result from any duty to do so. The incentive to produce a valid as opposed to an invalid law is substantial, even if the result of non-compliance with the First Amendment is only nullity.

80 481 U.S. 739 (1987).

81 *Id.* at 745 (holding that a facial challenge to a legislative act is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the act would be valid, and establishing that respondents have failed to demonstrate that the Bail Reform Act is facially unconstitutional).

82 *Texas v. Johnson*, 491 U.S. 397 (1989), held that Johnson, who burned a flag, could not be convicted under Texas's statute forbidding the desecration of venerated objects. The State of Texas argued that the application of the statute to Johnson could be vindicated on the grounds that it would prevent breach of the peace, as burning a flag may lead to violence. The Court responded that Texas had another statute forbidding breach of the peace, implying that when the two statutes overlapped and the breach of the peace law was applied for the legitimate reason of preventing violence, it could forbid an act of flag

may be punished as destruction of property. An immunity rule cannot produce that result, nor can any reading of the First Amendment that leads only to as-applied invalidity. *Salerno's* broad statement cannot be squared with the Court's practice.⁸³ In Matthew Adler's phrase, the rights protected by the Constitution are at least to some extent rights against rules.⁸⁴

Whether the First Amendment makes some conduct immune from any rule that would regulate it, or otherwise produces as-applied invalidity, is a difficult question. There is good reason to think that it does not. Expression and religious exercise are actions; as John Hart Ely said, burning a draft card or a flag to convey a message is 100% speech and 100% action.⁸⁵ There is a difference between regulating actions that are identified by their expressive conduct and regulating actions that are not so identified, but an action is an action. That is how some rules that are facially void nevertheless have some applications that could be achieved by another rule. A constitutional immunity rule describes conduct that cannot be reached by any statutory rule, no matter what its content. It is very difficult to see what that description might be. Certainly, religious exercise and speech do not fit the bill, as many instances of both may be regulated under some other description.

The First Amendment definitely does not include immunity rules if it is true, as the Court sometimes says, that general and neutral rules may incidentally regulate religious exercise or expression without constitutional difficulty.⁸⁶ The easiest examples of general and

burning. 491 U.S. at 407–10 (asserting that the Court's holding will not disable the State of Texas from preserving the peace).

83 Professor Richard Fallon has described *Salerno's* treatment of facial and as-applied invalidity as part of the fallacious conventional wisdom on the topic. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 926–31 (2011) (discussing the conventional reasoning in regards to facial challenges in *Salerno*).

84 Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998) (discussing *Salerno's* conception of the facial invalidity of a rule). As the title indicates, Professor Adler's argument concerns the moral structure of the Constitution. My argument is about its analytic structure.

85 John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) ("But burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.").

86 *See Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

neutral rules are those that establish private rights without referring to constitutionally protected conduct. Individuals are not at liberty to use other people's property for First Amendment purposes.

If general and neutral rules may indeed restrict constitutionally protected conduct, then they are valid per se, valid in all of their applications.⁸⁷ And if there are rules that are wholly valid, no matter what conduct they are applied to, then there are no immunity rules because there is no conduct that may not be regulated by any rule.

Immunity rules, as I have defined them, are not, of course, the only kind of constitutional norm that produces application-level invalidity, though they are probably the most natural example. Any reading of the First Amendment that leads to application-level invalidity, however, encounters a serious textual objection. The text refers to laws, and laws are readily understood to mean whole rules. To call a single application a law is quite unnatural.⁸⁸ Yet, if rules are to be invalid as applied in some circumstances and not in others, the word "law" must include particular applications.

Despite the force of that textual reasoning, First Amendment doctrine is not limited to facial invalidity. It is filled with cases in which rules are invalid in some but not all of their applications, with the constitutional applications severable from the unconstitutional applications as far as both the Constitution and the statute involved are concerned.⁸⁹ The fact that application-level invalidity is so common

⁸⁷ I use terms like protected conduct to refer to the kinds of conduct that the First Amendment mentions. As the rule-based reading of the First Amendment itself shows, it is possible to refer to such conduct without implying that there are disability rules as I have defined them. In Professor Adler's terminology, a category of conduct can be protected against certain rules, not all rules that happen to affect it.

