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Rights Against Rules: The Moral Structure of American Constitutional Law

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RIGHTS AGAINST RULES: THE MORAL STRUCTURE OF AMERICAN CONSTITUTIONAL LAW

*Matthew D. Adler**

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INTRODUCTION

What is the moral content of constitutional rights? In one sense, the “moral reading” of the Bill of Rights proposed, most famously, by Ronald Dworkin, is surely correct:

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights — the first several amendments to the document — and the further amendments added after the Civil War. . . . Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the “right” of free speech, for example, the Fifth Amendment to the process that is “due” to citizens, and the Fourteenth to protection that is “equal.” According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power.¹

The Bill of Rights, by means of open-ended terms such as “freedom of speech,” “equal protection,” or “due process,”² refers to moral criteria, which take on constitutional status by virtue of being thus referenced. We can disagree about whether the proper methodology for judicial application of these criteria is originalist or non-originalist. The originalist looks, not to the true content of the moral criteria named by the Constitution, but to the framers’ beliefs about that content;³ the nonoriginalist tries to determine what the criteria truly require, and ignores or gives less weight to the framers’ views.⁴ Bracketing this disagreement, however, it is surely correct to say — as Dworkin and many other prominent constitutional scholars have said⁵ — that the Constitution, through the open-ended clauses of the Bill of Rights, incorporates parts of morality.

Yet there is also a sense in which this “moral reading” of the Constitution is mistaken, or at least needs to be qualified. Constitutional rights have a special formal structure — a formal structure so familiar to us that this structure, and therewith its significance, have

1. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1996) [hereinafter DWORKIN, *FREEDOM’S LAW*]; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 132-37 (1977) (advancing moral reading of the Bill of Rights) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

2. U.S. CONST. amends. I, XIV, V.

3. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 143-85 (1990) (defending originalism).

4. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 781 n.69 (1997) (citing leading nonoriginalists); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (describing disagreements between originalists and nonoriginalists).

5. See Adler, *supra* note 4, at 781 n.69 (citing sources).

become invisible. I will call this structure the "Basic Structure." *Constitutional rights are rights against rules.* A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate⁶ or history); it does not protect a particular action of hers from all the rules under which the action falls.⁷ As a consequence of the Basic Structure, a constitutional right has only derivative moral content — or so this article will try to show. To say that *X*'s treatment pursuant to a rule *R* violates *X*'s "constitutional rights," or that the treatment is "unconstitutional," does *not* entail that the treatment itself is morally wrong, or morally problematic, or that there is moral reason to overturn the treatment *ceteris paribus*, or that the treatment violates *X*'s moral rights, or that moral wrong has been done to *X*, or anything like this. All the statement entails is that there exists moral reason to repeal or amend the rule *R*.

Let us begin by considering a famous and, for my purpose, exemplary case: the flag-desecration case, *Texas v. Johnson*.⁸ Mr. Johnson, who had burned an American flag during a political demonstration, was prosecuted for and then convicted of violating a Texas statute that read: "A person commits an offense if he intentionally or knowingly desecrates . . . a state or national flag."⁹ He was sentenced to one year in prison and fined \$2,000. Johnson challenged his sanction on constitutional grounds, claiming that it violated his right to free speech under the First Amendment. When the case reached the U.S. Supreme Court, the Court agreed with Johnson's claim, and overturned his sanction.¹⁰ Crucially, the Court did *not* hold that Johnson was constitutionally immune from sanction, under any statute, for the actions that had prompted the State's prosecution. "We . . . emphasize that Johnson was prosecuted *only* for flag-desecration — not for trespass, disorderly conduct, or arson."¹¹ Rather, what violated Mr. Johnson's rights was

6. By the "predicate" of a rule, I mean the act-description contained in the rule's canonical formulation. See *infra* text accompanying note 58 (discussing the concept of "rules" and their "predicates").

7. See Lawrence A. Alexander, *Is There An Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 545 (1985) ("The Constitution's individual rights provisions by and large do not protect specific conduct *per se*. . . . Rather, the Constitution ordinarily limits the types of reasons that government may act upon in regulating conduct.").

8. 491 U.S. 397 (1989).

9. *Johnson*, 491 U.S. at 400 n.1 (quoting TEX. PENAL CODE ANN. § 42.09 (West 1989)).

10. See 491 U.S. at 418.

11. 491 U.S. at 413 n.8. Although the Court did state that Johnson had not stolen the flag he burned, 491 U.S. at 412 n.8, this statement should not, in my view, be read to imply that Johnson's conviction was unconstitutional only by virtue of his action's being innocent under every description. See 491 U.S. at 412 n.8 (stating that "[o]ur inquiry is, of course, bounded

being sanctioned pursuant to a rule with the wrong rule-predicate — one that targeted the wrong type of action. As the Court explained: “A law directed at the communicative nature of conduct [such as a law prohibiting “flag desecration”] must . . . be justified by the substantial showing of need that the First Amendment requires,”¹² and the State of Texas was unable to make that substantial showing.

Texas v. Johnson exemplifies what I have called the Basic Structure: that constitutional rights are rights against rules. Mr. Johnson’s very action of flag-desecration might also have been an action of destroying government property (if the flag he desecrated had belonged to the government),¹³ or pollution (if the flag was burned, and dangerous chemicals were thereby released into the atmosphere), or battery (if the flag was burned in close proximity to a bystander, who was badly injured), or perhaps, as the Court suggested, arson, disorderly conduct, or trespass.¹⁴ Had Mr. Johnson been sanctioned under a rule that employed one of these constitutionally unobjectionable predicates, no constitutional right of Johnson’s would have been violated.¹⁵ Indeed, nothing in the

by the particular facts of this case and by the statute under which Johnson was convicted” (emphasis added)); *United States v. Eichman*, 496 U.S. 310, 313 n.1, 319 (1990) (overturning charge against flag burners pursuant to federal flag-mutilation statute, without disturbing charge against certain claimants for causing willful injury to federal property); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379-80, 396 (1992) (overturning charge against teenager pursuant to Minnesota ordinance prohibiting hate speech, where teenager’s particular action was burning a cross inside the fenced yard of a black family). See generally *infra* Part I (describing how constitutional rights generally function as shields against rules, not shields for actions). Why, then, did the Court even note that Johnson was innocent of theft? Perhaps because the Court thought this fact relevant to his as-applied challenge. See *Johnson*, 491 U.S. at 403 n.3 (sustaining Johnson’s as-applied challenge to flag-desecration statute without reaching his facial challenge); *infra* text accompanying notes 140-45 (discussing how as-applied adjudication is consistent with the proposition that constitutional rights do not shield actions).

12. *Johnson*, 491 U.S. at 406 (emphasis deleted) (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (1983) (Scalia, J., dissenting), rev’d sub nom. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

13. See *United States v. Haggerty*, 731 F. Supp. 415, 416, 422 (W.D. Wash. 1990) (overturning charge pursuant to federal flag-mutilation statute, for action of burning flag belonging to U.S. Postal Service, without disturbing charge pursuant to statute prohibiting willful injury to federal property), *aff’d sub nom.* *United States v. Eichman*, 496 U.S. 310 (1990).

14. On the nature of actions as particular things that can be picked out under multiple descriptions, see *infra* text accompanying notes 63-67. It appears that, in fact, Mr. Johnson’s particular action of flag-burning did not fall under the further description of “battery.” See *Johnson*, 491 U.S. at 399.

15. It remains open to discussion whether and, if so, when the application of a no-trespass rule to speech will violate the First Amendment. Compare *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that the application of a no-trespass law to a speaker, who was on the premises of a company town, violated the First Amendment) with *Hudgens v. NLRB*, 424 U.S. 507 (1976) (declining to recognize free speech right to picket on premises of shopping center, and distinguishing *Marsh*). See generally *infra* text accompanying notes 354-64 (discussing viability of First Amendment challenges to rules that pick out nonexpressive properties of actions).

Court's decision precluded Texas from sanctioning Mr. Johnson pursuant to an unobjectionable rule, in a future prosecution, for the very action of his that had given rise to the flag-desecration prosecution.¹⁶ Where the State of Texas had gone wrong was in prosecuting Johnson under the wrong rule — under a rule that prohibited “flag desecration.” And what violated Mr. Johnson's First Amendment rights, in *Texas v. Johnson*, was being sanctioned for his action under *that* rule — not being sanctioned for that action *simpliciter*.

Consider, now, two possible accounts of the moral content of Mr. Johnson's First Amendment rights. First, consider what I will call the Direct Account.

The Direct Account

To say that some treatment of *X* (sanctioning *X* pursuant to a rule, or subjecting *X* to the duty that the rule announces) “violates *X*'s constitutional rights” entails the following: the treatment is directly wrong, and *X* has the legal right to secure judicial invalidation of the treatment. “Directly wrong” means that there is sufficient moral reason¹⁷ for the court to invalidate the treatment (overturn *X*'s sanction, or free *X* from the duty), quite independent of any further invalidation of the rule under which the treatment falls.

On the direct account of *Texas v. Johnson*, it is morally improper to sanction Mr. Johnson for “flag desecration,” even if his action happened to have been an action of property-destruction, pollution, or battery. To sanction him for “flag desecration” is to sanction him on the wrong grounds — on the basis of his *speech*, rather than the harmful, nonexpressive properties of his action — and there is moral reason for the State of Texas not to do *that*. To be sure, if Mr. Johnson *was* a polluter, batterer, or property-destroyer, he ought to

16. See *Montana v. Hall*, 481 U.S. 400, 402 (1987) (“It is a ‘venerable principl[e] of double jeopardy jurisprudence’ that ‘[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge’ [i.e., a charge that would otherwise be the same for double jeopardy purposes].” (alteration in original) (citation omitted) (quoting *United States v. Scott*, 437 U.S. 82, 90-91 (1978))).

17. Throughout this article, I use the term “moral reason” in a generic way, which is meant to be neutral between consequentialist and deontological moral views. To say that “moral reason” obtains to overturn a claimant's treatment, or a rule, means that: (1) overturning the treatment or rule does not violate any deontological constraints, and is required under applicable consequentialist criteria; or (2) overturning the treatment or rule is required by deontological constraints. On the difference between deontological and consequentialist moral views, see generally SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 1-40 (1994).

be sanctioned. But he ought to be sanctioned pursuant to the right kind of rule, and it is not a matter of moral indifference which rule the State of Texas deploys against him.

By contrast, what I will call the Derivative Account of constitutional rights says something quite different.

The Derivative Account

To say that some treatment of *X* (being sanctioned pursuant to a rule, or subjecting *X* to the duty that the rule announces) “violates *X*’s constitutional rights” entails the following: there is sufficient moral reason to change in some measure the scope of the rule, and *X* has the legal power to secure the invalidation — the repeal or amendment — of the rule, including his own treatment. There may or may not be moral reason to overturn *X*’s treatment, *ceteris paribus*.

On the derivative account of *Texas v. Johnson*, it would be (or might be)¹⁸ a matter of moral indifference which rule the State of Texas deployed against Johnson, if Johnson’s action of flag-desecration also happened to have been an action of property-destruction, pollution, or battery. If his action happened to have been wrongful under a different description, there would be (or might be) nothing at all morally problematic in sanctioning Mr. Johnson pursuant to the flag-desecration statute. Rather, what is morally problematic, on the Derivative Account, is for *Texas to have in place a statute that prohibits flag-desecration*. This is morally problematic because *some* actions covered by that statute are innocent actions. Some actions of flag-desecration do not have further, wrong-making properties such that they are properly sanctioned or coerced — they are not also actions of property-destruction, pollution, battery, etc. — and therefore Texas is morally required to repeal or amend the flag-desecration statute.¹⁹

Mr. Johnson’s own action of flag-desecration may have been innocent of further wrong-making properties; it may not have been.

18. I say “might be” here to signal the following: The Derivative Account does not entail that it is a matter of moral indifference which statute Texas uses to sanction Johnson. Rather, on the Derivative Account, the propriety of a claimant’s particular treatment is simply not the proper moral focus of reviewing courts. Instead, their proper moral focus is on whether the underlying rule should be repealed or amended. See *infra* section III.A.3 (explaining how, within the Derivative Account, the judicial decision to uphold or invalidate a claimant’s treatment depends upon the extent to which the court revises the underlying rule). So the proponent of the Derivative Account in *Johnson* will say that, although the choice of rule with respect to Johnson may make a moral difference, that is not entailed by his having a constitutional right.

19. See *infra* text accompanying notes 315-42 (detailing how rule against “flag desecration” violates liberties, by including otherwise innocent speech-acts within its scope).

But that is irrelevant to Johnson's constitutional claim. On the Derivative Account, his case is simply an occasion²⁰ for the reviewing court to invalidate — to repeal or amend — Texas's statute. Because the statute does moral wrong to *someone* (whether Mr. Johnson, or other persons), the reviewing court rightly invalidates the statute, including but not limited to the sanction Mr. Johnson has received.²¹

Which of these two accounts, direct or derivative, is the correct account of the moral content of constitutional rights? To put the distinction between the two most succinctly: on the Direct Account, constitutional adjudication essentially involves the invalidation of the rights-holder's own treatment (*her* sanction, or *her* duty), while on the Derivative Account, it essentially involves the judicial repeal or amendment of rules. Which of these two accounts best describes the connection between constitutional law and morality?

In this article, I will argue that the Derivative Account is the correct one. The Derivative Account provides an elegant, unified, and morally straightforward view of constitutional rights and constitutional adjudication. It holds true, I will claim, not just for the free speech rights at stake in *Texas v. Johnson*, but for the entire array of substantive constitutional rights that figure in modern constitutional law: rights to speech,²² to religious freedom,²³ to equal protection,²⁴ and to substantive due process.²⁵ The Direct Account, by contrast, turns out to involve a view about morality — about the moral significance of the description under which someone is sanctioned, coerced, or otherwise set back by a legal rule — that is morally untenable, at least for purposes of constitutional law. And

20. For a similar view of the particular cases that federal courts adjudicate as mere occasions for broader, constitutional change, see Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1978).

21. Indeed, there is nothing in the Derivative Account itself that requires the judicial invalidation of the statute to include an invalidation of the claimant's own treatment, although the standing component of Article III may impose such a requirement. See *infra* text accompanying notes 401-08, 574-78 (arguing that requirement of personal benefit to the claimant is extrinsic to the Derivative Account).

22. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

23. See U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]").

24. See U.S. CONST. amend. XIV ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

25. See U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law"); *infra* text accompanying notes 53-60 (explaining article's focus on free speech, free exercise, equal protection and substantive due process rights).

although the Direct Account may be attractive to constitutional lawyers and scholars on *institutional* grounds — because it is consistent with a certain, purist view about the limited powers of federal courts — that view should be rejected. The purist view is that federal courts lack the legal power to repeal or amend rules; the legal force of the court's judgment extends only to the parties, and therefore the judicial focus in constitutional cases can only be, as the Direct Account claims, the moral propriety of the claimant's own treatment.²⁶ But the purist view is wrong; federal courts *do* have the power to repeal or amend rules, and they *can*, consistent with Article III of the Constitution,²⁷ adopt the rule-centered rather than claimant-centered perspective required by the Derivative Account.

This article has three Parts. Part I sets the stage for my argument, by demonstrating that the Basic Structure obtains. This is, I should emphasize, a *descriptive* claim. My claim is that the following description of the current constitutional case law, as set forth by the U.S. Supreme Court and followed by the lower federal courts, is true: constitutional rights are rights against rules. Things could be different; constitutional rights could be structured as shields around actions, rather than shields against rules; but they are not. The Basic Structure is *our* official structure, as constitutional doctrine now stands. This is true across the Bill of Rights, not just of free speech. For example, it would violate the gender-discrimination component of the Equal Protection Clause to sanction *X* pursuant to a rule that prohibits "the purchase of alcohol by men under twenty-one,"²⁸ even if *X*'s action is sanctionable under some other rule (such as a rule against credit-card fraud). It would violate the race-discrimination component of the Equal Protection Clause to sanction a black person under a law banning interracial marriages,²⁹ even if the black person is also a bigamist. Or — to switch from equal protection to religious freedom — it would violate the free exercise rights of members of the Santeria religion (who engage in ritual animal sacrifice) to sanction them pursuant to a law targeted

26. See *infra* section III.B (describing possible institutional objections to the Derivative Account).

27. See U.S. CONST. art. III, § 2 (confining federal judicial power to "Cases" and "Controversies").

28. See *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating, under Equal Protection Clause, statute prohibiting sale of low-alcohol beer to men but not women between the ages of 18 and 21).

29. See *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating, under Equal Protection Clause, statute prohibiting interracial marriages).

at Santeria,³⁰ even for their ritual sacrifice of eagles, cougars, pandas and other endangered species.

Parts II and III are the heart of the article. In Part II, I reject the Direct Account. This Part considers, and finds wanting, a wide array of possible defenses for the Direct Account: for the claim that *X*'s constitutional right entails the existence of moral reason to overturn *X*'s own treatment, independent of further invalidating the rule under which that treatment falls. Some of these defenses are, on balance, unpersuasive: for example, the view that (in general) a necessary condition for a morally and constitutionally justified sanction is that the sanctioned person be sanctioned under the right kind of rule.³¹ Some of these defenses, albeit persuasive or even compelling, explain at best a limited set of constitutional rights: for example, the view that sanctioning or coercing a black person under a law that contains the predicate, "black," is to stigmatize and thereby directly wrong her.³² And some of the defenses are simply question-begging: for example, the standard appeal to the "illegitimate purpose" of the legislator, such as a purpose to suppress speech, as somehow morally tainting the treatments meted out pursuant to the law that the legislator enacts.³³

Part III, in turn, argues in favor of the Derivative Account. On the Derivative Account, the reason *X*'s constitutional rights can be violated by one rule, even if the very action she performed is properly sanctioned or coerced under a different rule, is quite straightforward. It is straightforward to explain how, given two different rules that intersect to cover the very same action, the moral criteria set forth in the Bill of Rights require that one of the rules, but not the other, be repealed or amended. Freedom of speech requires that a rule against "flag desecration" be repealed, because some actions of flag-desecration are innocent, and the ones that are *not* innocent will fall under other rules. Conversely, freedom of speech does *not* require that a rule against "arson" be repealed, because all actions of arson are seriously wrong. It is, or may be,³⁴ a matter of moral indifference whether the arsonous flag-desecrator is sanc-

30. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating, under Free Exercise Clause, statute prohibiting animal sacrifice that was targeted at the Santeria religion).

31. See *infra* section II.A.1.

32. See *infra* section II.B.2.

33. See *infra* note 278 (arguing that the idea of an illegitimate legislative purpose or motivation is ambiguous, and that the different ways in which this ambiguous idea might be made more precise do not, in fact, underwrite the Direct Account).

34. See *supra* note 18.

tioned for "flag desecration" or, instead, for "arson"; but it is *not* a matter of moral indifference, under the First Amendment, whether we leave in place a rule against "flag desecration." Similarly, as I shall argue, it is, or may be, a matter of moral indifference whether the thieving, nineteen-year-old, male drinker is prosecuted pursuant to a gender-discriminatory rule prohibiting the sale of alcohol to nineteen-year-old men, or pursuant to a neutral law prohibiting credit-card fraud; but it is *not* a matter of moral indifference, under the Equal Protection Clause, whether we leave in place the gender-discriminatory rule. And so forth for the rest of the Bill of Rights.

Part III also raises and rebuts possible institutional objections to the Derivative Account. These include, *inter alia*, the purist view of the powers of federal courts. Federal courts do, indeed, have the legal power to repeal or amend rules, and Article III of the Constitution permits them to adopt the rule-centered perspective required by the Derivative Account. The remedies that federal courts enter in constitutional cases — including not merely class-action cases, but also individual cases, whether enforcement actions or anticipatory suits brought by claimants — should *always* be understood as repealing or amending rules. This is technically plausible, morally attractive, and consistent with the concept of "adjudication" embodied in Article III.

Finally, the conclusion to the article surveys the doctrinal implications of the arguments advanced in Parts I, II, and III. Although the methodology of the article is theoretical, not doctrinal, my ultimate purpose is a doctrinal one. Constitutional theory is ultimately important because of its practical import, for the practices of reviewing courts and other institutions. Originalists will want *Roe v. Wade*³⁵ to be decided one way; nonoriginalists will, or may, want it decided a different way. So too, as we shall see, the defenders of the Direct and Derivative Accounts will disagree on a wide variety of doctrinal matters. These include matters such as timing, remedy, and the propriety of facial invalidation. The paradigmatic constitutional suit for the Direct Account is a retrospective as-applied challenge by a claimant who has already acted and been sanctioned under a rule,³⁶ while the paradigmatic constitutional suit for the

35. 410 U.S. 113 (1973); see Adler, *supra* note 4, at 780-85 (describing debate between originalists and nonoriginalists over legitimacy of *Roe*).