⁸⁸ That is true when the rules involved are statutory. Common law rules are different. They have no canonical verbal formulation but instead are found in their applications. "Moreover, even though the decisional doctrine is respected in later cases, its *ratio decidendi* is not imprisoned in any single set of words; and this gives it a flexibility which the statute does not have." HART & SACKS, *supra* note 23, at 126 (discussing the flexibility of the decisional doctrine). As far as the common law is concerned, one might well say that each application, or each application that meets some description, is itself a law. Congress, however, passes statutes that are single sets of words, prisons or not.

⁸⁹ For example, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court held that the First Amendment did not permit a private action to recover damages, under applicable federal and Pennsylvania statutes, for public disclosure of unlawfully intercepted private telephone conversations. The Court relied on facts specific to the case, in particular that the intercepted conversation was about a matter of public concern (negotiations of a collective bargaining agreement for public employees). *Id.* at 535. The implication was that application of the statutes in other cases would be constitutionally permissible, for example, if the intercepted conversations were wholly private and very sensitive in their content. In order for such a case to go forward, the Court would have to conclude both that

indicates that it has strong substantive appeal as an implementation of First Amendment principles.

One solution to this difficulty is to accept both facial and as-applied invalidity at the price of some stretching of the text. The word “law” may include specific instances as well as whole rules. Another solution is available, however, one according to which, all First Amendment invalidity is rule-level invalidity. That approach entails thinking about severability in terms that are more natural with respect to the severance of distinct provisions of a statute than to the severance of applications of a single rule from one another. Determining whether parts of a statute are severable from one another involves interpreting the statute in light of a contingency and identifying the statute’s guidance, implicit or explicit, concerning its operation in light of that contingency. The contingency is that the statute is, to some extent, unconstitutional.⁹⁰ When that contingency arises, it often raises the question whether one application or provision is conditional on the validity of another. In the leading severability case of *Alaska Airlines, Inc. v. Brock*,⁹¹ for example, Alaska Airlines was subject to labor-related regulation under a statute that empowered the Federal Aviation Administration as regulator and gave Congress a legislative veto over the agency’s decisions.⁹² Alaska Airlines argued that because the legislative veto was unconstitutional under *INS v. Chadha*,⁹³ and the regulatory provisions were implicitly conditioned on the availability of that congressional check on agency pow-

the publication could be prohibited consistently with the Constitution and that the different applications of the statutes were severable from one another.

In considering severability, it is important to see that it operates at different levels. As *Bartnicki* suggests, different applications of the same rule may be severable from one another. Different provisions of statutes, which generally mean different rules, may also be severable or inseverable from one another. I will argue that the two forms of severability have more in common than may seem, but they are also significantly distinct from one another. For example, it is possible for one rule in a statute to be invalid as such without the entire statute being void. When that happens, the applications of the rule are, in a sense, inseverable from one another (though not necessarily in the sense in which that term is normally used), but the different provisions are severable.

90 The inquiry is often put by asking what the legislature would have done had it known that the statute as adopted was partly or wholly unconstitutional. Another way of putting the same question, more consistent with thinking about statutory construction in terms of meaning as opposed to legislative preferences, is to ask how the statute deals with that possibility. The former formulation suggests an inquiry into legislators’ desires, the latter an inquiry into the statute’s directives concerning a situation that has arisen under it.

91 480 U.S. 678 (1987).

92 *Id.* at 680–82 (describing the scheme under the Employee Protection Program and noting that it contains a legislative-veto provision).