36. See, e.g., *In re R.M.J.*, 455 U.S. 191 (1982) (retrospective, as-applied challenge under Free Speech Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (retrospective, as-applied challenge under Free Exercise Clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (retrospective, as-applied challenge under the substantive component of the Due Process Clause); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (retrospective challenge under Equal Protection

Derivative Account is a prospective *facial* challenge to a rule, by a claimant who has yet to act and seeks first the rule's immediate repeal.³⁷ In recent years, these matters — in particular, the propriety of facial invalidation³⁸ — have generated heated controversies among scholars and at the Supreme Court.³⁹ This article provides a theoretical foundation for addressing such matters. Although it is beyond the scope of this article to defend a specific position on the numerous doctrinal questions implicated by the morally derivative

Clause). See generally *infra* text accompanying notes 290-92, 588-91 (discussing the status of sanctions, within the Direct Account, as the paradigmatically concrete setbacks to claimants).

37. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (anticipatory, facial challenge to rule, under Free Speech Clause); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (anticipatory, facial challenge to rule, under Free Exercise Clause); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (anticipatory, facial challenge to rule, under the substantive component of the Due Process Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (anticipatory, facial challenge to rule, under Equal Protection Clause). See generally *infra* text accompanying note 598 (discussing timing of constitutional suits, within Derivative Account).

38. See generally Michael Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing distinction between facial and as-applied challenges, and surveying case law).

39. The controversy about facial challenges was triggered by the Court's announcement, in *United States v. Salerno*, that: "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). Since this announcement, the Justices have heatedly debated the propriety of facial invalidation, particularly in the area of abortion rights. See *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (denying certiorari) (memorandum of Stevens, J.); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1013 (1993) (denying stay) (O'Connor, J., concurring); *Ada v. Guam Socy. of Obstetricians & Gynecologists*, 506 U.S. 1011, 101 (1992) (denying certiorari) (Scalia, J., dissenting); *Casey*, 505 U.S. at 972-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

The Justices have debated the propriety of facial challenges in many other areas as well, including *free speech*, see *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2193-96 (1998) (Souter, J., dissenting); *Reno*, 117 S. Ct. at 2355-56 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 631-34 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *United States v. Edge Broad. Co.*, 509 U.S. 418, 429-36 (1993); *Edenfield v. Fane*, 507 U.S. 761, 779-81 (1993) (O'Connor, J., dissenting); the *Establishment Clause*, see *Bowen v. Kendrick*, 487 U.S. 589, 626-30 (1988) (Blackmun, J., dissenting); *equal protection*, see *Romer v. Evans*, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting); the *Takings Clause*, see *Pennell v. City of San Jose*, 485 U.S. 1, 15-19 (1988) (Scalia, J., concurring in part and dissenting in part); and other aspects of substantive due process, such as *assisted suicide*, see *Washington v. Glucksberg*, 117 S. Ct. 2302, 2304-05 (1997) (Stevens, J., concurring in the judgments of *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), and *Vacco v. Quill*, 117 S. Ct. 2293 (1997)).

Ripeness became a matter of some controversy in *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), which dismissed as unripe a challenge by certain would-be beneficiaries to a benefit-conferring rule, on the grounds that the claimants had not yet applied for and been denied the benefit they sought. *Reno* calls into question the availability of prospective challenges to benefit-conferring rules. See *Reno*, 509 U.S. at 67-70 (O'Connor, J., concurring in the judgment) (criticizing majority's ripeness holding); 509 U.S. at 77-83 (Stevens, J., dissenting) (same); 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.14, at 381-84 (1994) (same).

Finally, the scope of judicial remedies has, in recent years, been much debated by constitutional scholars, in the form of a dispute about the legitimacy of *Cooper v. Aaron*, 358 U.S. 1 (1958). See *infra* notes 502-05 and accompanying text (describing this dispute).

cast of constitutional rights, the conclusion *will* show just how wide-ranging the doctrinal implications of the Derivative Account are.

In particular, and most profoundly, the Derivative Account explicates the basic doctrinal structure of modern constitutional law. Every constitutional lawyer and scholar knows well the various rule-validity “tests” around which constitutional adjudication is structured: narrow-tailoring tests, under the First Amendment, that require rules regulating speech to be sufficiently closely tailored to sufficiently important interests;⁴⁰ antidiscrimination tests under the Equal Protection Clause, that require rules discriminating on the basis of race⁴¹ or gender⁴² to be more or less strictly scrutinized; and the parallel antidiscrimination test, for rules discriminating against religious groups or practices, that has become canonical for the Free Exercise Clause.⁴³ But what is the function of these familiar tests? What do they accomplish? The proponent of the Direct Account will claim this: To sanction or coerce X pursuant to a rule that fails a test is to do moral wrong to X; it is to inflict a treatment upon X such that moral reason obtains *ceteris paribus* to overturn X’s treatment.⁴⁴

But this is incorrect. On the Derivative Account — the correct account — the pervasive and familiar constitutional tests, governing the predicates and history of rules, are simply tests for whether a rule should be judicially repealed or amended. The essential function of constitutional courts is to assess rules against these kind of moral tests, and to repeal or amend those rules that are moral failures. This is what my article tries to show.

40. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (describing strict, narrow-tailoring scrutiny for content-based rules regulating speech); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (describing intermediate, narrow-tailoring scrutiny for content-neutral rules regulating speech).

41. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“[R]acial classifications [should] be subjected to the ‘most rigid scrutiny,’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of . . . racial discrimination.” (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))).

42. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[T]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”).

43. See *Employment Div. v. Smith*, 494 U.S. 872, 877, 879 (1990) (holding that state may not seek “to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display” but that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’ ” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

44. See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1-4 (arguing that a separate and special overbreadth doctrine does not exist, and that instead both the Court’s overbreadth decisions and its ordinary constitutional decisions are grounded upon the right of claimants to be judged in accordance with a constitutionally valid rule of law).

I. THE BASIC STRUCTURE

A constitutional right provides a legal advantage, of some kind, for the rights-holder.⁴⁵ But what kind of advantage is that? We can imagine a legal world in which constitutional rights were structured as protective shields around certain types of actions. A particular action of some person would either have this protective shield — if the action were, say, sufficiently harmless, or sufficiently important to the actor — or not. If the action bore the protective shield, then the rights-holder would be legally immune from being sanctioned for performing the action, or coerced not to perform it, pursuant to *any* rule. Conversely, if a particular action of some person did *not* have the protective shield, then the state would be free to sanction the actor for performing the action, or to coerce the actor not to perform it, pursuant to any rule. Protected actions would be protected, not just from discriminatory or overbroad rules, but from perfectly neutral, ordinary rules as well. Conversely, unprotected actions could be legally sanctioned, or coerced, pursuant to rules that discriminated on the basis of race, gender, viewpoint, or religion. This would just be how constitutional rights *worked*.⁴⁶

But of course constitutional rights work nothing like this.⁴⁷ Constitutional rights in our own legal world are structured, not as shields *around* particular actions, but as shields *against* particular rules. What violates X's constitutional right, what she has a constitutional right against, is for a particular rule to be (fully) in legal

45. See CARL WELLMAN, *REAL RIGHTS* 8-11 (1995) (defining a legal right as a complex of favorable Hohfeldian positions, that is, claim-rights, liberties, immunities, and powers, that function to confer a legal advantage upon the rights-holder).

46. This is not a crazy idea, given the centrality of actions to morality. At bottom, any particular action is either morally permissible, or morally impermissible — the latter either because the action breaches a deontological side-constraint, or because it makes the world worse in some manner picked out by a consequentialist standard. See GEOFFREY SCARRE, *UTILITARIANISM* 129 (1996) (noting that many philosophers now believe that the criterion of overall well-being is best construed, within utilitarianism, as a criterion for evaluating particular actions, not for evaluating rules somehow generalized from actions); SCHEFFLER, *supra* note 17, at 80-114 (discussing deontological, i.e., nonconsequentialist, side-constraints).

47. I am certainly not the first to note the point that a person's constitutional claim is more or less a function of the rule pursuant to which he is sanctioned or otherwise set back, and not solely a function of the action he performed. Scholars who have previously noted and discussed this feature of constitutional law include Larry Alexander, *see* Alexander, *supra* note 7, at 544-47; and Henry Monaghan, *see* Monaghan, *supra* note 44, at 4-14. However, the point is far from universally recognized. *See, e.g.*, GERALD GUNTHER, *CONSTITUTIONAL LAW* 1192 (1991) ("[In First Amendment challenges outside the overbreadth context] the Court asks simply whether the challenger's activities are protected by the First Amendment."); Monaghan, *supra* note 44, at 5 (noting that "many commentators assume that conventional constitutional challenges are invariably restricted to such fact-dependent claims of privilege").

force:⁴⁸ a rule with the wrong predicate or history. We saw that point in the flag-desecration case: sanctioning Mr. Johnson for destroying a government-owned flag pursuant to a rule prohibiting "flag desecration" would violate his constitutional rights, while sanctioning him for destroying a government-owned flag pursuant to a rule prohibiting the "destruction of government property" would *not*. As we shall see in a moment, *Texas v. Johnson* exemplifies the structure of substantive⁴⁹ constitutional rights across the Bill of Rights.

I will call this the Basic Structure of constitutional rights. Constitutional rights are rights against rules.

The Basic Structure: Rights against Rules

A constitutional right is a legal right that is targeted against a particular rule — a rule with the wrong predicate or history. Specifically, a constitutional right furnishes the rights-holder a legal power to secure, in some measure,⁵⁰ the judicial invalidation of a particular rule. To say that *X*'s constitutional rights have been violated entails that a reviewing court should at *X*'s instance invalidate, in some measure, a particular rule.⁵¹ It does *not* entail that any other rule should be invalidated, in any measure.

In particular, then, constitutional rights are not shields for actions. To say that sanctioning *X* pursuant to a particular rule violates her constitutional rights does *not* entail that the particular action at stake, by virtue of which *X* has been sanctioned, is constitutionally protected from being sanctioned pursuant to all other rules.⁵² Similarly, to say that it violates *X*'s constitu-

48. "Fully" here is meant to be neutral between the Direct and Derivative Accounts. The Direct Account says that the rule should not be fully in force, insofar as the claimant is sanctioned or coerced; the Derivative Account says that the rule should not be fully in force, insofar as it is properly amended or even wholly repealed.

49. See *infra* note 60 and accompanying text (explaining focus on substantive challenges).

50. Again, "in some measure" is meant to be neutral between the Direct and Derivative Accounts. See *supra* note 48.

51. This article is concerned with constitutional rights, insofar as these are enforced by reviewing courts. It remains an open question whether the concept of a judicially unenforced constitutional right is even coherent. See Adler, *supra* note 4, at 775-79 (discussing judicial enforcement of constitutional rights). In any event, the central problem addressed here is whether the legal rights that figure in constitutional *adjudication* are morally direct or derivative. That is a sufficiently discrete and salient problem, see *infra* section III.B (presenting institutional arguments against judicial repeal of rules), to merit separate attention.

52. The Basic Structure presupposes some concept of sanctioning *X* "pursuant to" a legal rule, such that sanctioning *X* "pursuant to" Rule₁ can be constitutional, while sanctioning her "pursuant to" Rule₂ can be unconstitutional. What, precisely, does this involve? The answer to that question — what it means, precisely, for state officials to be guided by a legal rule — is difficult and controversial, involving large issues about the nature of law and of rule-guided

tional rights to subject her to the legal duty a particular rule announces does *not* entail that actions within the scope of that duty are constitutionally protected from coverage by all other rules.

The claim I advance, in this Part of the article, is simply a *descriptive* claim. I claim that the Basic Structure is, in fact, our structure: that it holds true of our practice of constitutional adjudication. My claim is not that constitutional adjudication need be structured this way — structuring constitutional rights as shields for actions is certainly a conceptual possibility — nor do I claim, here, that the Basic Structure is better than an act-shielding structure. Rather, the plan of this article is to *describe*, in this Part, the *existing* structure of constitutional rights; and then to determine, in Parts II and III, whether the Direct Account or Derivative Account provides a more plausible account of the connection between constitutional rights, thus structured, and morality.

Relatedly, note that my description of the Basic Structure is neutral between the Direct and Derivative Accounts. A constitutional right furnishes some kind of legal advantage against a particular rule. The Direct and Derivative Accounts are *both* consistent with, and build upon, this basic, descriptive claim. Where they differ, crucially, is as to the precise nature and moral grounding for the legal advantage that a constitutional right secures. On the Direct Account, a constitutional right advantages *X* by empowering her to secure the judicial invalidation of her own *treatment* — her own sanction or duty — by virtue of there obtaining sufficient moral reason to overturn that treatment. On the Derivative Account, a constitutional right advantages *X* by empowering her to secure the judicial invalidation of *the rule* under which her treatment falls, by virtue of there obtaining sufficient moral reason to invalidate that rule.

We shall pursue this contrast at much greater length in Parts II and III. Let us start, however, at the foundation: by seeing how constitutional rights under the Free Speech Clause, Free Exercise

behavior. The answer I have in mind (although I believe that the arguments presented in this article for the most part do not depend upon a specific conception of rule-guidance or of law) is as follows: state officials (1) believe, or claim to believe, that *X* has performed an action prohibited by Rule₁ or failed to perform an action required by Rule₁; and (2) given that eventuality, take or claim to take Rule₁ as authoritative for issuing the disadvantageous directive that constitutes *X*'s sanction. See *infra* text accompanying notes 312-14 (distinguishing nonmoral fact that state officials take rules as authoritative, or claim to do so, from moral fact that the enactment of rules changes the moral reasons bearing upon officials); note 54 (defining "sanction").

Clause, Equal Protection Clause, and the substantive component of the Due Process Clause, function not as shields around particular actions, but as shields against particular rules.

Why these particular provisions? I concentrate, in this article, on these provisions both because they refer to moral criteria,⁵³ and also because they are the main constitutional provisions by virtue of which sanctions⁵⁴ or duties can violate substantive constitutional rights.⁵⁵ Sanctions and sanction-backed duties deserve special focus

53. See DWORKIN, *FREEDOM'S LAW*, *supra* note 1, at 7.

54. By "sanction" I mean something like this: a legal directive, addressed to a person by name, that constitutes a disadvantage for him (paradigmatically, a legal duty to pay a fine or serve a term of imprisonment), and that state officials impose pursuant to a conduct-regulating rule. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 157 (1990) (noting that "most sanctions consist in the withdrawal of rights or the imposition of duties"). Sanctions can, of course, be either civil or criminal, but because free speech, free exercise, substantive due process, and equal protection doctrines are indiscriminately applied to rules backed by civil and criminal sanctions, see *infra* text accompanying notes 68-129 (summarizing doctrines), I will not distinguish between the two. The Derivative Account explains in a crisp way why the doctrines are indiscriminate in this manner. Conduct-regulating rules can violate liberties and breach antidiscrimination norms whether the sanctions that back them up are civil or criminal. See *infra* sections III.A.1-2.

55. This leaves to one side Eighth Amendment challenges to special types of sanctions, such as the death penalty, see, e.g., *Gregg v. Georgia*, 428 U.S. 153, 188-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), or the conditions of the claimant's imprisonment, see, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832-35 (1994). The Eighth Amendment does *not*, under current jurisprudence, normally provide a viable basis by which to challenge an ordinary sentence of imprisonment, see *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting proportionality challenge to life sentence); see also *Powell v. Texas*, 392 U.S. 514 (1968) (rejecting claim that law against public intoxication prohibited mere status, and that sanction pursuant to such law therefore violated Eighth Amendment). The Eighth Amendment does prohibit excessive fines, but the jurisprudence on that is inchoate, see *United States v. Bajakajian*, 118 S. Ct. 2028, 2033 (1998) (holding forfeiture unconstitutional, under Excessive Fines Clause) ("This Court has had little occasion to interpret, and has never actually applied [until now], the Excessive Fines Clause."), as is the due process jurisprudence on the excessiveness of punitive damages, see *BMW v. Gore*, 517 U.S. 559 (1996), which likewise is not discussed here.

My statement also, clearly, leaves to one side double-jeopardy challenges, Ex Post Facto Clause challenges, and others that arise where the claimant has not merely been sanctioned pursuant to a single, preexisting rule. What we need to understand first is why, in that simple and standard case, sanctioning *X* under one clear and preexisting rule can violate his constitutional rights, even though his action may be wrongful under another description. See *infra* text accompanying notes 163-64 (further discussing double jeopardy).

Will not other parts of the Bill of Rights, along with free speech, free exercise, equal protection, and substantive due process, also advantage *X* in this way? In practice, the answer, currently, is no. For example, the "regulatory takings" component of the Takings Clause is certainly *applicable* to duty-conferring laws, such as laws for landowners, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); but the Takings Clause, properly understood, is not a protection *against* sanctions and duties. Rather, it is a complex kind of benefit-conferring provision. See, e.g., *Williamson County Regl. Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). As for the Establishment Clause, although that provision in theory covers conduct-regulating rules addressed to private parties, see, e.g., *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (rejecting "entanglement" challenge, by religious foundation, to requirements of Fair Labor Standards Act), in practice successful challenges to such rules are not a significant part of Establishment Clause jurisprudence.

because these are the most elementary and accepted sources of constitutional violations:⁵⁶ whatever else might be “unconstitutional,” sanctioning an action, or coercing actors to perform or refrain from actions, surely can be.⁵⁷ Relatedly, I use the term “rule” to mean what, more precisely, might be called a “prescription” or a “conduct rule”: a rule that prohibits or requires certain types of actions, that has a canonical, written formulation, that becomes legally authoritative through enactment, and that functions as a decision rule by which legal officials impose sanctions on those who perform, or fail to perform, the actions that the rule prohibits or requires.⁵⁸ By the

In any event, Takings Clause and Establishment Clause challenges (and, for that matter, excessiveness challenges under the Eighth Amendment or due process) can be readily assimilated to the argument structure presented in this article. If the Basic Structure holds true of such challenges — if, for example, *X*'s sanction can constitute a regulatory taking of his property even though the very action involved can be sanctioned under a different rule; or if *X*'s sanction can be excessive under one rule but need not be, for the very same action, under another — then the arguments presented in Part II against the Direct Account would apply.

As for constitutional challenges to special types of sanctions (such as the death penalty, or harsh conditions of confinement), I am less sanguine that the Basic Structure holds true of such challenges, although, again, if it did the arguments presented in Part II would apply. I will not even speculate here about the relevance of such arguments to double jeopardy or ex-post-facto type challenges; that is simply too far beyond the scope of this article.

56. Consider, by contrast, the continuing scholarly debates about the propriety of constitutional challenges to the denial of benefits. See Symposium, *The Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 859 (1995).

57. Joel Feinberg expresses this point elegantly at the very beginning of his famous treatise on the criminal law. In explaining why his project is to answer the question, “What sorts of conduct may the state rightly make criminal?” Feinberg explains: “My reason for restricting the inquiry to the criminal law is partly methodological. Even if one were concerned to give a complete account of social power, one would begin with the relatively blunt and visible forms of political coercion where interferences with liberty are ‘writ large.’” JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 3 (1983).

I say “coercing actors to perform or refrain from actions” rather than “imposing a duty upon actors,” given the justiciability problems (within the Direct Account) raised by duties that are not clearly coercive. See *infra* text accompanying notes 290-92, 588-97.

58. See GEORG HENRIK VON WRIGHT, *NORM AND ACTION: A LOGICAL ENQUIRY* 7 (1963) (defining “prescription” in this sense) (“Prescriptions are given or issued by someone. They ‘flow’ from or have their ‘source’ in the will of a norm-giver or, as we shall also say, a norm-authority. They are, moreover, addressed or directed to some agent or agents, whom we shall call norm-subject(s). . . . In order to make its will known to the subject(s), the authority promulgates the norm. In order to make its will effective, the authority attaches a sanction or threat of punishment to the norm.”). For philosophical discussion of the different types of rules, including what I am calling “prescriptions,” see *id.* at 1-16; FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 1-15 (1991); MAX BLACK, *MODELS AND METAPHORS* 95-139 (1962).