93 462 U.S. 919, 951 (1983) (holding that it is unconstitutional for one house of Congress to unilaterally veto decisions made by the executive branch).

er, the regulatory provisions were inoperative.⁹⁴ The Court found the legislative veto severable from the substantive requirements of the statute and so rejected the claim that those requirements were inoperative.⁹⁵

Sometimes, legislatures address the question of severability with a proviso stating that if any provision or application of a statute is found invalid, other provisions and applications shall remain in force.⁹⁶ Such clauses reflect the possibility that some, but not all, applications of a rule may be unconstitutional. Constitutional limitations can be more complicated than that, however, and sometimes Congress explicitly addresses more complex contingencies. The Constitution disallows some combinations of statutory provisions, each of which is innocuous by itself. Here, the leading case is *Bowsher v. Synar*,⁹⁷ which involved the Gramm-Rudman-Hollings deficit reduction act. The constitutional problem arose from the combination of a grant of power to an officer and a provision regarding the removal of the officer. The statute gave the Comptroller General authority to calculate and order certain reductions in appropriations.⁹⁸ That power was unobjectionable. It could have been conferred on the Secretary of the Treasury, for example, without difficulty. The Comptroller General was removable by statute.⁹⁹ By itself, that too was unobjectionable because Congress may provide for removal by statute of some people who work for the government.

The Court concluded, however, that the combination was not constitutional. Implementing statutes is an executive function, and Congress may not have the kind of influence over an officer who per-

⁹⁴ *Alaska Airlines*, 480 U.S. at 682–83 (describing Alaska Airlines' argument that the veto provision was unconstitutional under *Chadha* and that the entire program therefore was invalid because the veto provision was not severable from the rest of the statute).

⁹⁵ *Id.* at 697 (holding that the language, structure, and legislative history of the statute provided an uncontradicted view of congressional intent regarding severance of the veto).

⁹⁶ Typical is the severability provision of the Immigration and Nationality Act, which the Court addressed in *Chadha*, as follows: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 462 U.S. at 932 (citing the separability note following 8 U.S.C. § 1101). That clause addresses both the severability of applications of a single provision from one another and the severability of separate provisions from one another.

⁹⁷ 478 U.S. 714 (1986).

⁹⁸ *Id.* at 718 (noting that the statute required the Directors of the Office of Management and Budget and the Congressional Budget Office to report, jointly, their deficit estimates and budget reduction calculations to the Comptroller General).

⁹⁹ *Id.* at 727–29 (noting that although nominated by the President, the Comptroller General is only removable by Congress).

forms such functions that comes with removal by statute.¹⁰⁰ Together, the power and the removal provision were inconsistent with the grant to Congress of legislative and not executive power, even though neither the power nor the removal provision was unconstitutional in isolation.

The drafters of the Gramm-Rudman-Hollings legislation were aware of the constitutional difficulty. They wanted to prepare for the possibility that their preferred arrangement was unconstitutional. A simple affirmation of severability, however, would not have been adequate. When two provisions in combination create the constitutional problem, saying that the constitutional part should be preserved when the unconstitutional part is lost does not provide adequate guidance. Neither part alone is either constitutional or unconstitutional. Nor did the drafters wish simply to identify one provision that should survive; their second choice arrangement was neither one in which the sequestration process did not exist at all nor one in which the power to decide on sequestration was held by the Comptroller General, and the Comptroller could not be removed by Congress. If they could not have the power in the Comptroller, the drafters wanted the power to be with someone else. As a result, the statute contained an elaborate fallback arrangement that would operate if the primary arrangement was unconstitutional.¹⁰¹

As Michael Dorf has explained, conventional severability provisions are one form of fallback or back-up law.¹⁰² Standard severability clauses provide explicitly for two common contingencies: those in which a single provision in a statute is invalid, and the question arises whether other provisions are still operative, and those in which a provision is invalid in one application, and the question arises whether

100 See *id.* at 722 (noting that Congress may not have an active role in supervising those who execute the law); *id.* at 727–32 (noting that the congressional removal power gives Congress substantial control over the Comptroller General).

101 Under the fallback arrangement, the joint report of the Director of the Office of Management and Budget and the Director of the Congressional Budget Office, which under the primary rule was presented to the Comptroller General, was presented to a special joint committee of Congress. The joint committee would report deficit reduction legislation on an expedited schedule, with the reported legislation governed by special rules calling for an up-or-down vote in each house. *Id.* at 718–19.

102 Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 305 (2007) (“The most widely used kind of fallback provision is a severability clause, which provides that in the event that the original law is held partly invalid, a fallback of the original law minus the invalid provision or application will take effect.”). Professor Dorf goes on to explain that “[l]ess commonly, fallback law takes the form of substitute provisions, rather than merely the truncated version of the original law that a severability clause produces,” and he uses the Gramm-Rudman-Hollings legislation as an example. *Id.*

other applications of the provision, or other provisions, are still operative. Standard severability clauses do not address the situation in which a provision is wholly invalid, and the question is whether some similar provision is available as a fallback. That contingency is one for which Congress can provide, explicitly or implicitly, even though making such arrangements explicitly is unusual.

Rule-level invalidity under the First Amendment is like the situation in *Bowsher* in that the constitutional flaw is with a whole, not just one of its parts. In *Bowsher*, the whole was made up of multiple provisions. With rule-level invalidity, the whole is the rule as opposed to its applications. If a rule is invalid as a whole, it cannot be severed into permissible and impermissible applications.

The possibility of a fallback arrangement explains how a rule can be virtually severable even if it is wholly invalid and hence not actually severable. Suppose that Congress makes it a crime to incite violence against federal officers but does not require a clear and present danger that violence will ensue. If someone is prosecuted after having incited violence in circumstances of clear and present danger, a fallback rule question arises. Under current doctrine, the statute could not validly be applied in circumstances lacking the clear and present danger.¹⁰³ If the First Amendment is an immunity rule, those applications would be invalid, and the question would be the ordinary severability question, whether other applications are severable. But if the First Amendment is a disability rule, the statute, as drafted, is wholly void. The question, then, is whether Congress has provided for a back-up rule that includes the clear and present danger requirement. If it has, the substitute version of the rule may be applied when the requisite danger is present. And if Congress may do that implicitly, and it has, or has done so through an ordinary severability provision that is read to produce a new rule when appropriate, then a substitute rule may be available even if Congress has not provided one in depth, the way it did in the Gramm-Rudman-Hollings statute.

This understanding of severability can account for the phenomenon of severance while remaining consistent with the principle that all invalidity is rule-level invalidity. It thus can reconcile a rule-level understanding of the First Amendment with both long-standing doctrine and the obvious appeal of severability, or its functional equivalent, in some circumstances. The presence or absence of an accepta-

¹⁰³ See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (holding that political speech allegedly inciting violence may be punished only when there is an imminent threat of lawless action or a “clear and present danger” of violence occurring).

ble fallback arrangement will determine whether a statutory rule is de facto severable even though, according to the rule-level reading of the First Amendment, no rule is de jure severable.

That reconciliation can be wholly formal, just another way of expressing the results in cases that do and do not find severability. There is substance here as well, however, both in this understanding of severability and in the more fundamental principle that the First Amendment is about legislative rules. As to severability through fallback rules, if that is how statutory norms can, in effect, be partially unconstitutional, then they should be wholly unconstitutional when no fallback arrangement is available. Some of the leading justifications and explanations for facial invalidity have just that built into them: they operate when there is not or cannot be a secondary norm. And as to the more basic idea that the First Amendment is concerned with rules as such, those same justifications and explanations are based on the characteristic weaknesses and strengths of legislatures as institutions.