Meir Dan-Cohen, in a well-known article, has explained that the conduct-regulating and decision-authorizing aspects of a prescription may come apart. The state may use one description of actions to tell the public what it should or should not do, and another to tell its officials which actions or failures to act should be sanctioned. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984). For ease of exposition, I assume that the state's conduct rule and decision rule are one and the same; however, nothing in my critique of the Direct Account or defense of the Derivative Account depends upon that assumption.

“predicate” of a rule, I mean the *description* of actions contained in the rule’s canonical formulation, such that actors are obliged to refrain from performing, or to perform, any particular action falling under that description, and state officials are authorized to sanction any non-complying actor. Finally, my discussion focuses upon substantive rather than procedural challenges — that is, I ignore Fourth Amendment,⁵⁹ Sixth Amendment, procedural due process, and other such challenges to the investigatory and adjudicatory procedures by which a civil or criminal sanction is imposed upon the claimant — because the theoretical as well as doctrinal problems of procedural rights are quite distinct.⁶⁰ It is enough to show in detail, as this article attempts to do, that substantive constitutional rights are better explained by the Derivative Account.

* * *

It is hard to imagine a crisper formulation of the proposition that constitutional rights do not shield actions than the following passage from Supreme Court’s opinion in the *R.A.V.*⁶¹ case.

Rules — even the rules that the state uses to regulate conduct and impose sanctions — need not, as a conceptual matter, have a canonical formulation. See John Calvin Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-201 (1985) (describing nineteenth-century institution of common-law crimes); SCHAUER, *supra*, at 14 (noting that “specificity, conclusiveness [and] authoritative formulation [are not] necessary conditions for the existence of a mandatory rule”). Persons sanctioned by the state pursuant to a non-canonically formulated rule will have a constitutional vagueness or retroactivity claim, see Jeffries, *supra*, at 190-201; it is beyond the scope of this article to analyze the moral content and power of *this* constitutional right, and to decide whether it is itself morally direct or derivative. Assume that the right fails; *X* is sanctioned pursuant to a common-law rule. Then, on the Derivative Account, the judicial decision overturning *X*’s sanction simply amounts to a repeal or amendment of the common-law rule (whether that is, in turn, styled an interpretation of the rule, or an override). That would be my construal, for example, of *Cantwell v. Connecticut*, 310 U.S. 296, 307-11 (1940) (overturning, on free speech grounds, conviction of speaker for common law breach of the peace).

59. For an illuminating analysis, in the Fourth Amendment context, of a problem (Why do guilty persons have a Fourth Amendment right against unreasonable searches?) quite parallel to the problem discussed here (Why do persons who are guilty under some description have substantive constitutional rights against being sanctioned or coerced pursuant to the wrong kind of rules?), see Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996).

60. In general, procedures are valuable either instrumentally (as a mechanism by which to secure good outcomes) or because of the intrinsic value of participation. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981); Robert S. Summers, *Evaluating and Improving Legal Processes — A Plea for “Process Values,”* 60 CORNELL L. REV. 1, 4 (1974). The substantive rights under discussion here have a moral grounding that is, I believe, at least partly distinct from this moral grounding for procedural rights. See *infra* sections III.A.1-2. And even if this is untrue, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980) (presenting “process theory” of constitutional rights), the problem of explaining why a constitutional right can be violated by virtue of a flawed rule-predicate whose application by enforcement officers and courts is procedurally perfect, will prove sufficiently complex to merit separate attention.

61. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses — so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable “time, place, or manner” restrictions, but only if they are “justified without reference to the content of the regulated speech.” And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.⁶²

This passage describes not just the Free Speech Clause of the First Amendment, but *all* the provisions of the Bill of Rights that, within current constitutional jurisprudence, secure judicial protection for actors from sanctions and sanction-backed duties.

Let us begin with free speech. The Free Speech Clause concerns a special kind of action: a speech-act. Speech-acts, like actions more generally, are what philosophers call “particulars” or “tokens.”⁶³ That is, an action is a particular thing — specifically, a particular bodily movement — that can be picked out under different descriptions, which describe the various properties that one and the same bodily movement has.⁶⁴ “Property,” here, denotes some type, or class, of bodily movements — for example, the type, or class, of bodily movements that cause a certain kind of effect, or that constitute a certain kind of event.⁶⁵ A particular finger-pulling of yours can, at once, be an action of “shooting a gun,” “killing a human being,” “disturbing the neighbors,” and “stopping an in-

62. 505 U.S. at 385-86 (citations omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

63. On the distinction between “tokens” or “particulars,” and “types” or “universals,” see D.M. ARMSTRONG, *UNIVERSALS: AN OPINIONATED INTRODUCTION* 1-7 (1989).

64. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 60-77, 280-301 (1993) (analyzing actions as particulars); *id.* at 78-112 (arguing that each particular action is a particular volition-caused bodily movement). Although the so-called “coarse-grained” view of actions as particulars is not a universal one, see ROBERT AUDI, *ACTION, INTENTION, AND REASON* 2 (1993) (describing coarse-grained view as “more widely held, and perhaps dominant, at present”), a legal right that protected one and the same action from sanction pursuant to different rules would, necessarily, presume a coarse-grained view. It would identify some particular, dynamic human thing (call it a “shmaction,” if indeed “actions” are fine-grained) that no rule could pick out.

65. See ARMSTRONG, *supra* note 63, at 1-7.

truder," all of which descriptions refer to the diverse states or events that the very same finger-pulling causes or constitutes.⁶⁶ Similarly, a particular mouth movement of yours (performed, say, during an anti-war demonstration in a public park) can, at once, be an action of "protesting the war," "offending the bystanders," "disturbing the wildlife," and "breaking windows" (if your pitch is sufficiently shrill). A particular hand-motion of yours can, at once, be an action of "striking a match," "burning acrylic," "desecrating a flag," and "battering a bystander."⁶⁷

So a speech-act, like any action, has multiple properties.⁶⁸ By definition, *one* property that a speech-act has is the property of communicating, of "expressing," a statement. But a speech-act always also has some nonexpressive property — at a minimum, an innocuous property like producing sound waves, or darkening paper. And sometimes, as in the action of burning a flag, or sabotaging military production to protest the war, or performing a "symbolic" assassination, the nonexpressive properties of a speech-act — its causal or constitutive connection to states or events, independent of the fact that the act-token is communicative — can be quite morally serious. Thus it has long been a staple of First Amendment jurisprudence, as *R.A.V.* rightly explains, that a speech-act can be sanctioned or prohibited by a rule whose predi-

66. See, e.g., *R.A.V.*, 505 U.S. at 379-81 (speech-act also action of trespass); *United States v. Eichman*, 496 U.S. 310, 313 n.1 (1990) (speech-act also action of injuring federal property); *Ward v. Rock Against Racism*, 491 U.S. 781, 784-90 (1989) (speech-act also action of causing loud noise); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 291-92 (1984) (speech-act also action of camping); *United States v. O'Brien*, 391 U.S. 367, 369-70 (1968) (speech-act also action of destroying government documents).

67. It might be objected, again, that I am assuming an unduly coarse-grained view of act individuation. It is consistent with the status of actions as particulars to say that, where the same bodily movement falls under two radically different types, we have not one but two actions. It might be the case that some, but not all, of the different properties that a particular bodily movement has are properties of the same action. See *MOORE*, *supra* note 64, at 366-74. I believe, however, that the most plausible act-shielding constitutional right would be significantly coarse-grained, in this sense: it would delineate some type of action sufficiently important or harmless that actors, or certain actors (e.g., black actors), should be free to perform it. But how is the freedom of actors to perform a type of action violated? It is violated by coercing them not to perform the bodily movement that instantiates the action, or sanctioning them by virtue of that bodily movement. So, whether or not the rule-predicate pursuant to which that bodily movement is coerced and sanctioned picks out the same "action," for nonlegal purposes, it *would* for purposes of our act-shielding right.

For this reason, in my descriptive efforts I focus on showing that sanctioning or coercing the very same (significantly) coarse-grained action can be unconstitutional under one description and constitutional under another. But, in any event, my descriptive claims are equally true, I think, on a more moderately coarse-grained view. Otherwise, why would constitutional challenges be styled as facial or as-applied challenges to particular rules? See *infra* text accompanying notes 133-34. Therefore, I will not belabor the point through a separate discussion of the moderately coarse-grained view.

68. Or, more generally, like any token. See *ARMSTRONG*, *supra* note 63, at 1-7.

cate picks out certain nonexpressive properties of actions, even though sanctioning or prohibiting the very same speech-act under a rule whose predicate picks out certain *expressive* act-properties would be unconstitutional.

The leading case for this doctrine is *United States v. O'Brien*.⁶⁹ Mr. O'Brien burned his draft card on the steps of a federal courthouse as an act of political protest against the Vietnam War, and was prosecuted and convicted pursuant to a federal statute that prohibited destroying or mutilating draft cards.⁷⁰ The Supreme Court upheld O'Brien's conviction,⁷¹ despite the assumed expressive cast of his particular action of draft-card-destruction.⁷² The Court's reasoning centered on the predicate of the particular statute pursuant to which O'Brien was convicted.

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁷³

In short, Mr. O'Brien's conviction satisfied the First Amendment because the act-property set forth by the statute's predicate was a (sufficiently important) nonexpressive property of actions: the property of causing draft cards to be damaged.⁷⁴ Had O'Brien, instead, been convicted for violating a rule that prohibited draftees

69. 391 U.S. 367 (1968).

70. See *O'Brien*, 391 U.S. at 369-70.

71. See 391 U.S. at 386.

72. See 391 U.S. at 376 ("[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

73. 391 U.S. at 376-77 (emphasis added).

74. See 391 U.S. at 382 ("In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction."). The *O'Brien* reference to the government's "substantial interest" implies that rules picking out insignificant nonexpressive act-properties might be invalid, insofar as these include speech-acts within their scope. I believe this is indeed the correct interpretation of the Free Speech Clause and the Court's free speech case law. See *infra* text accompanying notes 354-64.

from "protesting the war," or "desecrating draft cards," his conviction would certainly have been unconstitutional. Although First Amendment doctrine is dense and complicated, it is at least clear that *certain* rules that pick out expressive act-properties — specifically, rules that are "content-based" — are subject to intensive scrutiny and are almost always unconstitutional.⁷⁵ This was the case, for example, in *Texas v. Johnson*. The statutory term "flag desecration" picked out an expressive property of actions — to desecrate a flag is, necessarily, to perform a bodily movement that *communicates* disrespect — and triggered strict scrutiny by the Court.⁷⁶

Consider what the First Amendment would look like if *O'Brien's* distinction between rules whose predicates pick out nonexpressive versus expressive properties of actions did not obtain. Either speech-acts with seriously harmful nonexpressive characteristics, such as expressive burnings, sabotages, assassinations, and so forth, would be constitutionally protected: someone who was speaking as well as harming would have a successful First Amendment defense to a prosecution for battery, property-destruction, or homicide. Alternatively, expressive burnings, acts of sabotage, or assassinations could be sanctioned pursuant to grossly overbroad or discriminatory laws that prohibited, say, "offensive utterances," "language disrespectful to the Nation," or "the making of a misleading statement about the President, by a registered member of the Independent Party."⁷⁷

Besides the *O'Brien* distinction between the expressive and nonexpressive properties of speech-acts, there is a second distinc-

75. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988); see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123-27 (1991) (arguing that, in general, content-based laws should not be subject to "compelling interest" scrutiny but rather should be automatically unconstitutional).

76. Although the Court initially pointed out that Texas had defined "desecration" in a way that left open the possibility of nonexpressive desecration, see *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989) (defining "desecration" as physical mistreatment of flag that causes serious offense), the Court's subsequent analysis belied this point and took "desecration" (even as defined by Texas) to be expressive. See 491 U.S. at 412 (holding that Texas statute is "content-based" because the offensive cast of expressive flag-desecration is not a secondary effect, unrelated to its expressive cast).

77. For a cogent statement of the First Amendment distinction between rules picking out nonexpressive versus expressive properties of speech-acts, see Alexander, *supra* note 7, at 545 ("['C]riticizing the government' is not protected conduct viewed in isolation from the various ways government might attempt to regulate, 'criticizing the government.' 'Criticizing the government' may be validly — constitutionally — regulated if the criticism is broadcast from a soundtruck at night, and the regulation proscribes the use of soundtrucks at night. . . . But 'criticizing the government' is not validly regulated if the regulation proscribes, or was motivated by a desire to proscribe, 'criticizing the government.'").

tion, relevant here, within First Amendment jurisprudence. That is the distinction between low-value and full-value speech. The classic low-value categories are obscenity, incitement, "fighting words," and libel.⁷⁸ What this means is that a speech-act token falling within a low-value category — the action of displaying a sexually prurient, patently offensive movie that lacks serious literary, artistic, political or scientific value;⁷⁹ or inciting a crowd, with likely success, to imminent lawless action;⁸⁰ or uttering a face-to-face insult that, by its very utterance, tends to cause an immediate breach of the peace;⁸¹ or knowingly stating an injurious falsehood about another person⁸² — can be sanctioned pursuant to an appropriate rule. But it has long been a fixture of the Court's First Amendment jurisprudence that sanctioning a low-value speech-act pursuant to the wrong kind of rule will be unconstitutional. The doctrine that expresses this proposition, of course, is the First Amendment "overbreadth" doctrine.⁸³

In [overbreadth] cases, an individual whose own speech . . . may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity⁸⁴

So, for example, to use the exemplary case of *Gooding v. Wilson*,⁸⁵ it violated the First Amendment to sanction a political protester pursuant to a statute prohibiting "[the utterance of] opprobrious

78. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in the judgment).

79. See *Miller v. California*, 413 U.S. 15, 24-25 (1973).

80. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

81. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The *Chaplinsky* Court defines fighting words disjunctively to include also speech-acts which "by their very utterance inflict injury," 315 U.S. at 572, but whether the First Amendment category of fighting words truly includes non-peace-breaching, injurious speech-acts is seriously questionable after *R.A.V.*

82. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

83. For scholarly discussions of the overbreadth doctrine, see Alexander, *supra* note 7; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997); Monaghan, *supra* note 44; Martin Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

84. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

85. 405 U.S. 518 (1972).

words or abusive language”⁸⁶ — given the breadth of the statutory terms “opprobrious” and “abusive” — even though what the protester in fact had said, to a police officer, was, “White son of a bitch, I’ll kill you.”⁸⁷ Or, to switch from “fighting words” to obscenity, it would presumably violate the First Amendment to sanction *X* pursuant to a law generally prohibiting the display of “pictures of children not fully clothed” — given the umpteen nonpornographic pictures of this kind that parents display — even if *X* himself is a child pornographer.⁸⁸ Similar examples could readily be constructed for incitement⁸⁹ and libel.

The reader familiar with the First Amendment overbreadth doctrine, and the Court’s conceptualization thereof, may protest at this point that the application of an overbroad rule to an assaultive protester, or a child pornographer, or another such actor *X* whose own speech is proscribable under a different rule, does not actually involve the violation of *X*’s “constitutional rights.” Rather, this reader may explain, overturning *X*’s sanction is simply a prophylactic measure designed to protect other, *innocent* speakers falling under the same rule as *X*.⁹⁰ But this response misconstrues what I mean by “constitutional right.” The response assumes that constitutional rights necessarily have a special and robust moral content; *X*’s constitutional rights can only be violated, the response assumes,

86. *Wilson*, 405 U.S. at 519 (quoting GA. CODE. ANN. § 26.6303 (Harrison Supp. 1971)).

87. 405 U.S. at 520 n.1 (citing *Wilson v. State*, 156 S.E.2d 446, 449 (Ga. 1967)); see also *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (invalidating Louisiana ordinance that made it unlawful to “curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police,” where speaker allegedly cursed and screamed at police officer (citing NEW ORLEANS, LA., ORDINANCE 828 M.C.S. § 49-7 (1972))).

88. Surely this would be true if “not fully clothed” were defined to include the display of any body part except for the head, arms, or feet. See *Massachusetts v. Oakes*, 491 U.S. 576, 590 (1989) (Brennan, J., dissenting) (arguing that statute prohibiting nude or sexual photographs, etc., of children, with nudity defined only to include genitals, pubic areas, and postpubertal female breasts, is overbroad); cf. *Osborne v. Ohio*, 495 U.S. 103, 112-14 (1990) (rejecting overbreadth challenge to statute regulating child pornography, by virtue of statute’s predicate requiring more than nudity); *New York v. Ferber*, 458 U.S. 747, 764-74 (1982) (same).

More generally, as the Court has stated in *Miller*, the foundational obscenity case: “State statutes designed to regulate obscene materials must be carefully limited. . . . [Obscene] conduct must be specifically defined by the applicable state law, as written or authoritatively construed.” *Miller v. California*, 413 U.S. 15, 23-24 (1973) (footnote omitted). The obscene cast of the claimant’s own conduct is not a sufficient condition for his constitutional claim to fail.

89. See *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (scrutinizing predicate of criminal syndicalism statute, and invalidating statute because it covered actions not within the narrow category of incitement).

90. See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (explicating overbreadth as a special prophylactic doctrine that obtains where the speaker’s own constitutional rights are not violated); *Ferber*, 458 U.S. at 769-70 (1982) (same); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973) (same).

if moral wrong was done to *X*. I do *not* mean to assume that. Rather, by “constitutional right,” I simply mean a *legal right (technically, a legal power) to secure the judicial invalidation, in some measure, of one or more rules* (of a particular rule on the rule-centered view, or of all rules covering a particular action on the act-shielding view).⁹¹ This concept of a “constitutional right” is both plausible and deliberately catholic. It is, by design, consistent with both the Direct Account and the Derivative Account, and leaves open, for further debate, what the moral content of constitutional rights truly is. The Direct Account ought not triumph at the definitional stage, by defining “constitutional right” to exclude the very possibility of constitutional rights having derivative moral content.

And it is, further, clear that “constitutional rights,” as here catholically defined, do not have an act-shielding structure in the overbreadth context. The assaultive protester has a constitutional right, in my sense, to secure the invalidation of her sanction pursuant to an overbroad rule prohibiting “opprobrious words or abusive language”; neither she nor anyone else has a constitutional right to secure the invalidation of her sanction, for the very same action, imposed pursuant to a narrowly tailored rule prohibiting fighting words. The child pornographer has a constitutional right, in my sense, to secure the invalidation of her sanction pursuant to an overbroad rule prohibiting all pictures of unclothed children; neither she nor anyone else has a constitutional right to secure the invalidation of her sanction, for the very same action, imposed pursuant to a narrowly tailored rule prohibiting child pornography.

The First Amendment case that ties together all the doctrine I have just summarized, and shows, better than any other, how free speech rights are not act-shielding, is the *R.A.V.* case itself. In *R.A.V.*, a speaker whose speech-act was *doubly* bad — not only was the speech-act an instance of low-value speech, but it also possessed harmful nonexpressive properties — nonetheless secured the invalidation of his indictment. This particular speaker, a teenager, had decided to express his views by burning a cross on the front yard of a black family who happened to live across the street from him.⁹² The teenager was prosecuted for breaching a Minnesota ordinance that broadly prohibited racist, sexist, and anti-religious expression: “‘Whoever places on public or private property a symbol, object, appellation, characterization or graffiti [which] arouses anger,

91. See *supra* note 45 and accompanying text; *infra* text accompanying notes 434-39.

92. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379-80 (1992).

alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.' ”⁹³ The teenager’s particular action was an action of trespass and perhaps arson,⁹⁴ and also, the entire Court assumed, of uttering “fighting words.”⁹⁵ But the entire Court also agreed (on differing rationales)⁹⁶ that sanctioning the teenager pursuant to the particular statute Minnesota had chosen would be unconstitutional. The entire Court concurred in overturning the indictment of our doubly harmful teenager, by virtue of the Minnesota statute’s flawed predicate.

In sum, First Amendment cases like *Texas v. Johnson*, *O’Brien*, the overbreadth cases, and *R.A.V.* show unequivocally that free speech rights do not possess an act-shielding structure. In theory, one might think, constitutional liberties such as liberty of speech should indeed have an act-shielding structure. What a constitutional liberty should do, one might claim, is to shield from all rules particularly important actions — those actions falling within the category defined by the liberty (for example, full-value expression, or religiously motivated conduct) that do not have overriding, harmful properties.⁹⁷ But our actual constitutional practices belie this claim. It is unsurprising then, that when we move from liberties to equality — from the Free Speech to the Equal Protection Clause — our practices remain rule-centered rather than act-shielding. For if constitutional liberties do not give rise to protective shields around actions, then *a fortiori* constitutional guarantees, such as the Equal Protection Clause, that have nothing to do with important types of actions, should not.