Justice Hans Linde, in his classic article concerning facial invalidity, argued that the Supreme Court had rightly held the Ohio statute at issue in *Brandenburg v. Ohio*¹⁰⁴ to be void on its face.¹⁰⁵ In Justice Linde's view, all statutory rules that are justified by the prevention of criminal activity, and that seek to prevent it by identifying speech with impermissible content, are wholly invalid. He distinguished speech-specific rules from more general rules, such as a ban on obstructing the draft, that apply to speech in some circumstances. The latter might be permissibly applied to speech that creates a clear and present danger that the prohibited effect will come about, he maintained, but the former are wholly unconstitutional.¹⁰⁶

His argument emphasizes that the text of the First Amendment refers to a legislature and its product, law, and explains that textual focus with a rationale about the distinctive characteristics of legislatures and their decision-making process.¹⁰⁷ Because legislatures nec-

¹⁰⁴ *Id.* at 444.

¹⁰⁵ Linde, *supra* note 1, at 1165 (explaining that the Court held that the Ohio statute was unconstitutional on its face and did not address whether constitutional immunity applied to Brandenburg's conduct under the circumstances). Whether the Court so held in *Brandenburg* is subject to some doubt, but that doubt does not affect Linde's argument insofar as it concerns the First Amendment's meaning.

¹⁰⁶ *Id.* at 1174 (“‘Clear and present danger’ is of no use in judging the constitutionality of legislation that in terms restricts the permissible content of speech.”).

¹⁰⁷ *Id.* (“Legislation directed in terms at expression, and particularly expression of political, social, or religious views, or against association for the purpose of such expression, should be found void on its face. The factual circumstances of the particular instance of expres-

essarily operate in advance by adopting general and prospective rules, they cannot reliably describe the content of messages that will very likely give rise to substantive harms like obstruction of the draft or, as in *Brandenburg*, violence.¹⁰⁸ Linde illustrated the problem with the language of the New York Criminal Anarchy Act of 1902, which the Supreme Court had sustained, language that was used virtually verbatim in a large number of later state and federal statutes.¹⁰⁹ The New York statute was adopted in the wake of the assassination of President McKinley and was inspired by fears of revolutionary anarchists.¹¹⁰ In Linde's view, legislative judgment about dangerous messages made in 1902, directed at nineteenth-century bomb-throwers, was of minimal relevance to later circumstances, involving for example post-World War II Communists and the Ku Klux Klan in Ohio in the late 1960s.¹¹¹ He concluded that legislatures are institutionally incapable of making the kind of judgment that is necessary if only truly dangerous speech is to be suppressed.¹¹² Hence, their attempts to prevent violence by describing impermissible messages are laws abridging the freedom of speech considered as rules, and wholly invalid.

If Linde is correct, no fallback rule that operates by describing prohibited messages can be constitutional, even if the legislature adopts one. Although more general rules that sometimes apply to speech are not invalid per se on his account, it is hard to see why a legislature would adopt such a statutory norm as a fallback, rather

sion cannot logically bear upon the constitutionality of the law. This follows, I believe, from the text of the first amendment and from the nature of legislation, and it is confirmed by the experience with the contrary use of 'clear and present danger,' to which Justice Douglas alludes in *Brandenburg*.”).

108 *Id.* at 1175–76 (“[T]here is a constitutional difference [between rules that address acts and rules that address words], and . . . it is apparent when we focus on the legislative process, to which the first amendment was addressed, rather than on judicial defense of ‘protected’ expression, which is a later development. The objective conditions under which the particular expression occurs, the fourth element of analysis identified earlier—whether stated as ‘clear and present danger’ or some other formula—can be a factor at the time when suppression of that particular occurrence is before a court. It cannot easily be an element in the constitutionality of the decision to make a law proscribing a kind of speech or publication for the future. Yet the first amendment is addressed to that legislative decision, in the legislative forum, at that time.”).

109 *Id.* at 1176 (discussing that the New York statute was upheld as applied to Benjamin Gitlow in *Gitlow v. New York*, 268 U.S. 652 (1925)).

110 *Id.* (“To the extent that this enactment represented a legislative diagnosis of a substantive evil, the evil was presumably the threat of . . . the politics of anarchists.”).

111 *Id.* at 1178 (“A prescription . . . designed as an answer to 19th-century anarchy . . . was found constitutional in punishing the organization of the Communist Party immediately after World War II . . .”).

112 *Id.* at 1179–82 (outlining both the legislatures’ incapability to legislate speech and the undesirable outcomes of such legislation).

than simply adopting it as primary law. Linde's interpretation of the First Amendment, thus, would produce facial invalidity de facto, and not only de jure, because it would produce no virtual severability. Laws describing speech would be void, and there would be no fallback. And the First Amendment, on Linde's account, makes those laws void as such because of the way legislatures do their work.¹¹³

Linde's argument rests on the institutional limitations of legislatures. They are unable to describe, generally and in advance, the content of messages that are sufficiently likely to lead to harm sufficiently serious to justify the messages' suppression. His reading would invalidate certain rules, even though the conduct forbidden by the rule could be punished by another; that is, the characteristic feature of rule-level invalidity. Unconstitutionally overbroad rules have the same feature, as the term suggests: their vice is their sweep, meaning that some of the conduct they burden could legitimately be burdened by a less sweeping rule.

One standard explanation for the ban on overbroad laws rests on their supposed chilling effect. That explanation, I will suggest, itself rests on the institutional strengths of legislatures as opposed to their weaknesses. As Larry Alexander has explained, the overbreadth doctrine is justified on the basis of the chilling effect only when severance is inadequate.¹¹⁴ If those who plan to engage in conduct that may not constitutionally be burdened know that the application of the rule to them will be held invalid and severed, they will not be chilled. Their constitutionally protected conduct will be deterred only when constitutional doctrine and the courts that administer it are likely to make mistakes. Chilling will result from anticipated false negatives, in which the courts fail to properly identify impermissible applications. A constitutional principle that makes overbroad rules wholly invalid will assure private people that they need not worry about the rule at all, and so need not worry about errors in severing it

113 Although Linde stressed the text of the First Amendment, he did not address the point that the First Amendment itself applies only to Congress and not to the states. A very similar argument is available with respect to the states, provided that incorporation is accomplished through the Privileges or Immunities Clause, which refers to laws. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

114 Larry Alexander, *There Is No First Amendment Overbreadth (But There Are Vague First Amendment Doctrines); Prior Restraints Aren't "Prior"; and "As Applied" Challenges Seek Judicial Statutory Amendments*, 27 CONST. COMMENT. 439, 439-41 (2011) (arguing that vague First Amendment tests chill free speech, not overbreadth).

(though they must worry about error in applying the overbreadth doctrine).¹¹⁵

Overbreadth is a problem that constitutional doctrine and the courts that administer it cannot solve, so a legislature cannot solve it simply by including an ordinary severability clause. But a legislature can avoid the problem by drafting more narrowly. By doing so, the legislature can reduce the number of instances in which religious exercise or expression is restricted. If there are fewer such instances, there will be fewer opportunities for the doctrine and the courts to err on the side of constitutionality. Only the legislature can limit the opportunities to make mistakes because those opportunities arise in the application of legislative rules. Courts and constitutional doctrine take the substance of the non-constitutional law as given, but legislatures have the power to change it. The overbreadth doctrine reflects not just the incapacities of courts but the capacities of law makers.

As Alexander emphasizes, an ordinary severability clause cannot cure overbreadth because an ordinary severability clause simply invokes constitutional doctrine, and constitutional doctrine here is the problem, not the solution.¹¹⁶ In principle, a more circumstantial fallback rule could solve the problem and would go into effect if the primary rule were indeed overbroad. Such detailed fallback rules are very rare, and their rarity accounts for the fact that overbroad rules regularly are invalid and are replaced, not with a back-up arrangement, but with nothing.