And indeed the Equal Protection Clause does not. “Discriminatory purpose” has, for some time now, been the touchstone of equal protection analysis. A rule has a “discriminatory purpose,” within equal protection law, if the rule-predicate refers explicitly to particular races, genders, or other “suspect” classes, or if the legislators

93. 505 U.S. at 380 (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

94. See 505 U.S. at 380 n.1.

95. See 505 U.S. at 381; 505 U.S. at 402 (White, J., concurring in the judgment); 505 U.S. at 432 (Stevens, J., concurring in the judgment).

96. The majority overturned the teenager’s indictment, on the assumption that the ordinance had been narrowed to cover a content-based and viewpoint-based subset of “fighting words.” See 505 U.S. at 391-96. The concurring Justices agreed that the teenager’s indictment should be overturned, but their rationale was that the ordinance was overbroad, by including speech-acts that were not “fighting words.” See 505 U.S. at 411-15 (White, J., concurring in the judgment).

97. Cf. *infra* text accompanying notes 315-33 (discussing true nature of constitutional “liberties”).

intended the rule to have a disparate impact along suspect lines.⁹⁸ Having a "discriminatory purpose" is close to⁹⁹ a necessary condition for a successful equal protection challenge.¹⁰⁰ A rule that merely has a disparate impact, not a "discriminatory purpose," will not violate the Equal Protection Clause. This doctrine stems from the Court's well-known decision in *Washington v. Davis*,¹⁰¹ where it upheld a qualifying exam for D.C. police officers, even though blacks were disqualified by the test in disproportionate numbers; and from the extension of *Davis* to gender in the *Feeney* case,¹⁰² which upheld Massachusetts's civil service preference for veterans, even though virtually all veterans in Massachusetts were men.

To construe the Equal Protection Clause as act-shielding would eviscerate the doctrines here described. As an illustration, consider *Craig v. Boren*,¹⁰³ perhaps the leading example of an equal protection challenge to a conduct-regulating rule (the type of rule discussed in this article). An Oklahoma statute prohibited the sale of low-alcohol beer to minors, with a "minor" defined as a man under the age of twenty-one, and a woman under the age of eighteen.¹⁰⁴

98. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Personnel Adm. v. Feeney*, 442 U.S. 256, 271-80 (1979) (holding that rule that employs a nonsuspect predicate will still trigger heightened scrutiny under the Equal Protection Clause, but only if predicate was selected, by rule-formulator, because of rule's adverse effects on a suspect class).

Beach also adverts here to the possibility of an equal protection challenge enhanced by the presence of fundamental rights. The Court has indeed recognized discrimination-type challenges in the area of fundamental rights, but, most recently — at least with respect to conduct-regulating rules — it has proceeded directly under the relevant fundamental right, and has not relied upon the Equal Protection Clause. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (free exercise); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (free speech).

99. I say "close to" because the Court has, on occasion, invalidated statutes under the rational-basis prong of equal protection scrutiny. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Allegheny Pittsburgh Coal Co. v. County Commn.*, 488 U.S. 336 (1989); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973). Such cases, or at least some of them, can be understood as involving "suspect" classes that the Court was unwilling to label as such — for example, the class of new state residents in *Hooper* and *Zobel*, the class of homosexual persons in *Romer*, and the class of mentally retarded persons in *Cleburne*.

100. It will be sufficient if the interest behind the rule lacks enough importance to justify purposeful discrimination. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

101. 426 U.S. 229 (1976).

102. *Feeney*, 442 U.S. 256 (1979).

103. 429 U.S. 190 (1976).

104. See *Craig*, 429 U.S. at 191-92.

A vendor of low-alcohol beer brought an anticipatory challenge to the statute. The Court sustained her challenge, finding an insufficient connection between gender and the state's claimed objective — traffic-safety — to justify the statute's explicit gender classification.¹⁰⁵ The vendor was constitutionally free from the particular legal duty to which the gender-discriminatory statute purported to subject her. But this could hardly mean, given *Davis* and *Feeney*, that the vendor was also free from the duties to which a host of gender-neutral rules might subject her, and under which her (various) actions of selling low-alcohol beer to minors might fall: for example, a rule requiring her to possess a valid license, to refrain from selling alcohol to someone obviously intoxicated, or to sell alcohol for take-away consumption only in closed containers.¹⁰⁶

Indeed, the Court in *Craig v. Boren* made clear that Oklahoma could cure the defect in its statute by *widening* the statutory duty, so as necessarily to include within its scope every single action covered by the now-discriminatory duty. "[T]he Oklahoma Legislature is free to redefine *any cutoff age* for the purchase and sale of [low-alcohol beer] that it may choose, provided that the redefinition operates in a gender-neutral fashion."¹⁰⁷ Sanctioning the vendor for breaching a rule that banned sales to women as well as men under the age of twenty-one would not violate the vendor's constitutional rights, or anyone else's. This is a tight, logical consequence of the doctrinal focus on discriminatory purpose; but note that it would hold true even if the doctrine were changed to make *either* disparate impact *or* discriminatory purpose the basis for an equal protection violation. The concept of disparate impact, like the concept of discriminatory purpose, takes as its referent a particular rule.¹⁰⁸ It

105. See 429 U.S. at 199-204.

106. Here, as in the overbreadth context, the point that the vendor was not asserting "her own" constitutional rights, but instead was asserting (under the rubric of *jus tertii*) the constitutional rights of others — male purchasers of low-alcohol beer, see 429 U.S. at 192-97 (holding that vendor had *jus tertii* standing) — is misplaced. The vendor *did* have a constitutional right in my minimal sense: a legal right to secure the invalidation, in some measure, of the rule that purported to impose a duty upon her. See *supra* text accompanying notes 90-91 (discussing this issue in the overbreadth context).

In any event, my point would also hold for a rule that penalized the purchase of alcohol by men between 18 and 21. Clearly, overturning a young man's sanction or duty pursuant to this rule would not entail that he had a general constitutional immunity for otherwise-illegal actions of purchasing alcohol.

107. *Craig*, 429 U.S. at 210 n.24 (emphasis added).

108. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-69 (1976). Fiss provides a theoretical defense of disparate-impact-type scrutiny, by arguing in favor of what he calls the "group disadvantaging principle": "[A] state law or practice [that] aggravates . . . the subordinate position of a specially disadvantaged group . . . is what the Equal Protection Clause prohibits." *Id.* at 157.

concerns whether *that* rule falls more heavily on blacks rather than whites, men rather than women. So imagine that our vendor in *Craig* successfully challenged some gender-neutral rule on the grounds of its disparate impact (say, a rule prohibiting the sale of certain beverages disproportionately consumed by men). She would still be subject to existing gender-neutral rules lacking that disparate impact, as well as to a *widened* version of the unconstitutional rule — widened so as to eliminate the disparate impact.

So much for the Free Speech and Equal Protection Clauses of the Bill of Rights. The Free Exercise Clause can be handled quickly. As a consequence of the Court's decision in the seminal case of *Employment Division v. Smith*,¹⁰⁹ free exercise doctrine is now closely isomorphic to equal protection doctrine and roughly isomorphic to free speech doctrine.¹¹⁰ The Court in *Smith* held that Native Americans who had used peyote as part of the ceremony of a Native American church, and as a result were dismissed from their jobs for illegal drug use, could be denied state unemployment benefits.¹¹¹ The right to religious freedom, the Court announced, simply protected actors from being sanctioned or coerced pursuant to non-neutral rules. Non-neutral rules, here, are those that explicitly pick out *religious* properties of actions — for example, that the

It is, in theory, possible to construct an act-shielding doctrine under the Equal Protection Clause. Certain otherwise-proscribable actions, if performed by blacks, would be constitutionally immune; blacks' freedom to perform such actions could be conceptualized as a resource to which they have a special claim, by virtue of distributive or reparative justice, or by virtue of an anti-caste principle, or whatever. But this is not what Fiss argues for, or what the concept of disparate impact involves. See *Personnel Admr. v. Feeney*, 442 U.S. 256, 259-61 (1979) (describing claimant's disparate-impact challenge to statutory provision establishing preference for veterans); *Washington v. Davis*, 426 U.S. 229, 232-38 (1976) (describing claimants' disparate-impact challenge to various hiring practices, in particular a qualifying test, employed by the District of Columbia).

109. 494 U.S. 872 (1990).

110. I say "roughly" rather than perfectly isomorphic to free speech doctrine, because rules picking out nonexpressive act properties are, at least officially, subject to heightened scrutiny under the Free Speech Clause, see *supra* text accompanying note 73 — properly so, see *infra* text accompanying notes 354-64 — while neutral laws are not subject to heightened equal protection or free exercise scrutiny. I say "closely" rather than perfectly isomorphic to equal protection doctrine because of a special proviso that the Court deployed in *Smith*, and reaffirmed in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), to explain its earlier unemployment-compensation cases: "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Boerne*, 117 S. Ct. at 2161 (quoting *Smith*, 494 U.S. at 884). The existence of this special proviso does not materially undermine the isomorphism between free exercise and equal protection doctrine, for purposes of this article. Post-*Smith*, sanctioning or coercing an action under a religiously discriminatory rule will violate the Constitution even though sanctioning or coercing the very same action under a neutral rule that lacks the requisite "system of individual exemptions" will not.

111. See *Smith*, 494 U.S. at 890.

action is performed for religious purposes, or by the members of a particular religious group.

[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."¹¹²

Post-*Smith*, the religious cast of a particular action will not, under the Constitution, work to exempt that action from a rule the predicate of which describes actions in nonreligious terms¹¹³ — just as, under the Equal Protection Clause, actors are not exempt from race-neutral or gender-neutral laws and, under the *O'Brien* portion of First Amendment jurisprudence, speakers can generally be regulated by rules picking out nonexpressive properties of their actions. Thus the rule-centered — rather than act-protecting — structure of free speech and equal protection doctrine holds true, *mutatis mutandis*, for free exercise.

Finally, constitutional doctrine in the area of substantive due process quite clearly fits the Basic Structure. Here, as elsewhere, constitutional challenges — whether anticipatory challenges by would-be actors, or retrospective challenges by actors who already have been sanctioned — are structured as challenges to particular rules. This is so natural to constitutional lawyers, scholars, and jurists, that the Court without pause or comment adopted a rule-centered approach in the seminal, post-New Deal substantive due process cases: *Griswold v. Connecticut*¹¹⁴ and *Roe v. Wade*.¹¹⁵ *Griswold* was a retrospective, individual challenge by Dr. Griswold and another doctor, who had been tried and convicted in state court for prescribing contraceptives in violation of a Connecticut criminal statute that prohibited "‘us[ing] any drug, medicinal article or instrument for the purpose of preventing contraception,’" or assisting others in doing so.¹¹⁶ *Roe* was an anticipatory, class-action challenge by the pseudonymous Jane Roe and others, who brought a declaratory and injunctive suit in federal district court against the Texas abortion statutes, which criminalized "‘procur[ing] an abortion’" except for those "‘procured . . . by medical advice for the

112. 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)); see *Boerne*, 117 S. Ct. at 2160-61 (reaffirming *Smith*).

113. With the special exception noted above, see *supra* note 110.

114. 381 U.S. 479 (1965).

115. 410 U.S. 113 (1973).

116. *Griswold*, 381 U.S. at 480 (quoting CONN. GEN. STAT. ANN. § 53-32 (West 1958)).

purpose of saving the life of the mother.'"¹¹⁷ In each case, the Court focused on the particular statute against which it took, respectively, Dr. Griswold's and Ms. Roe's claims to be targeted. Specifically, the Court in each of these cases asked whether the particular statute at issue was narrowly tailored — a concept familiar from free speech jurisprudence.¹¹⁸ To quote the analysis in *Griswold*:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹¹⁹

The narrow-tailoring approach in *Roe* was identical:

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

. . . .

Measured against these standards, [the Texas statute], in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.¹²⁰

Because the Connecticut statute at stake in *Griswold* failed the Court's narrow-tailoring test, the Court overturned the sanctions of Dr. Griswold and his fellow physician that had been meted out pursuant to that statute.¹²¹ There was only a brief description of the particular actions that these doctors had performed;¹²² and it was surely not an entailment of the holding in *Griswold* that the doctors

117. *Roe*, 410 U.S. at 117 n.1 (quoting TEX. PENAL CODE ANN. arts. 1192, 1196).

118. See *Griswold*, 381 U.S. at 485 (citing free speech case law for narrow-tailoring analysis); *Roe*, 410 U.S. at 155 (citing substantive due process, free speech, and other fundamental rights case law for narrow-tailoring analysis).

119. *Griswold*, 381 U.S. at 485 (quoting *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964)).

120. *Roe*, 410 U.S. at 155, 164 (citations omitted).

121. See *Griswold*, 381 U.S. at 486.

122. See 381 U.S. at 480-81.

were constitutionally immune from being sanctioned, under any statute, for those particular actions. What if the notation Dr. Griswold used on his prescription form was a secret message to the pharmacist that constituted blackmail or extortion on an unrelated matter? What if the forms Griswold used had been stolen from the government? What if he prescribed more expensive contraceptive C rather than cheaper contraceptive D, as part of a price-fixing scheme with other doctors and the drug companies? The Court in *Griswold* did not need to confront these possibilities — it did not need to undertake a complete description of all the morally relevant properties of Dr. Griswold's actions¹²³ — because Dr. Griswold's substantive due process right was rule-centered, not act-shielding. It protected him from being sanctioned pursuant to the no-contraception rule; it did not protect him from being sanctioned pursuant to all the rules under which his actions of prescribing contraceptives might fall.

As for the decision in *Roe*: when the Court upheld the entry of anticipatory relief prohibiting any enforcement of the Texas no-abortion statute,¹²⁴ this holding clearly did not entail that every action within the scope of that statute was immune from coverage by every rule. The very point of the famous trimester analysis of *Roe* was to make clear that a state *could* proscribe and sanction post-viability abortions absent a threat to the mother's life or health.¹²⁵ A future actor who procured a post-viability abortion could not be sanctioned by Texas pursuant to the particular overbroad rule targeted and invalidated in *Roe*,¹²⁶ but that actor could be sanctioned for the very same action if Texas in the interim had responded to *Roe* by enacting a more narrowly tailored no-abortion statute limited to post-viability abortions not involving maternal life or health.

The post-*Roe* and -*Griswold* substantive due process cases are similarly structured as challenges to particular rules rather than to the sanctioning or coercing of particular actions.¹²⁷ I will not test

123. See DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 30-61 (1965) (analyzing concept of complete moral description of particular action).

124. See *Roe*, 410 U.S. at 166-67.

125. See 410 U.S. at 162-66.

126. See 410 U.S. at 166 ("[T]he Texas abortion statutes, as a unit, must fall. . . . We find it unnecessary to decide whether the District Court erred in withholding injunctive relief [and merely entering declaratory relief], for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.").

127. Some exemplary and prominent cases, besides *Casey*, are *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (regulation of abortion); *Bowers v. Hardwick*, 478 U.S.

the reader's patience by discussing the facts and reasoning of these decisions here, beyond noting that the recent landmark decision in *Casey*¹²⁸ was, like *Roe*, an anticipatory class action in which the Court facially invalidated a particular state law — a Pennsylvania statute prohibiting doctors from performing an abortion on a married woman without receiving a signed statement of spousal consent from her.¹²⁹ To spin out the familiar story: the holding in *Casey* protects Pennsylvania physicians from being sanctioned pursuant to this particular rule; but it does not entitle them to perform abortions that not only violate the rule but are also wrongful under another description, for example, because the physician's license elapsed, or because the physician failed to secure the *woman's* consent, and so on.

* * *

This descriptive survey of constitutional doctrine under the relevant portions of the Bill of Rights should suffice, I hope, to show that constitutional rights are not act-shielding, or even remotely like that.¹³⁰ But the observant reader might complain that, by demonstrating this negative claim, I have not yet demonstrated the *positive* claim that constitutional rights are rights against particular rules. There is logical space between having rights shield particular actions from all the rules under which the actions fall, and having rights that are targeted against particular rules. A constitutional right might be targeted, not against a particular rule but against some class of rules different from the class targeted by an act-shielding right. For example, constitutional adjudication might be structured such that a constitutional right empowers the claimant to

186 (1986) (regulation of sodomy); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (family unity); and the recent assisted suicide cases, *Vacco v. Quill*, 117 S. Ct. 2293 (1997), and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

128. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court in *Casey* moved from *Roe's* narrow-tailoring test for laws regulating abortion, to an "undue burden" test, principally to permit pre-viability measures aimed to protect fetal life, see 505 U.S. at 868-79, but this does not change the rule-centered cast of the *Casey* decision itself or of abortion doctrine more generally.

129. See 505 U.S. at 887-98.

130. What about the possibility of a hybrid structure, such that constitutional rights₁ are targeted against rules, while constitutional rights₂ protect innocent actions? It might be protested that, by demonstrating that constitutional rights₁ exist — by showing that it can violate *X's* constitutional rights to sanction him by virtue of an action proscribable under another description — I have not ruled out the existence of constitutional rights₂. While a hybrid structure is indeed logically possible, it does not describe the case law. The closest cases we have to cases that recognize rights₂ are as-applied challenges to rules. But as I demonstrate below, as-applied challenges to rules are best construed as rule-targeted; they do not involve a complete moral inspection of *X's* action, and therefore *X's* successful as-applied challenge does not confer a constitutional right₂ on him. See *infra* text accompanying notes 140-44.

secure a judicial order immunizing him from being sanctioned, for performing a particular action, pursuant to any rule where the “purpose” behind the rule (whatever precisely that means) is not a compelling one.¹³¹

Although this intermediate sort of constitutional right — one that neither protects a particular action from all rules, nor is targeted against a particular rule — is indeed a logical possibility, it seems morally esoteric. The act-shielding structure, at least, has real moral resonance. Actions are the primary object of moral assessment, at least on certain plausible theories now widely held by moral philosophers — namely, act-consequentialist or deontological theories.¹³² A particular action will, at bottom, be permissibly performed or not, and if our constitutional reviewing courts were epistemically and remedially perfect, they might well focus their efforts on protecting particular actions. But constitutional courts do not do this, presumably because of the formal simplicity and practical advantages of focusing on particular rules. Given that they do not, why think that an intermediate position, with neither the moral resonance of rights-as-shields-for-actions, nor the countervailing benefits of the Basic Structure, is anything more than a logical possibility?

Given that an intermediate position is both formally complex and morally esoteric, my descriptive efforts here will be brief: the intermediate position does *not* accurately describe our constitutional practices, any more than the act-shielding structure does. Our very language belies it. Constitutional challenges are characterized as facial or as-applied challenges to particular rules,¹³³ not to classes of rules. Constitutional courts typically focus on the predicate or history of one particular rule, regardless of whether the constitutional challenge is retrospective or prospective, or whether it is facial or as-applied. Sometimes, constitutional courts will consider, in the same case, a challenge to two or more rules; but it is not a *necessary* feature of constitutional adjudication that this occur.¹³⁴ The odd, intermediate position I am briefly considering says that, necessarily, recognizing *X*’s “constitutional right” entails inval-

131. I am indebted to Michael Dorf for pressing me to recognize and discuss this possibility.

132. See *supra* note 46.

133. See Dorf, *supra* note 38, at 236.

134. I will not try to demonstrate this exhaustively. But it is true, for example, of the various cases I have selected as doctrinal exemplars, see *infra* cases cited notes 156-61, 334-41, 348-51, that they typically if not exclusively involve challenges to one rather than multiple rules, on any plausible text-based individuation criterion.

idating a class of rules, rather than just one rule. But constitutional courts typically invalidate (in some measure) merely one, particular rule. This implies that the Basic Structure rather than the intermediate position holds true.

I should note that the general view of constitutional adjudication presented in this article (that courts repeal or amend rules, not individual treatments), and the arguments generally supporting this view, presuppose only the weaker claim that the act-shielding view is false (that is, that either the Basic Structure or an intermediate structure obtains), and not the more robust claim that the Basic Structure is true. The Direct Account of constitutional rights is unpersuasive because it cannot persuasively account for the following feature of constitutional law, which is a feature *both* of the Basic Structure *and* of the intermediate structure just described: that it can be unconstitutional to impose a sanction or duty pursuant to one rule even though the very action by virtue of which the sanction is imposed, or that the claimant is coerced not to perform, can be sanctioned or coerced pursuant to a different rule.¹³⁵

Nonetheless, because I think the more robust claim is indeed correct, the view of constitutional adjudication presented here, and the arguments advanced to support that view, are specifically framed with the Basic Structure in mind. Constitutional rights are targeted against particular rules, not against classes of rules.¹³⁶

135. See *infra* Part II (criticizing Direct Account). A derivative account of the intermediate structure would construe courts as repealing or amending classes of rules rather than particular rules.

136. To be sure, a judicial invalidation of one rule may have collateral consequences for other rules. For example, the invalidation may be *stare decisis* for a subsequent, judicial invalidation of another rule with similar content. The invalidation may even trigger duties, on the part of enforcement officials, to refrain from enforcing other rules. For example, the invalidation of one rule might make it sufficiently "clear" that a second is unconstitutional, such that an enforcement official would no longer possess qualified immunity from a damages action if she were to enforce the second. See generally Kent Greenawalt, *Constitutional Decisions and the Supreme Law*, 58 U. COLO. L. REV. 145 (1987) (analyzing consequences of Supreme Court constitutional decisions for legislative and executive officials). Nonetheless, it is a mistake to conceive these collateral consequences as an invalidation of the collaterally-affected rules — or at least to conceive them as the kind of invalidation envisioned by an intermediate structure. The difference between the intermediate structure and the Basic Structure concerns whether a particular rule is *targeted* by a judicial holding — whether the Court's analytic focus concerns the moral propriety of a particular rule; and, relatedly, whether the change in the duties, powers, etc. of private persons and state officials, with respect to a particular rule, secured by the judicial holding, can be different from the changes that follow from the holding with respect to other rules. But surely the answer is yes, given current practices. For instance, the court can enjoin officials not to enforce the particular rule; it need not enjoin them not to enforce a class of rules. Where such an injunction is entered, official enforcement of the targeted rule can trigger contempt sanctions, under the injunction, while official enforcement of other rules (however similar) will not.

What do I mean by "one" particular rule? In saying this, I presuppose some kind of criterion for individuating rules.¹³⁷ I will not specify a particular criterion, beyond saying this: the (descriptively) correct individuation criterion is some kind of *text-based* criterion. Criminal or civil statutes as well as administrative regulations — the kind of rules at stake in this article — have a canonical, written formulation that is part of a canonical "code": the U.S. Code, or the Code of Federal Regulations, or a state statutory or administrative code.¹³⁸ The (descriptively) correct criterion, at least for such rules, must individuate rules along textual lines: as a single deontic sentence, or a single term in a deontic sentence, or a single provision made up of several sentences, or something like that. Why? Because the constitutional courts, in reviewing sanctions and duties, focus on the predicate and history of these sort of textually defined deontic entities. The courts will look at a code provision, or a sentence in that provision, or a bunch of "related" provisions, and so on.¹³⁹ "What, precisely, is *the* correct text-based individuation criterion?" is a tough question; perhaps there is a different criterion for different constitutional clauses. I need not answer that question, for purposes of this Part or indeed this article. My claim is that, whatever the precise, text-based criterion for individuating rules that is descriptively most accurate (or normatively most attractive), the Basic Structure and not some other structure — act-shielding or intermediate — holds true.

Finally, I should make clear that the Basic Structure does not require constitutional courts to focus *exclusively* on the predicate or history of the rule pursuant to which an actor is sanctioned or coerced, as opposed to also considering some of the features of his particular action. This goes to the problem of facial versus as-applied challenges, to which I have already alluded. In *X*'s facial challenge to a rule *R* (whether an anticipatory challenge by which *X* seeks to free himself of a duty, or a retrospective challenge by which *X* seeks to overturn a sanction), the court's analysis does focus solely on the predicate and history of *R*.¹⁴⁰ In *X*'s as-applied

137. See SCHAUER, *supra* note 58, at 62 (discussing individuation of rules); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 825-29 (1972) (same); JOSEPH RAZ, *CONCEPT OF A LEGAL SYSTEM* 70-92, 140-47 (1980) (same).

138. See *supra* note 58 (discussing issue of canonical formulation). For common-law rules without a canonical formulation, the individuation criterion might not be text-based.

139. This is true, for example, of the doctrinal exemplars, see *infra* cases cited notes 156-61, 334-41, 348-51.

140. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 887-99 (1992) (prospective facial challenge to duty); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (retrospective facial challenge to indictment).

challenge to *R*, the court's analysis focuses *in part* on the predicate and history of *R*, but also in part on some of the features of *X*'s own past or future actions. The Basic Structure is consistent with as-applied challenges, insofar as (a) the court engages in a morally limited, rather than morally complete description of *X*'s own actions; and relatedly (b) *X*'s victory does not entail that those actions are free from sanction under other rules.

As-applied challenges, as adjudicated by the Court, fit this description. To give an example: In *In re R.M.J.*¹⁴¹ the claimant attorney had been sanctioned, pursuant to a Missouri rule generally prohibiting attorneys from advertising their services, and the Supreme Court then overturned his sanction on free speech grounds. It held that the Missouri rule violated the Free Speech Clause, as applied to the claimant.¹⁴² This meant that the Court analyzed the particular advertisements for which the claimant had been sanctioned: it determined that the advertisements were a form of "commercial speech" and, further, that the advertisements did not have certain properties (being false or misleading) relevant to the purpose behind the Missouri rule.¹⁴³ Had the claimant published a false advertisement, his sanction would have been upheld. What the Court did *not* do was perform a complete moral inspection of the claimant's advertisements; the inspection was limited to the properties that related, either to the liberty of speech, or to the particular rule that Missouri had deployed against the claimant. Presumably, then, he could still be sanctioned for the advertisements if they were sufficiently wrong under another description — for example, if the action of publishing the advertisements constituted an antitrust violation, theft of services, or the breach of a statute regulating the level of wages and prices. The claimant attorney's challenge was as-applied but not act-shielding, and I will further claim that this is generally true of as-applied challenges (at least to sanctions and duties) throughout constitutional law.¹⁴⁴

141. 455 U.S. 191 (1982).

142. See 455 U.S. at 206-07.

143. See 455 U.S. at 204-07.

144. The overwhelming majority of the cases in which the Court sustains as-applied challenges arise under the Free Speech Clause, at least for substantive challenges to the kinds of rules discussed in this article. Clear, recent examples of successful as-applied free speech challenges include: *Colorado Republican Federal Campaign Commission v. FEC*, 518 U.S. 604 (1996); *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994); *Edenfield v. Fane*, 507 U.S. 761 (1993); *United States v. Eichman*, 496 U.S. 310 (1990); *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); and *United States v. Grace*, 461 U.S. 171 (1983). See also *Texas v. Johnson*, 491 U.S. 397, 404 n.3 (1989) (styled as as-applied challenge, given possibility of nonexpressive flag "desecration"). These are generally consistent

When and why reviewing courts should engage in as-applied analysis, as opposed to facial analysis, remains a very interesting constitutional question — one that the Direct and Derivative Accounts will answer quite differently. We will consider this question below.¹⁴⁵ My point here is that, whatever the correct answer, the existence of as-applied challenges is quite consistent with the Basic Structure.

* * *

The Basic Structure is *our* structure. It holds true of as-applied challenges as well as facial challenges, in anticipatory suits as well as retrospective suits, and across the wide terrain of the Bill of Rights — from free speech to equal protection to free exercise to substantive due process. Perhaps morality requires this structure to change; but I will not pursue that issue in this article.¹⁴⁶ For there is a morally tenable account of the moral content of constitutional rights, structured the way those rights are. That is the Derivative Account. Rule-targeted rights are best construed, and plausibly construed, as morally derivative rights. The Direct Account is a poor view of rule-targeted rights; the Derivative Account is a much

with my descriptive claim that as-applied adjudication is not act-shielding, and does not involve a complete moral inspection of the claimant's actions. This is also true of the few clear as-applied challenges that the Court has sustained in the area of substantive due process. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (as-applied challenge, insofar as Court relies upon married status of doctors' patients); *Carey v. Population Servs. Intl.*, 431 U.S. 678 (1977) (striking down law restricting distribution and advertisement of contraceptives, as applied to nonprescription contraceptives).

As-applied challenges virtually never arise under the Equal Protection Clause. For the exception that proves the rule, see *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-51 (1985); 473 U.S. at 476 (Marshall, J., concurring in the judgment in part and dissenting in part) ("[T]o my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis.").

As for the Free Exercise Clause: although as-applied challenges were standard prior to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), see *Hobbie v. Unemployment Appeals Commn.*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963), the isomorphism between free exercise and equal protection created by *Smith* implies that as-applied challenges should become unusual here as well. In any event, there is a reading of the pre-*Smith* case law that makes it consistent with the Basic Structure — and, given the absence of a complete moral inspection of the religiously motivated actions at stake in *Hobbie*, *Thomas*, *Yoder*, and *Sherbert*, such is probably the better reading. Pre-*Smith* type free exercise rights are consistent with the Basic Structure if the successful constitutional claim of a religiously motivated actor against being sanctioned (or, as in *Hobbie*, *Thomas*, and *Sherbert*, being denied benefits) pursuant to neutral Rule, leaves open the possibility that he might be sanctioned (or denied benefits) for the very same action pursuant to another neutral rule (say, a neutral rule justified by a more compelling purpose than the purpose justifying Rule). This is not to say that an act-shielding right to religious liberty is impossible, simply that the pre-*Smith* cases probably did not create such a right.

145. See *infra* text accompanying notes 414-21.

146. The question is whether the legal institution or practice of act-shielding rights is morally preferable to the Basic Structure. See *infra* text accompanying note 427 (discussing this issue).

better view. These are normative, not descriptive claims, and the time has come to defend them.

II. THE DIRECT ACCOUNT

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court . . .¹⁴⁷

This is the official view of constitutional rights — the view that the Court officially espouses.¹⁴⁸ This view sees constitutional rights as essentially “personal,” in the following sense: *X*’s constitutional right secures judicial protection, for *X*, against the application of a particular rule *R* to *him*. If applying rule *R* to *X* is morally unproblematic, then *X* has no constitutional claim; the Constitution does not empower *X* to secure a judicial invalidation (a repeal or amendment) of the rights-targeted rule, merely because the rule does wrong to other persons within the rule’s scope. In the Court’s words: “[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others.”¹⁴⁹ To construe the Constitution as empowering *X* to trigger a judicial invalidation of rules that merely do wrong to some persons, but not to *X* himself, would make reviewing courts into mini-legislatures — “roving commissions assigned to pass judgments on the validity of

147. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (citations omitted).

148. The Court has numerous times made statements similar to the above-quoted statement from *Broadrick*, particularly in the context of explicating the overbreadth doctrine. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 112 n.8 (1990); *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (plurality opinion); *Board of Airport Commrs. v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Secretary of State v. Joseph H. Munson, Co.*, 467 U.S. 947, 955 (1984); *New York v. Ferber*, 458 U.S. 747, 767 (1982); see also *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”). *Salerno’s* rule, clearly, trades upon the “personal” view of constitutional rights articulated by the Court in *Broadrick* and the other cases here cited.

149. *Broadrick*, 413 U.S. at 610.

the Nation's laws"¹⁵⁰ — rather than adjudicatory bodies essentially concerned with the treatment of particular litigants.

The Direct Account encapsulates and formalizes this official view of constitutional rights.

Direct Account

To say that some treatment of *X* (sanctioning *X* pursuant to a rule, or subjecting *X* to the duty that the rule announces) "violates *X*'s constitutional rights" entails the following: the treatment is directly wrong, and *X* has the legal right to secure judicial invalidation of the treatment. "Directly wrong" means that there is sufficient moral reason for the court to invalidate the treatment (overturn *X*'s sanction, or free *X* from the duty), quite independent of any further invalidation of the rule under which the treatment falls.

Is this account morally tenable? I think not. This Part considers, and criticizes, the possible defenses of the Direct Account. I analyze, and reject, a variety of purported explanations why moral reason might obtain for a court to overturn *X*'s own treatment, independent of further invalidating the rule under which that treatment falls.¹⁵¹ For purposes of clarity and rigor, I discuss separately the two kinds of legal treatments that are at issue in this article: sanctions and duties. My strategy will be to rebut, first, the possible explanations why the Direct Account holds true of sanctions.¹⁵² Then, at the end of this Part, I discuss whether moving from sanctions to duties helps the Direct Account.¹⁵³

To assess the Direct Account I use the following simple and stylized examples of constitutional rights. The examples are meant to reflect the range of substantive constitutional rights that sanctions, and the duties that sanctions back up, can violate.¹⁵⁴ I draw the

150. 413 U.S. at 611.

151. In advancing this criticism, I do not mean to deny the plausibility of deontological or agent-relative moral constraints: for example, the plausible constraint upon killing one person even to save five. See, e.g., SCHEFFLER, *supra* note 17, at 80-114 (critically discussing agent-relative constraints). What the Direct Account tries to advance is an agent-relative, or quasi-agent-relative, view of the moral content of constitutional rights: a purported moral reason to save the claimant, independent of what happens to anyone else. My claim is not the generic claim that moral views of this sort are implausible; rather, it is the specific claim that, given the proscribability of rights-holders' actions under other descriptions, the Direct Account won't fly for the constitutional rights I discuss.

152. See *infra* sections II.A, B, C.

153. See *infra* section II.D.

154. With one exception: a right against vagueness. Vagueness may provide a viable challenge to a conduct-regulating law that is otherwise constitutional. See *Kolender v. Lawson*, 461 U.S. 352, 352 (1983) (striking down, on vagueness grounds, a statute that required

rule in each example, more or less directly, from a major Supreme Court case or cases under the Bill of Rights. And the stylized facts are designed to highlight the Basic Structure of constitutional rights: that constitutional rights function as shields against particular rules, not shields around particular actions.¹⁵⁵

THE FLAG DESECRATION CASE: A rule provides that "no person shall desecrate a flag of the United States."¹⁵⁶ It violates the actor's free speech rights to be sanctioned pursuant to this rule. It turns out that actor was, by his very action, a batterer, polluter, and arsonist.

THE RESIDENTIAL PICKETING CASE: A rule provides that "no person shall picket a residence or dwelling, except for persons

loiterers to provide, upon request by a peace officer, a "credible and reliable" identification). But the moral import of vagueness is sufficiently distinct from, say, the moral import of a clear law regulating speech, or abortion, *see* LON FULLER, *THE MORALITY OF LAW* 39 (1969) (listing a total "failure to make rules understandable," along with a failure to publicize rules, retroactivity, and several others, as a failure to maintain a legal system at all), that I leave for another day the question whether a Direct Account of vagueness succeeds.

155. To avoid misunderstanding, let me emphasize that the stylized facts in these examples are *not* drawn from particular cases. I am aware of free-speech cases where the successful claimant was, in fact, a wrongdoer under another description. *See* cases cited *supra* note 66, 85-87. I am not aware of equal protection, free exercise, or substantive due process cases where that was true, in part, no doubt, because of the facial character of constitutional adjudication in these latter areas. *See supra* note 144; *infra* notes 554-57 and accompanying text. Nonetheless, as I have argued at some length, the successful equal protection, free exercise, and substantive due process claimant, as well as the successful free speech claimant, *could* be a wrongdoer under another description. Nothing in his having a successful constitutional claim entails otherwise, and these stylized facts are designed to illustrate that. If you deny that a claimant with these particular facts would have a successful claim (on the Derivative Account, because the Court would amend the rule but leave the claimant's action covered by the amended rule, *see infra* text accompanying notes 414-21), simply substitute a different kind of wrongdoing plaintiff. Some wrongdoing plaintiff must have a successful claim, if constitutional rights are not act-shielding.

It might be objected that the Basic Structure (*X*'s valid constitutional claim does not protect him from being sanctioned under a different description) is, strictly, consistent with the following: *X*'s valid constitutional claim *does* entail that *X* is not (the Court predicts) sanctionable under a different description. This is strictly consistent with the Basic Structure if, when the court's prediction is proven wrong, the claimant is not protected, by judicial order, from the latter sanction. However, I see nothing in existing free speech, free exercise, equal protection, and substantive due process doctrines, as described in Part I, that would rule out the Basic Structure but support the latter proposition. I will not belabor matters by re-discussing the doctrines here. It might further be objected that, although *X* can have a valid constitutional claim and still be constitutionally sanctionable under a different description, this does not strictly entail that *X* can be a *moral wrongdoer* under another description. For example, one can imagine a regime in which *X*'s constitutional right entails that his action was not *malum in se*, but permits his action to be *malum prohibitum*. Again, I see absolutely nothing in free speech, free exercise, equal protection, or substantive due process doctrines that draws this distinction, and so the stylized actors here perform actions that are *malum in se*. This assumption will be significant at certain points below. *See infra* text accompanying notes 193-97.

156. *See Texas v. Johnson*, 491 U.S. 397 (1989) (holding flag-desecration statute unconstitutional under Free Speech Clause).

engaged in labor picketing.”¹⁵⁷ It violates the actor’s free speech rights to be sanctioned pursuant to this rule. It turns out that the actor trespassed upon the resident’s property and used threatening language while picketing.

THE CHILD PORNOGRAPHY CASE: A rule provides that “no person shall display a photograph of a naked child.”¹⁵⁸ It violates the actor’s free speech rights to be sanctioned pursuant to this rule. It turns out that the actor was a child pornographer.

THE ALCOHOL CASES: A rule provides that “no male [or no female, or no black person] between the ages of eighteen and twenty-one shall purchase alcohol.”¹⁵⁹ (The rule supplements a background prohibition on the purchase of alcohol by any person under eighteen.) It violates the actor’s equal protection rights to be sanctioned pursuant to this rule. It turns out that the actor used a stolen credit card to purchase alcohol.

THE ANIMAL SACRIFICE CASE: A rule provides that “no person shall kill animals for religious purposes.”¹⁶⁰ It violates the actor’s free exercise rights to be sanctioned pursuant to this rule. It turns out that the actor killed an endangered animal protected by an endangered species statute (for example, a panda, cougar, or eagle) that the actor had stolen from a zoo.

THE ABORTION CASE: A rule provides that “no person shall procure an abortion.”¹⁶¹ It violates a woman’s substantive due process rights to be sanctioned pursuant to this rule. It turns out that she procured an abortion by threatening to kill the

157. See *Carey v. Brown*, 447 U.S. 455 (1980) (holding unconstitutional, under Free Speech and Equal Protection Clauses, statute that prohibited residential picketing but exempted labor picketing). RESIDENTIAL PICKETING is meant to exemplify the special portion of free speech case law, evident in *Carey* and most recently in the majority opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Court finds an underinclusive rule to violate free speech rights.

158. See *supra* note 88 (citing child pornography cases). The Court, in these cases, has upheld rules targeted at child pornography, by virtue of their being narrower than the hypothetical rule in CHILD PORNOGRAPHY. If the reader doubts that the Court would, indeed, find the hypothetical rule to be overbroad, then the reader can replace it with a yet broader rule — for example, a rule prohibiting any pictures of “unclothed” children, with unclothed defined prophylactically to include, e.g., the lack of clothing over torsos or thighs.

159. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding gender-discriminatory ban on beer sales unconstitutional under Equal Protection Clause).

160. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding unconstitutional, under Free Exercise Clause, ordinance that prohibited animal killing and was targeted at Santeria religion).

161. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional, under substantive component of Due Process Clause, statute generally prohibiting the procuring of abortions).

physician who performed the procedure, if he declined to do so.

Any moral theory of constitutional rights, whether the Direct Account or some other account, will need to explain the Basic Structure of constitutional rights that these stylized cases are meant to exemplify. Sanctioning *X* pursuant to rule *R*, by virtue of some action that *X* has performed, can violate *X*'s constitutional rights *even if* *X*'s very action bears proscribable properties (other than those picked out by *R*) such that sanctioning *X* for that very action pursuant to a different rule is not unconstitutional. To say that *X*'s sanction pursuant to *R* is "unconstitutional," or that it "violates *X*'s constitutional rights," does *not* entail (1) that *X*'s action is not constitutionally proscribable under any description. But according to the Direct Account, to say that *X*'s sanction is "unconstitutional," or that it "violates *X*'s constitutional rights," *does* entail (2) that there exists moral reason for a court to overturn *X*'s sanction, independent of further invalidating the rule *R* pursuant to which *X* has been sanctioned. The key puzzle, for the defender of the Direct Account, is to explain why the latter proposition holds true even when the first proposition does not.