Perhaps the most important source of rule-level invalidity in current doctrine is impermissible legislative purpose.¹¹⁷ A rule's purpose operates as to every one of its applications, so an impermissible purpose means that every application is ill founded. This principle too rests on the characteristics of legislatures, including one of the central strengths of legislatures. Purpose-based invalidity is subject to the

115 This account of the overbreadth doctrine assumes that it causes legislative rules to be invalid when they are adopted and not that it enables courts to make previously valid rules invalid. Individuals who engage in conduct that could be burdened by a narrower rule benefit from overbreadth limitations even though their conduct is not the reason that those limitations exist, but that does not mean that they lack standing to raise the unconstitutionality of the impermissibly overbroad rules that apply to them. Invalid rules may not be applied.

116 *Id.* at 441 (“[T]he vagueness of first amendment doctrines is the true source of the chilling effect [on speech] . . .”).

117 *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that the city council had the impermissible purpose of burdening religious exercise).

objection that the very same instance of conduct may be constitutionally protected or not, depending on the purpose of the rule that regulates it. Regulated parties who are lucky enough to have badly-motivated regulators have constitutional protection; those regulated by the innocent do not. If the First Amendment is about people's ability to express themselves or exercise their religion, it is hard to see why legislators' motives should matter.¹¹⁸

Legislators' reasons for acting, however, matter enormously in a democracy. Legislators are selected because the voters have confidence in those reasons. If a legal rule is adopted for some reason, and only that reason, the legislators' judgment is that, absent that reason, the legal system as a whole would be better without the rule. Particular rules, thus, are adopted because legislatures conclude that the rule will produce some good at the margin, compared to the legal system without the rule. To say that the First Amendment makes some purpose impermissible is to say that the Constitution contains a judgment that the achievement of the purpose would be undesirable. As far as the Constitution is concerned, producing the result that the legislature desires with that rule is bad and not good. If the Constitution overrides the legislature's conclusion that the marginal effect of a rule is good, the remaining legislative judgment is that the legal system without the rule was fine. Different results depending on legislative purpose are not arbitrary but reflect the principle that, subject to constitutional limitations, legislators decide what the law should be.

By way of example, suppose that a state legislature bans littering in order to make it more difficult to distribute political leaflets, and only for that purpose. That means that in the legislature's judgment, banning littering is not worth the trouble except for its effect on political leafleting. If the Constitution means that reducing political leafleting is undesirable in and of itself, and hence an impermissible purpose, then once the impermissible purpose is subtracted, the re-

118 This objection to purpose-based, rule-level invalidity is an instance of a more general objection to rule-level invalidity, which is that it produces different results for the same regulated conduct depending on the rule that is applied. See, e.g., Larry Alexander, *Rules, Rights, Options, and Time*, 6 LEGAL THEORY 391, 393 (2000) (illustrating that a criminal prosecution for the exact same offense may produce differing results depending on the rules that are applied in the proceeding). Alexander makes the point that the Constitution, by leaving so many policy questions open, assigns great importance to legislative bodies. *Id.* at 398 (“[Optional application of rules] accounts for the relative importance the Constitution gives to the legislative bodies, their selection and their powers”). His explanation of rule-level constitutional norms, which I believe is consistent with mine, does not rely on the interaction between legislative and constitutional judgments concerning desirable results the way mine does.

maintaining legislative judgment is that banning littering is not worthwhile. By contrast, a ban on littering adopted for permissible purposes, and so valid, reflects a different legislative judgment, according to which, reducing littering is worthwhile without regard to its effects on expression. Representative government is supposed to produce different policy results depending on the different judgments of representatives.¹¹⁹

Inquiry into purpose has built into it inquiry into fallback rules. To conclude that a rule has only an impermissible purpose implies that it would not have been adopted had the legislature known that it could not pursue that goal. The back-up rule is no rule at all.

In both its text and its doctrinal elaboration, the First Amendment is about the decisions of legislatures, decisions that take the form of general prescriptions and not specific applications. It imposes disabilities on Congress, from which immunities of individuals follow. The First Amendment is a rule about rules.

119 The seeming arbitrariness comes from neglecting the aspects of legislative choice that are constrained by the Constitution. Although legislators may not act on impermissible purposes, they are free to decide whether to pursue permissible purposes or not.