Let me clarify what it means to say that the flag-desecrator's action in THE FLAG DESECRATION CASE turns out to have been an action of battery or polluting the environment, that the photo-displayer's action in THE CHILD PORNOGRAPHY CASE turns out to have been pornographic, that the residential-picketer's action in THE RESIDENTIAL PICKETING CASE was also trespassory, and so on. I do *not* mean that the reviewing court reliably knows about these further, proscribable properties of the rights-holder's action. To assume that would be ungenerous to the Direct Account, for as we shall see in a moment, one possible defense of the Account is epistemic — a defense that trades upon the limited epistemic capacities of reviewing courts.¹⁶² Rather, I simply mean that the relevant action truly had those additional properties.

Relatedly, the stylized examples of constitutional rights assume that the actor is sanctioned under the wrong rule — the rule prohibiting "flag desecration," "residential picketing," "photo display," etc. — *instead* of being sanctioned pursuant to a rule prohibiting "battery," "trespass," "obscenity," etc. Let us place to one side the double jeopardy issues that might arise where the flag-desecrator, etc., is sanctioned for the very same action pursuant to multiple

162. See *infra* section II.A.2 (discussing epistemic defense of Direct Account).

rules, either seriatim or simultaneously.¹⁶³ A so-called theory of constitutional rights which is, in truth, merely an addendum to double-jeopardy doctrine is too weak to be a satisfactory theory. Constitutional rights to free speech, equal protection, free exercise, and substantive due process function, in practice, as protection for rights-holders quite independent of the Double Jeopardy Clause — that is, as protection against being sanctioned pursuant to the wrong rule *R* even if *R* is the *sole* rule that the state deploys against the rights-holder.¹⁶⁴

Can the Direct Account explain why it is unconstitutional to sanction, solely for “flag desecration,” the flag-desecrator who also was a batterer; why it is unconstitutional to sanction, solely for “residential picketing,” the picketer who also was a trespasser; and so on? Let us see.

A. A Theory of Justified Sanctions

One might try to defend the Direct Account by invoking a general theory of justified sanctions — a general theory, such as an expressive theory, a deterrent theory, or a rehabilitative theory, that purports to set forth the necessary and sufficient conditions for a legal sanction to be morally justified, at least *prima facie*.¹⁶⁵ This

163. See generally MOORE, *supra* note 64, at 325-55 (discussing problem of deciding whether two different rules, pursuant to which a person is sanctioned for the very same act-token, pick out the same or different act-types for double-jeopardy purposes).

164. A recent case that clearly illustrates this point is *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down fine pursuant to law prohibiting distribution of anonymous campaign literature, as violating free speech). Other exemplary cases are: *Texas v. Johnson*, 491 U.S. 397 (1989) (free speech); *In re R.M.J.*, 455 U.S. 191 (1982) (free speech); *Loving v. Virginia*, 388 U.S. 1 (1967) (equal protection); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (substantive due process). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise under pre-*Smith* regime). I should also note the following, reciprocal point. Where *X*'s sanction pursuant to one rule violates the Free Speech, etc., Clause, and is overturned on constitutional grounds, sanctioning him for the very same action pursuant to a different rule will not constitute double jeopardy — regardless of the similarity between the invalid and valid rule under ordinary double jeopardy doctrine. See *Montana v. Hall*, 481 U.S. 400, 402 (1987) (double jeopardy does not bar reprosecution where conviction overturned, on grounds other than sufficiency of the evidence, on appeal).

165. See R.A. DUFF, *TRIALS AND PUNISHMENTS* 151-266 (1986) (surveying theories of punishment); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* (1990) (same); NIGEL WALKER, *WHY PUNISH?* (1991) (same). Certain justified-sanction defenses of the Direct Account, such as Hampton's expressive theory, see *infra* text accompanying notes 171-75, are clearly most persuasive in explaining why the Direct Account might hold true of criminal sanctions. And my rebuttal to these defenses trades upon a theory of sanctioning — retributivism — which again is most germane to criminal sanctions. See *infra* text accompanying notes 179-201. Given the frequency with which the Court strikes down criminal sanctions or criminal-law duties, under the Free Speech, etc., Clauses, and given the absence of any distinction between civil and criminal rules in this jurisprudence, see *supra* note 54, I suggest and henceforth assume that a would-be defense of the Direct Account which fails for criminal rules should be rejected.

is an attractive route for the defender of the Direct Account, because certain theories of justified sanctions are *rule-dependent*. Under certain theories, *X*'s sanction is morally justified only if the predicate or history of the rule pursuant to which *X* is sanctioned meets certain conditions. For example, an expressive theory stipulates that a sanction, to be morally justified, must express what it was about the actor's conduct that made it wrong.¹⁶⁶ *X* must have been a (1) culpable (2) wrongdoer, and (3) the rule under which she is sanctioned must express *that*. An expressive theory of justified sanctions, or some other rule-dependent theory, seems a natural way for the constitutional theorist to explain why sanctioning *X* pursuant to rule *R* is morally problematic even though *X*'s very action is properly sanctioned under a different rule. The problem with *R*, the explanation goes, is just that its predicate or history fails to meet the moral conditions set out by the rule-dependent theory of justified sanctions.

In considering whether a theory of justified sanctions, such as an expressive theory, can underwrite the Direct Account, we must keep separate two, crucially different ideas. The first idea is *nonepistemic*. The idea, here, is that the predicate or history of the rule pursuant to which a person is sanctioned truly matters, quite independent of the epistemic capacities of a constitutional reviewing court. It truly is *not* a matter of nonepistemic moral indifference whether the battering flag-desecrator is punished for "flag desecration" rather than "battery." It is simply a bedrock moral fact that she should be sanctioned under the right kind of rule.¹⁶⁷

166. See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (analyzing expressive theories of punishment); Igor Primoratz, *Punishment as Language*, 64 PHIL. 187 (1989) (same); A.J. Skillen, *How to Say Things with Walls*, 55 PHIL. 509 (1980) (same). Expressive theories of law, not just sanctions, have recently become salient in legal scholarship. See Larry Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

167. The nonepistemic defense of the Direct Account, and indeed virtually every other defense I consider in this Part, as well as the Derivative Account I defend below, presumes that "moral facts" exist in the following sense: moral utterances, e.g., "*X*'s sanction is deserved" or "*X*'s sanction is not deserved" or "*X*'s duty is unjust," constitute claims about the world that are generally true or false, as opposed to merely expressing some attitude on the speaker's part, such as a preference. The technical term for this view of morality as truth-stating is *cognitivism*. *Cognitivism* is to be distinguished from a stronger claim, *realism*, which states that the truth-content of moral claims is independent of society's conventions. See DAVID BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 1-36 (1989) (discussing, and distinguishing between, cognitivism and realism). Whatever the appeal of realism, none of the moral arguments mooted here — neither the ones I criticize, nor the ones I advance — presuppose it. All are consistent with some form of moral conventionalism. See Adler, *supra* note 4, at 803-04 (discussing varieties of conventionalism).

Even if the reviewing court is epistemically reliable¹⁶⁸ — even if the court reliably knows that the flag-desecrator also was a batterer — it should still overturn the flag-desecrator's sanction under the flag-desecration rule.

The second, contrasting idea is *epistemic*.¹⁶⁹ One of the central functions of legal institutions, specifically the institutions that enact and then apply conduct rules, is to identify those actions whose performance is morally wrong. You, or I, or a fallible federal judge somewhere, cannot impose an imprisonment on *X*, or take away some of his money, merely because we believe that *X* performed wrong. Society needs to do more epistemic work — more work to assess the wrongfulness of his action — than *that*. Society does the epistemic work, principally, by enacting rules and then enforcing them. So even if it truly is a matter of nonepistemic moral indifference whether the battering flag-desecrator is sanctioned under one rule or the other — even if the predicate or history of the rule do not figure in the morally necessary nonepistemic conditions for a justified sanction — the reviewing court should overturn *X*'s sanction for "flag desecration." The epistemically reliable way to determine whether his action was wrongful, by virtue of some property other than flag-desecration, is just for state officials to draft and try an indictment against him for some other offense.

I will consider these two, importantly distinct ideas, *nonepistemic* and *epistemic*, in turn.

1. *The Nonepistemic Idea*

The nonepistemic idea is that the predicate or history of the rule pursuant to which a person is sanctioned has true moral significance for the justifiability of his sanction, independent of the epistemic capacities of reviewing courts. It is morally improper to sanction him pursuant to the wrong kind of rule — there is moral reason to

168. See Adler, *supra* note 4, at 771-80 (distinguishing between arguments that point to epistemic or other deficits of constitutional reviewing courts, and arguments that point to content of moral criteria that reviewing courts enforce).

169. By "epistemic," I mean pertaining to moral *knowledge*: knowledge of whether *X*'s sanction is morally justified. Given cognitivism about morality, this idea is coherent. See *supra* note 167 (discussing cognitivism). I draw this epistemic idea from the epistemic strain in the scholarly literature on authority. Whether authoritative rules create reasons for belief or action, see Heidi Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1615-20 (1991) (explaining this distinction); *infra* text accompanying notes 282-88 (same), it is plausible to think that the rule's authority is at least partly grounded upon the moral expertise of the rule-formulator: her knowledge of what morality requires. See *id.* at 1667-77 (defending reason-for-belief account of legal authority, grounded upon epistemic capacities of legal institutions); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 38-69 (1988) (defending reason-for-action account of legal authority, grounded in part upon epistemic capacities of legal institutions).

overturn that sanction — in the same way that it is (or may be) morally improper to sanction him if his action was not wrongful, or if his state of mind was not culpable.¹⁷⁰

How might this nonexpressive idea be fleshed out? One way, as I have already suggested, may be to defend an expressive theory of sanctions — the kind of theory that, most famously, Jean Hampton has defended.¹⁷¹ On Hampton's view, the essence of punishment is to cancel the demeaning and injurious message that crime communicates.

[Punishment] is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity. What do I mean by "vindicating the value of the victim?" . . . To vindicate the victim, a [punitive] response must strive first to re-establish the acknowledgement of the victim's worth damaged by the wrongdoing, and second, to repair the damage done to the victim's ability to realize her value.¹⁷²

Part of what makes a proper punishment morally appropriate is what the punishment says: it says that the wrongdoer is not superior to the victim.¹⁷³

170. On the moral importance of wrongdoing and/or culpability in justifying sanctions, see generally Symposium, *Harm v. Culpability: Which Should be the Organizing Principle of the Criminal Law*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994).

171. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992) [hereinafter Hampton, *Correcting Harms*]; Jean Hampton, *An Expressive Theory of Retribution*, in RETIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992); JEAN HAMPTON & JEFFREY MURPHY, *FORGIVENESS AND MERCY* 111-61 (1988). Hampton terms her theory an "'expressive' theory of retribution," Hampton, *Correcting Harms*, *supra*, at 1659, but I use the terms "retributivism" and "retribution" in this article to refer to the *nonexpressive* variant of that view, namely, that the morally culpable deserve punishment independent of what punishment expresses, with "punishment" itself construed not to entail some kind of expression. See Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 181 (Ferdinand Schoeman ed., 1987) (distinguishing between retributivist and "denunciatory," i.e., expressive, theories of punishment).

172. Hampton, *Correcting Harms*, *supra* note 171, at 1686. Hampton actually uses the term "retribution" in this quotation rather than "punishment" — thus the alterations — both because she is developing an expressive variant of retributivism, see *supra* note 171, and because she wants her theory to cover nonpunitive as well as punitive responses to wrongdoing, see *Correcting Harms*, *supra* note 172, at 1685; but for the sake of a clear distinction between her theory and nonexpressive retributivism, I have altered the quotation and more generally describe Hampton as offering an expressive theory of punishment. This terminological point does not affect the substantive question here, namely, whether a theory such as hers can underwrite the Direct Account.

173. To be sure, a mere statement does not constitute the kind of "expression" that Hampton's theory warrants and demands. Rather, it warrants and demands hard treatment for the wrongdoer that is also *expressive* treatment. See *id.* at 1686-87 ("Re-establishment of the acknowledgement of the victim's worth is normally not accomplished by the mere verbal or written assertion of the equality of worth of wrongdoer and victim. . . . [Rather] we are

In developing her expressive theory, Hampton does not, of course, mean to defend the Direct Account. Her theory is a theory of punishment, not a theory of constitutional law. But the defender of the Direct Account might try to employ Hampton's theory, or more broadly the kind of expressive theory that Hampton's epitomizes, for his own purposes. He might say that the rule pursuant to which *X* is sanctioned must, *inter alia*, pick out the wrong-making property of *X*'s action. The rule must do that, because the very point of punishing *X* is to point out — to *X*, the victim, and the broader community — that *X* was *not* free to inflict that type of action upon a moral equal.¹⁷⁴ This is a possible route for the defender of the Direct Account, because a common failure among some of the rules in our stylized examples — particularly FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION — is that these rules fail to describe (or fully describe) wrong-making properties of actions.¹⁷⁵ Burning a flag is not wrong because it desecrates the flag; it is wrong because the burning batters a bystander, pollutes the air, etc. Displaying a sexually explicit picture of a child is not wrong just because the child is unclothed; it is wrong because the picture is sexually explicit and exploitative. Procuring an abortion, by means of a coercive threat, is not wrong because the actor procures an abortion; it is wrong because she procures *something* by means of a coercive threat.

Another kind of theory of justified sanctions that the defender of the Direct Account might try to turn to her advantage is the kind of deterrent theory developed by Larry Alexander, Daniel Farrell, and Warren Quinn.¹⁷⁶ Although Alexander's, Farrell's, and Quinn's specific theories differ in their details, the general idea behind these theories is to ground the justifiability of (ex post) sanctions upon the justifiability of (ex ante) deterrent threats. We are

morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish . . .").

174. See *id.* at 1677 (arguing that "a wrongful action that produces moral injury and which merits retributive punishment is an action that has a certain kind of meaning," viz., that the wrongdoer is morally superior to the victim).

175. See *infra* text accompanying notes 203-04 (further explicating how rules in FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION underdescribe wrong-making features of actions). The remaining stylized rules are not morally underdescriptive in the same way, see *infra* text accompanying notes 216-17, and so the expressive defense of the Direct Account, as well as the deterrent theory discussed immediately below, is most persuasive with respect to FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION.

176. See WARREN QUINN, *The Right to Threaten and the Right to Punish*, in MORALITY AND ACTION 52 (1993); Lawrence Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 MONIST 199 (1980); Daniel M. Farrell, *The Justification of Deterrent Violence*, 100 ETHICS 301 (1990).

justified in inflicting a setback on a wrongdoer if and only if we justifiably threatened him with that setback, prior to the wrongdoing. Farrell, for example, argues in favor of the following principle:

When my situation is such that either (i) I enforce a conditional threat of retaliation that I have previously and justifiably made, thereby protecting myself from a decrease in my credibility and hence from an increase in my vulnerability or (ii) I do not enforce the relevant threat, thereby jeopardizing my credibility and hence increasing my vulnerability to aggression I might otherwise have deterred, I am entitled to choose (i) over (ii), provided that the penalties thus threatened and imposed are within certain limits and are directed only at offenders for offenses.¹⁷⁷

How might the defender of the Direct Account develop this kind of deterrent theory, for her own purposes? She might say something like this: Sanctioning *X* pursuant to a particular rule is justified only if enacting the rule — issuing that particular coercive threat to *X* and others, not to perform the type of action identified in the rule — was justified. For if enacting the rule was justified, then sanctioning *X* is justified as a way to maintain the credibility of the particular deterrent threat embodied in the rule. But enacting the rules in cases such as FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION was not justified, because these rules encompass plenty of harmless actions.¹⁷⁸ We have moral reason to maintain the credibility of our deterrent threats against “batterers,” etc., but we do *not* have moral reason to maintain the credibility of our deterrent threats against “flag desecrators,” etc. Thus we have true, nonepistemic moral reason to sanction the battering flag-desecrator pursuant to a rule that prohibits battery rather than pursuant to a rule that prohibits flag-desecration, and the same is true for the other stylized cases.

But the difficulty with this kind of defense of the Direct Account — a nonepistemic defense based upon a rule-dependent theory of sanctioning, such as Hampton’s expressive theory or the Alexander/Farrell/Quinn deterrent theory — is that the would-be defender must overcome the following, *retributivist* objection. As Michael Moore explains:

Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it. Retributivism thus stands in stark contrast to utilitarian views that justify punishment of past offenses by the greater good of preventing future offenses. It also con-

177. Farrell, *supra* note 176, at 316.

178. See *infra* text accompanying notes 315-53 (discussing how rules in these cases go morally awry in including innocent actions within their scope).

trasts sharply with rehabilitative views, according to which punishment is justified by the reforming good it does the criminal.¹⁷⁹

For the retributivist, "moral culpability" is not only a necessary condition for a punitive sanction — something that an expressive theory or the kind of deterrent theory discussed here does not mean to deny¹⁸⁰ — but it is a *sufficient* condition as well.¹⁸¹ The actor's "moral culpability" is sufficient to justify punishing him, independent of any further good that punishment may secure: specifically, independent of the role of punishment in preventing future wrongdoing, rehabilitating the criminal, or expressing social condemnation.¹⁸²

Thus, the retributivist might object as follows to the Direct Account: There is simply no nonepistemic reason to overturn the actor's own sanction, independent of further invalidating the rule under which it falls, in cases such as FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION as well as RESIDENTIAL PICKETING and ANIMAL SACRIFICE. The battering flag-desecrator, etc., was a culpable wrongdoer, and that suffices to justify *his* sanction, whatever the predicate or history of the underlying rule. To be sure, there is reason to repeal or amend the flag-desecration *rule*, etc. — because some flag-desecrators, etc., are not wrongdoers under another description — but it remains a matter of (nonepistemic) moral indifference whether in FLAG DESECRATION the state chooses to sanction the battering flag-desecrator for "battery" or "flag desecration," and similarly in CHILD PORNOGRAPHY, ABORTION, RESIDENTIAL PICKETING, and ANIMAL SACRIFICE. And although the Direct Account may hold true for ALCOHOL, that is not because of a general theory of sanctions, such as an expressive or deterrent theory. Rather, the Direct Account may hold true here because of quite separate considerations of equality. Sanctioning a black person who uses a credit card to purchase alcohol, pursuant to a racially discriminatory rule, is concededly wrong — but

179. Moore, *supra* note 171, at 179; see also Michael S. Moore, *Justifying Retributivism*, 27 ISRAEL L. REV. 15 (1993). An updated version of Moore's well-known article on *The Moral Worth of Retribution*, *supra* note 171, is MICHAEL MOORE, *PLACING BLAME* ch. 3 (1997).

180. See, e.g., Hampton, *Correcting Harms*, *supra* note 171, at 1686 (stating that "retribution is a response to a wrong"); Farrell, *supra* note 176, at 316 n.9 (stating that the principle justifying the carrying out of deterrent threats "is meant to apply only to . . . threats to harm those who do an innocent person wrong").

181. See Moore, *supra* note 171, at 181-82 ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability ('desert') is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions." (footnote omitted)).

182. See *id.* at 180-81 (distinguishing retributivism from utilitarian, "denunciatory" (i.e., expressive), and other theories of punishment).

not because *retributivism* is wrong. It is wrong because, whatever the correct theory of sanctions, imposing a legal burden upon someone or depriving him of a legal benefit under the description "black" is a serious insult and stigma.¹⁸³

How might the would-be defender of the Direct Account reply to the retributivist objection? First, she might try to show that retributivism is wrong on the merits. This is a tall order. The debate between retributivist and non-retributivist theories of punishment has raged on for centuries, and in recent years there has been a real revival of interest in retributivism, among moral philosophers,¹⁸⁴ as part of a general revival of non-utilitarian theorizing most famously exemplified by John Rawls's *A Theory of Justice*.¹⁸⁵ To defeat retributivism, the defender of the Direct Account would either need to demonstrate the truth of utilitarianism (the view that overall well-being is the sole criterion of moral rightness);¹⁸⁶ or she would need to show that, despite the existence of principles of justice constraining or coexisting with the principle of maximizing overall well-being, the retributivist principle (that a morally culpable actor deserves punishment) is not among the true principles of justice. Proving the truth of utilitarianism is obviously a daunting task.¹⁸⁷ And the non-utilitarian approach to defeating retributivism is little less daunting, given that the retributivist principle coheres with our concrete judgments¹⁸⁸ at least as well as the principle that a tortfeasor has a duty to repair the losses that his tortious conduct

183. See *infra* section II.B.2 (discussing stigma theory of Equal Protection Clause).

184. See David Dolinko, *Some Thoughts about Retributivism*, 101 *ETHICS* 537, 537 (1991) (noting "a dramatic change in the regard in which courts and legislators hold the doctrine of retributivism" and the fact that "[t]his shift on the part of official legal sentiment parallels a shift in the views of philosophers and legal scholars"); Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 157 n.1 (1994) (citing scholars who defend retributivism).

185. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). As Moore notes: "Retributivism . . . joins corrective justice theories of torts, natural right theories of property, and promissory theories of contract as deontological alternatives to utilitarian justifications . . ." Moore, *supra* note 171, at 182.

186. See SCARRE, *supra* note 46, at 4 (noting that utilitarian moral theories have generally been "welfarist, consequentialist, aggregative and maximising").

187. See SCARRE, *supra* note 46, at 152-204 (summarizing criticisms of utilitarianism). Probably the most famous critiques of utilitarianism, in the modern literature, are those advanced by Bernard Williams, see Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77 (1973), and, of course, by Rawls, see RAWLS, *supra* note 185, at 150-92.

188. See Moore, *supra* note 171, at 183-85. For a recent explication and defense of coherentism in moral reasoning, specifically the Rawlsian idea of "reflective equilibrium" that gives place to judgments about concrete cases as well as to general principles, see NORMAN DANIELS, *JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE* 1-17 (1996).

occasioned,¹⁸⁹ or that promisors are morally obliged to keep their promises,¹⁹⁰ or that social and economic inequalities should work to the benefit of the least well-off.¹⁹¹ Indeed, in its jurisprudence directly addressing the content and justification of punishment, such as its Eighth Amendment and double jeopardy jurisprudence, the Supreme Court has for some time said quite consistently that retributivism is a constitutionally acceptable and standard theory of punishment.¹⁹²

Note that the defender of the Derivative Account does not need to prove retributivism to be *true*. All she needs to say is that, whatever the truth of retributivism, she has a morally impeccable and straightforward explanation for the content of constitutional rights under the Free Speech, Free Exercise, Equal Protection, and Due Process Clauses. The moral content of a constitutional right is that some rule should be repealed, whether or not retributivism is true — for example, because the rule coerces persons not to perform certain types of innocent actions, such as mere flag-desecration. By contrast, the defender of the Direct Account needs to provide not only an explanation why these rules go wrong — why they are not deterrent threats worth maintaining, or proper expressive mechanisms — but in addition must show that retributivism is wrong on the merits. So the serious arguments for retributivism undermine the moral plausibility of the Direct Account; but

189. See JULES COLEMAN, RISKS AND WRONGS 303-28, 324 (1992) (describing and defending "mixed conception" of corrective justice institutionalized by tort law, such that "the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible").

190. See CHARLES FRIED, CONTRACT AS PROMISE 1 (1981) (arguing that "[t]he promise principle . . . is the moral basis of contract law"); *id.* at 17 (arguing that breaching promises is morally wrong "[b]y virtue of the basic Kantian principles of trust and respect").

191. See RAWLS, *supra* note 185, at 83.

192. This goes back, at least, to *Gregg v. Georgia*, 428 U.S. 153 (1976). See 428 U.S. at 183 ("Retribution is no longer the dominant objective of the criminal law,' but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.") (opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted). For recent statements, see, e.g., *Austin v. United States*, 509 U.S. 602, 621 (1993) (deciding whether civil forfeiture constitutes "punishment" for purposes of Excessive Fines Clause) ("[b]y civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (alteration in original) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989))); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (striking down civil-commitment statute on due process grounds) ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution."); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (upholding civil-commitment statute for "sexually violent predators") (describing "retribution" and "deterrence" as twin purposes of criminal punishment); and *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (describing factors that are useful in determining whether a penalty is "criminal" for double-jeopardy purposes) ("[T]he factors includ[e] whether its operation will promote the traditional aims of punishment-retribution and deterrence." (citation omitted)).

the serious arguments against retributivism do not undermine the moral plausibility of the Derivative Account.

Another tack the defender of the Direct Account might take is to bracket the truth of retributivism, but then argue that the retributivist principle of punishing the morally culpable does *not* justify the sanctions meted out in the stylized cases above. Yet why not? The retributivist principle, again, is that moral culpability is not only necessary but sufficient to justify punishment.¹⁹³ I suggest that the actors, in all the stylized cases above, satisfy this principle. They are "morally culpable" because they have culpably¹⁹⁴ committed serious wrongs:¹⁹⁵ battery, pollution, and arson; assault and trespass; child pornography; fraud; the killing of a stolen and endangered animal; assault with a deadly weapon. The *epistemic* point — that *X*'s having been tried and convicted for flag-desecration, etc., fails to *evidence* his moral culpability, qua batterer, etc. — should not obscure the moral fact that *X* committed wrong. He performed an action that breached some other rule and that, quite apart from that, ought not have been performed. (Even if, by some mistake, the rules against battery, etc., had temporarily been repealed in the relevant jurisdictions, it was wrong of *X* to do what he did.¹⁹⁶) In addition, the sanctions that the actors actually received are, I suggest, "punishment," although this is admittedly open to some debate.¹⁹⁷

Finally, the temptation to amend the retributive principle and insist that morally culpable actors must receive punishment *for the right reasons* should be resisted. For how would a "right reasons" addendum be defended, within a retributivist theory? The retributivist principle expresses (part of) what is morally fitting: it is fit-

193. See Moore, *supra* note 171, at 181-82.

194. I mean to assume this in the stylized facts.

195. It is open to debate whether the "moral culpability" sufficient to warrant punishment, within a retributivist theory, entails wrongdoing, culpability, or both. See Symposium, *Harm v. Culpability*, *supra* note 170. Further, it is open to debate whether the retributivist's "wrongdoing" entails only harmful action, or whether it includes harmless wrongs as well, or even mere illegality. See FEINBERG, *supra* note 57, at 10-14 (summarizing considerations, besides harmfulness, that support a criminal prohibition on certain actions); Moore, *supra* note 171, at 181 n.1 (defining moral culpability as including morally innocent actions that are legally prohibited). Whatever the boundaries of moral culpability, for retributivist purposes, our stylized actors lie within that concept's core.

196. Only a super-shallow conventionalist would claim that *X*'s action cannot be morally wrong unless prohibited by a formal legal rule. See Adler, *supra* note 4, at 803-04 (discussing, and criticizing, super-shallow conventionalism).

197. See DUFF, *supra* note 165, at 151 ("Punishment . . . must logically be imposed on an offender, *for an offence*, by a duly constituted authority, and must inflict suffering on him." (emphasis added)). Notably, however, Duff offers this definition of punishment in the service of an expressive account, see *id.* at 267.

ting, the retributivist claims, that wrongdoers receive the punishment they deserve. A legal practice that tends to realize the morally fitting events or states-of-the-world identified by the retributivist principle is, for the retributivist, a justified practice; a legal practice that tends not to realize those events or states is, for her, less well justified. So the practice of enforcing a rule against "batterers" is better justified than the practice of enforcing a rule against "flag desecration."¹⁹⁸ But this is not because the retributivist wants to punish batterers "for the right reasons;" it is because batterers are usually wrongdoers, while flag-desecrators often are not. We might, perhaps, have a *general* theory why legislators should act for the "right reasons" (a theory of authority, or of legislative motivation, of the kind considered below)¹⁹⁹; but a specific "right reasons" addendum to the retributivist principle is simply ad hoc, just as a specific "right reasons" addendum to, say, the Rawlsian principle of redirecting resources to the less-well-off would be.

Is there anything left for the defender of the Direct Account to say, in response to the retributivist? I suppose she might say this: although the sanctions meted out in our stylized cases do, indeed, satisfy the conditions for punishment specified by the retributive principle — in this important sense, no wrong has been done to the actors — it would still be a good idea to sanction them pursuant to different rules. Doing so would not only dispense the punishment they deserve, but *additionally* would express what made their actions wrong, or maintain the credibility of justified threats against future wrongdoers. Yet I find it hard to see how this final defense of the Direct Account coheres, in any way, with the moral concepts underlying our stylized cases, particularly FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION. Surely the constitutional rights to free speech and abortion do not rest upon the moral claims of the once and future *victims* of wrongdoing speakers and of wrongdoing women who procure abortions! It is much more straightforward and plausible to say what, as we shall see, the Derivative Account says: that the constitutional rights to free speech and abortion typically rest upon the moral claims of otherwise-innocent speakers and women, who fall within the scope of overly

198. On the general distinction between the moral justifications for a practice and the moral justifications for a particular application of that practice, see John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 3 (1955); SCHAUER, *supra* note 58, at 128-34.

199. See *infra* section II.C; *infra* note 278. Cf. MOORE, *supra* note 179, at 751 (arguing that "every citizen [has the right] not to have his or her behaviour regulated for the wrong reasons by the government," but that such right "is not basic but is the correlative of a more basic duty on the part of legislators to enact legislation for certain reasons but not others").

broad rules such as the rules in FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION.²⁰⁰

Note, finally, that a nonepistemic defense of the Direct Account based upon a rule-dependent theory of sanctions must overcome, not just retributivism, but every other rule-independent theory of sanctions. Retributivism is one such theory; it may not be the only one.²⁰¹ Because I think the retributivist's objection is sufficiently powerful to defeat the nonepistemic defense of the Direct Account, I will not pursue the point here. My burden is merely to adduce *one* constitutionally satisfactory, rule-independent theory of justified sanctions — retributivism — that justifies the sanctions imposed in FLAG DESECRATION, ABORTION, and the rest of our stylized cases. By contrast, a nonepistemic defense of the Direct Account must demonstrate that there exists *no* constitutionally satisfactory, rule-independent theory sufficient to justify the sanctions in the stylized cases. If the defender of the Direct Account refutes retributivism, then she must proceed to defeat whatever other rule-independent theories might plausibly obtain.

2. The Epistemic Idea

The nonepistemic defense of the Direct Account, sketched above, tries to show why the predicate or history of the rule pursuant to which an actor is sanctioned has true moral significance for the justifiability of her sanction, independent of the epistemic capacities of reviewing courts. The defense tries to demonstrate why sufficient nonepistemic reason obtains to invalidate *X*'s own sanction, without a further invalidation of the rule, and despite the fact that *X* has culpably committed a wrong by the very action for which she has been sanctioned. The epistemic defense is less ambitious. The idea here is that, whatever wrong *X* happens to have performed, she has not been tried and convicted for *that*. Rather, she has been tried and convicted for breaching a rule that (in some way)²⁰² does not serve as an epistemically reliable mechanism for *identifying* wrongful actions. And the right way for society to determine whether *X*, indeed, performed a wrong is simply to indict and

200. See *infra* section III.A.1.

201. For example, consider an incapacitative theory: imprisoning *X*, who has performed wrongdoing in the past, serves to incapacitate him and thereby prevent his future wrongdoing quite independent of the predicate or history of the particular rule pursuant to which *X* is sanctioned. See WALKER, *supra* note 165, at 34-41 (discussing incapacitative theory).

202. "In some way" is meant to anticipate the different, specific ways that sanctioning *X* pursuant to a rule may fail to constitute adequate epistemic work. See *infra* text accompanying notes 203-19 (discussing epistemic₁ rights and epistemic₂ rights).

try her for violating a rule that is not epistemically flawed in this way.²⁰³

The following formulation takes an initial stab at the epistemic idea:

Epistemic₁ Rights: Underdescriptive Rules

To say that *X*'s sanction pursuant to rule *R* is "unconstitutional," or that it violates her "constitutional rights," is to say that *X* has a legal right to have more epistemic work performed (specifically, by trying her under a different rule), prior to imposing a sanction upon her. More epistemic work is needed because the rule is *underdescriptive*. Some (or many) actions falling within the description set forth by the rule's predicate are morally innocent; relative to that description, *X*'s action was not necessarily (or probably) wrongful.

FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION motivate this idea of "underdescriptive" rules — rules whose scope includes some or many morally innocent actions. A given action of "flag desecration," or "procuring an abortion," or "displaying photos of naked children" is not necessarily or likely wrongful. Thus, even if retributivism is *true* — even if an actor's wrongdoing truly suffices to justify a sanction, regardless of the predicate or history of the rule pursuant to which *X* is sanctioned — society has not yet done enough to identify the properties of *X*'s action that make it wrong. To say that *X* has a "constitutional right" not to be sanctioned pursuant to a rule prohibiting "flag desecration," "abortion," or "photo display" could simply entail that her sanction is possibly or likely unjustified, *relative to the act-description set forth by the predicate of the targeted rule*. Even the retributivist can accept this construal of *X*'s constitutional right, for even the retributivist does not want to sanction innocent actors. Whatever our underlying theory of sanctions, we can all agree that, in cases such as FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION, we need to

203. Indeed, nothing I say in this section is meant to deny the general proposition that rules have an epistemic function. See *supra* note 169 (discussing epistemic idea, within literature on authority). Whatever else rules do — whether that is solving coordination problems, or prisoners' dilemmas, or coercing morally apathetic actors to do what morality requires — I find it compelling to think of agencies and legislatures as institutions that, among other things, perform the epistemic work needed to determine what morality (particularly the consequentialist component of morality) requires of actors in certain domains. See RAZ, *supra* note 169, at 38-69 (presenting theory of authority, grounded both on moral expertise of authorities and on role of authoritative utterances in solving coordination problems and prisoners' dilemmas). I simply do not think that the epistemic idea is an adequate account of constitutional rights to free speech, free exercise, equal protection, and substantive due process.

undertake more epistemic work to determine whether X 's action was wrongful.

We must carefully distinguish this plausible idea of epistemic₁ rights from a different idea, with which it might be confused, and which is not plausible at all. That is the following:

The Implausible Epistemic Idea: Substantive Rights Based on Limited Evidence

To say that X 's sanction pursuant to rule R is "unconstitutional," or that it violates her "constitutional rights," is to say that X has a legal right not to be sanctioned by virtue of the action she performed. The moral content of the legal right is as follows: there is true, moral reason not to sanction X by virtue of the action she performed, or so the reviewing court has determined on the evidence before it. The reviewing court has determined that such moral reason obtains, because it has concluded that X 's action was not wrongful. The court has concluded that X 's action was not wrongful because, relative to the description embodied in the targeted rule, it was not wrongful.

This latter explanation is implausible, of course, because it squarely contradicts the Basic Structure. If X 's constitutional right were a legal right not to be sanctioned, under any rule, for the action she performed, then the flag-desecrator, etc., whose sanction was invalidated on First Amendment, etc., grounds could not subsequently be sanctioned under *any rule*: a rule prohibiting battery, obscenity, or assault with a deadly weapon. Relatedly, if constitutional rights had this act-shielding structure, we would want reviewing courts to engage in considerably more investigation of the potentially wrong-making features of actions, beyond the features picked out by a particular rule.²⁰⁴

So let us return to the more plausible notion — that constitutional rights are epistemic₁ rights. An epistemic₁ right is a right of some sanctioned X to have more epistemic work done, given that the rule R pursuant to which he has been sanctioned is underdescriptive — given that an action is not necessarily or likely wrongful, merely by virtue of falling under the description set forth by R . The idea of epistemic₁ rights is plausible because it is consis-

204. Perhaps it might be objected that the state's failure to prosecute X pursuant to a second rule is itself strong grounds for an inference that X 's action has no further wrong-making properties. But such an inference is unwarranted, given the structure of double-jeopardy doctrine. See MOORE, *supra* note 64, at 325-55 (double jeopardy permits the sequential prosecution of an actor, for the very same action, pursuant to statutes picking out different act-types).

tent with the Basic Structure. Sanctioning you for "procuring an abortion" violates your epistemic₁ rights because society has not, yet, reliably determined whether you did something wrong; sanctioning you for "assault with a deadly weapon," by virtue of the very same action, does not violate your epistemic₁ rights, because now society *has* reliably determined your wrongdoing. Further, as I have said, the explanation is quite consistent with retributivism. Its defender can concede that if *X*'s action of procuring an abortion also was an action of assault with a deadly weapon — indeed, if in the past *X* performed a wrongful action, and no fitting punishment has yet been produced to match that — then her sanction might be (nonepistemically) justified. The very point of a constitutional right, the defender can say, is to require that our legal institutions do the epistemic work needed to determine the true properties of *X*'s action or prior actions. Finally, and relatedly, the idea of an epistemic₁ right fits nicely with the notion that legal institutions have different and limited roles. The limited role of the legislature or agency is to enact rules that, *inter alia*, purport to describe wrong-making features of actions; the limited role of a prosecutor and trial court, or an enforcement official and agency judge, is to apply these rules; and the limited role of a constitutional reviewing court is to determine whether these legal institutions have, yet, done enough epistemic work to impose a sanction upon *X*.²⁰⁵ The reviewing court's role is *not* to engage in a boundless search for something, sometime, that *X* did wrong, and so the truth of retributivism is no obstacle at all to a rule-targeted, epistemic right.

Despite its plausibility, the idea of epistemic₁ rights must be rejected. The problem is that, in general, there is no justiciable constitutional norm against proscribing actions that are morally innocent, or against sanctioning persons who merely breach rules that proscribe morally innocent actions.²⁰⁶ The Constitution, as enforced by the courts, does not generally prohibit the imposition of a civil or criminal sanction upon a morally innocent actor: some *Y* whose action, which a legal rule prohibited, was morally permissible

205. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (articulating view of constitutional courts as institutions with a limited role). Some view of this sort is surely right. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979) (denying that federal courts are limited to resolving disputes, but arguing that their role is limited to the protection of "constitutional values").

206. See Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 216 & n.76 (discussing absence of federal constitutional restrictions on states' definitions of crimes); Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998) (same).

or required.²⁰⁷ State officials do not violate *Y*'s constitutional rights under the Eighth Amendment, the Due Process Clause, or any part of the Constitution by sanctioning him for breaching a rule that prohibits "the sale of filled milk," even if filled milk is a perfectly healthy product that was banned by mistake or because the legislature was controlled by the manufacturers of substitute products.²⁰⁸ They do not violate *W*'s constitutional rights by sanctioning her for breaching a rule that prohibits opticians from "dispensing eyeglasses without an ophthalmologist's prescription," even if most opticians, including *W* herself, are perfectly competent to write eyeglass prescriptions.²⁰⁹ Relatedly, then, the Constitution does not generally provide epistemic₁ rights to sanctioned persons. *Z* can be sanctioned, without further epistemic work, pursuant to a rule prohibiting "the sale of filled milk" or "dispensing eyeglasses without an ophthalmologist's prescription" — regardless of whether some

207. Nor does it do to say that actors have a general moral obligation to obey the law, such that *Y*'s action may have been morally innocent prior to its legal proscription, but breaching that proscription was itself morally wrong. See SCHAUER, *supra* note 58, at 125 (noting possibility of moral obligation to obey the law). This argument, cogent or not, is hardly one that the defender of epistemic₁ rights can advance; rather, she must claim that some of the actions that legal rules proscribe are morally innocent, and that actors retain epistemic rights with respect to those actions even after breaching the legal rules. If so, she must explain why the actors in FLAG DESECRATION and the other stylized cases, but not other actors, have such rights.

208. See *United States v. Carolene Prods.*, 304 U.S. 144 (1938) (upholding, over substantive due process challenge, indictment of filled milk manufacturer pursuant to statute prohibiting interstate shipment of filled milk); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (detailing absence of moral reason to ban filled milk, and special-interest politics behind passage of statute). Although the *Carolene Products* opinion itself leaves open the possibility of some judicial scrutiny for those "garden variety" statutes that do not trigger heightened scrutiny, see 304 U.S. at 152-54, it is now notoriously true that the effective level of judicial scrutiny for such statutes is zero. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding, over substantive due process and equal protection challenge, statute prohibiting nonlawyers from engaging in business of debt adjusting, and detailing judicial deference absent more specific constitutional challenge). The upshot, as Professor LaFave notes, is that "the United States Supreme Court has all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public." 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.12(b), at 211-12 (1986).

Although the Court in *Robinson v. California*, 370 U.S. 660 (1962), did strike down a statute criminalizing mere "status" (viz., drug addiction), as violating the Eighth Amendment, it has since been careful to cabin *Robinson* narrowly. See *Powell v. Texas*, 392 U.S. 514, 533 (1967) (plurality opinion) ("*Robinson* . . . brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility . . .").

209. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding, over substantive due process challenge, statute prohibiting opticians from dispensing eyeglasses without prescription from licensed optometrist or ophthalmologist).

or many actions within the scope of these rules are morally innocent.²¹⁰

The defender of the Direct Account might be tempted to distinguish FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION from the case in which Z is sanctioned for "the sale of filled milk," or "dispensing eyeglasses without an opthamologist's prescription," by appealing to the concept of liberty: "The particular action X performed, in our stylized cases, was an action falling within some class of constitutional liberties. X's particular action was an action of speech in FLAG DESECRATION and CHILD PORNOGRAPHY, and an action lying within the zone of privacy in ABORTION. This is not true of Z: Z's particular action was not a liberty-type action. Therefore X, but not Z, is entitled to more epistemic work sufficient to determine whether his action was wrong." But this attempt to salvage the idea of epistemic₁ rights is misconceived, because it distorts the concept of liberty.

The concept of liberty, or freedom, is forward-looking, not backward-looking. To say that actors should be at liberty to perform actions of type A — expressive actions, or actions falling within the zone of personal privacy — is to say that performing an A-type action, or not, should be at the actor's choice (absent overriding reason). Actors should not be coerced (absent overriding reason) into refraining from A-type actions, or otherwise prevented from choosing, themselves, whether or not to perform actions of that type.²¹¹ But it is only physically possible for actors to choose

210. Creating a general epistemic₁ right — a general right not to be sanctioned pursuant to a rule where, relative to the act-description set forth in the rule plus whatever further facts about the claimant's action have properly come to the court's attention, the claimant is possibly or likely morally innocent — would involve a return to the broad-ranging practice of judicial review characteristic of the *Lochner* period, see *Lochner v. New York*, 198 U.S. 45 (1905). What if the defender of the Direct Account wants to do just that? Then he can plausibly argue that the claimants in CHILD PORNOGRAPHY, FLAG DESECRATION, and ABORTION have had their epistemic₁ rights violated; but I would then reply, as to the notion of epistemic₂ rights, that this is dilutive. See *infra* text accompanying notes 220-25.

211. Consider Joel Feinberg's definition of "liberty," at the beginning of his famous treatise on the criminal law, where he quite naturally ties the idea of "liberty" to choice and coercion:

We can . . . formulate the basic question of these volumes as one about the moral limits of individual liberty, understanding "liberty" simply as the absence of legal coercion. When the state creates a legal statute prohibiting its citizens from doing X on pain of punishment, then the citizens are no longer "at liberty" to do X. The credible threat of punishment working directly on the citizens' motives makes X substantially less eligible than before for their deliberate doing. . . . [W]hen we are prohibited from doing [X] we are required, under threat of penalty, to omit doing [X].

FEINBERG, *supra* note 57, at 7. One might dispute Feinberg's definitional link of liberty and coercion. "There are many other barriers to our actions than prohibitory rules backed by threats of punishment. . . . But it would be false and misleading to say that I am not free or not at liberty to do [such] things." *Id.* at 8. Whether or not Feinberg is right, here, it is at

the actions that they will perform in the future; it is physically impossible for actors to change the actions they already did or did not perform, in the past.²¹² Therefore, any moral imperative to leave actors free to perform A-type actions must be a forward-looking imperative. For example, the freedom of speech at Time T_0 means that actors who might speak at future times $T_1, T_2 \dots$ ought not be coerced by the duty-imposing legal rules that are or will be in force, into remaining silent at those future times. It does not mean that an actor who already has spoken, at some prior times T_{-1} , or $T_{-2}, \dots$ is entitled to extra, epistemic work — beyond what is ordinarily required under the Eighth Amendment or the rest of the Constitution — to determine whether her past speech-act was wrongful under another description.²¹³

Now, it is certainly open to the defender of the Direct Account to submit a creative reinterpretation of the Free Speech Clause and the substantive component of the Due Process Clause. He might argue, creatively, that these clauses do not protect “liberties” in my forward-looking sense; rather, they protect “liberties*” in the special, backward-looking sense appropriate to the idea of epistemic₁ rights. A liberty* is an *epistemic trigger*. A liberty* marks out some class of actions such that, if X performed an action within that class, and is sanctioned pursuant to an underdescriptive rule, X is specially entitled to the performance of additional epistemic work sufficient to determine whether his sanction is justified. But the standard, and better, moral readings of the Free Speech Clause and the substantive component of the Due Process Clause see these provisions as protecting liberties, not liberties*. It is vitally important to actors, and to their listeners, that they be free to perform certain expressive actions; it is vitally important to them that they have the free choice whether or not to perform actions lying within

least clear that legal coercion *exemplifies* a restriction on liberty because legal coercion (and brute state force) is the exemplary way to restrict actors’ future choices.

As for the Feinbergian link between liberty and choice: I believe that this is the correct analysis of the concept of liberty, but ultimately this conceptual claim is less important than the point that the choice-based concept Feinberg delineates — and not its backward-looking analogue — better captures the constitutional criteria of free speech and substantive due process.

212. I assert this to be true as a matter of common sense. How to cash out this truism, in a theory of free will and the nature of the physical world, is well beyond my ken. See, e.g., STORRS MCCALL, *A MODEL OF THE UNIVERSE: SPACE-TIME, PROBABILITY, AND DECISION* 1-19, 250-79 (1994) (defending branching model of universe, with open future and closed past, and explicating free will within this model).

213. This raises the question why, on *any* account of the Free Speech Clause and the substantive component of the Due Process Clause, retrospective challenges to sanctions rather than prospective challenges to duties should be allowed. I deal with that question below. See *infra* text accompanying notes 409-13.

the zone of privacy.²¹⁴ This is a forward-looking, not a backward-looking, reading of the moral criteria lying behind FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION. As between the standard view that the Free Speech Clause and the substantive component of the Due Process Clause of the Constitution protect liberties, and the creative view that they protect liberties*, the standard view is much better.²¹⁵

An additional problem with the notion of epistemic₁ rights, and the associated concept of liberties* (epistemic triggers), is that these ideas do little to explain the remaining stylized cases: RESIDENTIAL PICKETING, ANIMAL SACRIFICE, and ALCOHOL. If there is an epistemic failure that occurs in these remaining cases, it does not seem to be the failure of underdescription. A rule prohibiting the "picketing of residences, except by labor groups" is *not* significantly underdescriptive: most actions of residence-picketing are unnecessarily disruptive and upsetting to the residents, and ought not be performed.²¹⁶ Similarly, a rule prohibiting "the sacrifice of animals for religious purposes" may not be significantly underdescriptive, depending on how one balances the religious needs of the actors against the animals' welfare. Thus, even if the First Amendment *does* underwrite liberties* rather than liberties, it is hard to see how the idea of epistemic₁ rights explains RESIDENTIAL PICKETING and ANIMAL SACRIFICE. As for ALCOHOL: X's purchase of alcohol was not an exercise of a liberty or a liberty*, because the Equal Protection Clause does not protect "liberties" in either sense.²¹⁷ So an appeal to liberties* will not explain why epistemic rights are violated in that case, as opposed to the case of a Z

214. See *infra* notes 317, 327-28, 343 and accompanying text (discussing standard, liberty-protecting view of free speech and substantive due process, and citing sources).

215. The standard view might be wrong. See *infra* text accompanying notes 354-57 (discussing discrimination, rather than liberty, account of free speech and substantive due process). But the plausible alternative to the standard view is that these clauses protect liberties in *no* sense — not that they protect liberties*.

216. See *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding general ban on residential picketing, over free speech challenge). Another, more conventional way of putting the distinction between RESIDENTIAL PICKETING and FLAG DESECRATION is to say that the first is underinclusive and the second overinclusive. See, e.g., Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 29-32 (articulating puzzle of underinclusion, within free speech jurisprudence). Underinclusion precludes underdescription, in the sense demanded by epistemic₁ rights. Whatever the correct account of RESIDENTIAL PICKETING, or of the majority decision in *R.A.V.*, it cannot be that the sanctions in these cases were meted out pursuant to rules that were underdescriptive.

217. No plausible theory of the Equal Protection Clause sees it as delineating liberties in either sense. See *infra* section II.B (discussing leading theories of equal protection).

sanctioned for "the sale of filled milk" or "dispensing eyeglasses without an ophthalmologist's prescription."

Given these difficulties with the notion of epistemic₁ rights, the defender of the Direct Account might be tempted to rework the epistemic idea along the following lines:

Epistemic₂ Rights: Rules That Are Enacted Through an Unreliable Process

To say that *X*'s sanction pursuant to rule *R* is "unconstitutional," or that it violates her "constitutional rights," is to say that *X* has a legal right to have more epistemic work performed (specifically, by trying her under a different rule), prior to imposing a sanction upon her. More epistemic work is needed because the *process* by which *R* was formulated was defective in certain, constitutional ways. The legislators or administrators who formulated *R* were not sufficiently informed, impartial, and deliberative to determine, in a reliable way, which actions should be legally proscribed and subject to sanctions. Specifically, certain errors (false beliefs) about the moral relevance of speech, religion, race, or gender infected the process by which *R* was formulated.

Note a few attractive features of this new formulation of the epistemic idea. First, the idea of epistemic₂ rights potentially explains RESIDENTIAL PICKETING, ANIMAL SACRIFICE, and ALCOHOL as well as (perhaps) FLAG DESECRATION, CHILD PORNOGRAPHY, and ABORTION. The rule in each case can, arguably, be taken as *evidence* of some process defect. For example, the rules in RESIDENTIAL PICKETING and ANIMAL SACRIFICE are not underdescriptive in the sense required by epistemic₁ rights, but we can plausibly say that they evidence a rule-formulation process infected with false beliefs about the moral relevance of speech and religion. An action of residential picketing is not made less harmful by the labor-related viewpoint of the picketers; an action of killing animals is not made more harmful by the religious cast of the actors. So we can infer that the legislators or administrators who formulated these rules made certain moral errors (within a class of errors delineated by the First Amendment); and we can therefore conclude that *X*'s epistemic₂ rights have been violated. The Constitution demands, we might say, that persons not be sanctioned pursuant to rules whose formulation was infected by certain error-types: at least *that* much epistemic work is morally and constitutionally required, prior to imposing a sanction.

Relatedly, the idea of epistemic₂ rights does not require an appeal to the notion of liberties* (epistemic triggers) in order to explain why epistemic rights are violated in our stylized cases but not in the case of a rule prohibiting "the sale of filled milk" or "dispensing eyeglasses without an ophthalmologist's prescription." The process for formulating a rule can be constitutionally defective, independent of whether the rule includes liberties* within its scope, and independent of whether *X*'s particular action was an instance of a liberty*. All we need is some constitutional basis for delineating a class of *error-types* — types of false beliefs, such that, if these beliefs infected the rule-formulation process, more epistemic work is morally and constitutionally required. The First Amendment, *inter alia*, proscribes legislative error about the moral relevance of speech²¹⁸ and religion; the Equal Protection Clause proscribes legislative error about the moral relevance of race and gender.²¹⁹ Thus, the idea of epistemic₂ rights can be used to explain ALCOHOL (which does not involve liberties or liberties*) as well as the remaining stylized cases. The promulgation of a rule prohibiting men between eighteen and twenty-one (or women or black persons) from purchasing alcohol evidences false beliefs, among legislators, about the moral relevance of gender (or race), and it therefore violates *X*'s epistemic₂ rights to be sanctioned pursuant to this rule quite independent of the presence of liberties or liberties*.

But does this epistemic tack really work? Does the idea of epistemic₂ rights successfully underwrite the Direct Account? I think not. The difficulty with the idea of epistemic₂ rights is that it dilutes the moral justification for judicial review. The moral fact about FLAG DESECRATION, CHILD PORNOGRAPHY, ABORTION, and the remainder of our stylized cases is not merely the *epistemic* fact that society needs to undertake further moral deliberation and research. It is not merely that more epistemic work needs to be done to determine whether sanctioning a given individual under the stylized rule is morally justified. Rather, and more strongly, the moral fact about each and every one of the stylized rules is the nonepistemic fact that the rule-predicate should be repealed or amended. As I will argue at much greater length in Part III, for each stylized rule there is sufficient moral reason that the rule-predicate be changed,

218. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227-33 (1983) (arguing that free speech doctrine operates, in part, to identify laws where legislators were improperly motivated with respect to speech).

219. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 13-56 (1996) (analyzing process theories of equal protection).

in some measure. The rule in FLAG DESECRATION wrongly coerces otherwise-innocent speakers to refrain from expressing their views about the flag; the rule in ABORTION wrongly coerces some women not to procure abortions; the rule in CHILD PORNOGRAPHY wrongly coerces parents not to display pictures of their naked infants; the rules in ALCOHOL, ANIMAL SACRIFICE, and RESIDENTIAL PICKETING wrongly discriminate on the basis of race, gender, religion, or viewpoint. A world with these rules is a world that, in some measure, is morally awry — not merely a world whose moral status demands more inquiry on our part.²²⁰

The difference between epistemic and nonepistemic grounds for judicial intervention is a large one; it parallels the large differences that moral philosophers and jurists have elaborated in other contexts, for example, between reason for belief and reason for action,²²¹ between attempted and completed crime,²²² and between risking and wronging.²²³ By advancing merely an epistemic claim, the idea of epistemic₂ rights makes a weaker case for constitutional review, under the Bill of Rights, than can and should be made. Although this critique is not catastrophic for the epistemic idea — it does not prove the idea to be internally incoherent, or deeply confused — it does weigh against epistemic₂ rights and in favor of the Derivative Account.

The defender of the Direct Account might respond to this point by saying that constitutional reviewing courts are not competent to determine whether morality requires a change in the predicates of rules. Their role is merely epistemic, not nonepistemic — to protect epistemic₂ rights, and nothing more. But if that were true, constitutional law would look radically different. Constitutional courts pervasively scrutinize rule-predicates and not merely the direct historical evidence (in the legislative or administrative history, or in a rulemaking record, or in the testimony of legislators or administrator) of the beliefs that motivated rule-formulators.²²⁴ Judicial re-

220. See *infra* sections III.A.1-2.

221. See Hurd, *supra* note 169, at 1615-20.

222. See Hurd, *supra* note 184, at 187-93 (criticizing attempted-act deontology).

223. See Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321 (David G. Owen ed., 1995).

224. This is not to say that direct historical evidence is irrelevant to reviewing courts. See *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (relying on direct historical evidence of racist motivation behind facially neutral provision of state constitution to invalidate provision). Nor is it to say that a system exclusively focused on the rulemaking record, cf. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 250-53 (2d Cir. 1977) (invalidating rule under Administrative Procedure Act, given agency's failure to respond adequately to public comments), or even on testimony by officials about their mental states, cf. *Citizens to*

view, under the First Amendment, the Equal Protection Clause, and the substantive component of the Due Process Clause, is largely structured around moral "tests" governing the predicates of rules: the state must justify its rule-predicate as "narrowly tailored to a compelling governmental interest," or as "significantly related to an important governmental interest," or as non-discriminatory, or whatever.²²⁵ To interpret these as tests for false beliefs that may have figured in a rule's enactment, which courts apply so as to protect epistemic₂ rights, is to get matters quite backwards. A rule-predicate evidences the role of false beliefs in the rule's enactment *only if* moral reason obtains to change, in some measure, the rule-predicate. For if the predicate is morally perfect, where is the evidence? In short, if courts are competent to perform this "evidentiary" testing of rule-predicates, then *mutatis mutandis* they are competent to perform the task required by the Derivative Account, and the epistemic₂ idea is unduly dilutive.

B. *Equality*

I have extensively discussed, and criticized, two possible defenses of the Direct Account: a *nonepistemic* theory of justified sanctions, such as an expressive or deterrent theory, that counts a rule's predicate or history as part of the morally necessary conditions for a justified sanction, independent of the epistemic capacities of reviewing courts; and an *epistemic theory* of justified sanctions, that counts a rule's predicate or history as indicating the need for additional moral inquiry prior to imposing a sanction.

But these are not the only defenses available to the Direct Account. *Equality* is a partly separate, and morally rich, idea within constitutional theory. The defender of the Direct Account might hope to explain some, or even most types of constitutional rights, by employing a theory of equality. At a minimum, she should hope thus to explain the constitutional rights that arise in classic equal protection cases, here exemplified by the stylized case I call ALCOHOL. And, by extension, she might think that equality can underwrite the Direct Account for cases of "discrimination" that arise, not under the Equal Protection Clause, but under the Free Speech Clause (as in RESIDENTIAL PICKETING, or perhaps FLAG DESECR-

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (remanding, under Administrative Procedure Act, for possible testimony by administrator), is a conceptual impossibility. But clearly constitutional review, as now and long practiced, is *not* exclusively focused on direct historical evidence of the beliefs behind rules.

225. See *supra* notes 40-43 and accompanying text.

TION and CHILD PORNOGRAPHY),²²⁶ or the Free Exercise Clause (as in ANIMAL SACRIFICE),²²⁷ or even the Substantive Due Process Clause.

Let us focus on ALCOHOL, for I will argue that a theory of equality does *not* underwrite the Direct Account in this classic equal protection scenario — and thus, *a fortiori*, that it does not explain free speech, free exercise, or other such cases that may have something to do with equality. My discussion cannot be comprehensive, for there are in fact many different theories of equality. Equality is an especially tricky and multifaceted moral concept.²²⁸ Rather, I will focus on those theories of equality that have figured most prominently in constitutional law and constitutional scholarship: (1) equality as the equal treatment of “similarly situated” persons; (2) equality as the freedom from moral stigma or insult; (3) equality as the guarantee of a political process that is free of prejudice against certain groups; and (4) equality as a guarantee against laws that aggravate the subordinate position of a specially disadvantaged group.

1. *Similarly Situated Individuals*

Joseph Tussman and Jacobus tenBroek are justly famous for their 1949 article on the “Equal Protection of the Laws,” which clarified and made influential the idea that equal protection requires the equal treatment of “similarly situated” persons.

The essence of [the Equal Protection Clause] can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.²²⁹

226. See *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (invalidating rule prohibiting picketing near school, except peaceful labor picketing, under Equal Protection and Free Speech Clauses); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 622-24 (1991) (noting increasingly important idea of “content discrimination” within free speech doctrine).

227. See *supra* text accompanying notes 109-13 (discussing isomorphism between current free exercise doctrine and equal protection doctrine).

228. For recent philosophical treatments, see LARRY S. TEMKIN, *INEQUALITY* (1993); Dennis McKerlie, *Equality*, 106 ETHICS 274 (1996). For an overview of the theories that have figured most importantly within the literature on the Equal Protection Clause, particularly with respect to race and gender, see KOPPELMAN, *supra* note 219, at 13-114.

229. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 3 CAL. L. REV. 341, 344 (1949) (footnote omitted); see Fiss, *supra* note 108, at 110 & n.2 (describing Tussman and tenBroek’s “now classic article”).

The Supreme Court regularly articulates this theory of equality in its equal protection jurisprudence,²³⁰ and Kenneth Simons has carried forward and refined the idea within constitutional scholarship.²³¹

Let us bracket the point that the Court does not, in fact, *enforce* a general guarantee of equal treatment for “similarly situated” individuals. It is notoriously true that the Court will uphold wildly arbitrary and unfair laws — laws that fail to accord equal treatment to similarly situated firms, or workers, or consumers — as long as the laws do not employ “suspect” predicates such as race and gender, and other special factors are not present.²³² Even leaving this point aside, the “similarly situated” theory of equality does not help show why the Direct Account holds true.

Consider the following variant of ALCOHOL: A rule prohibits the purchase of alcohol by women (but not men) between the ages of eighteen and twenty-one. For purposes of this discussion, I will assume that the rule is irrational: its purpose is to prevent drunk driving, and while all persons between eighteen and twenty-one are more prone to drive drunk than all persons twenty-one or over, women and men between eighteen and twenty-one are equally prone to drive drunk. A woman *W* is sanctioned for breaching the rule, and challenges her sanction on equal protection grounds. It turns out that *W*’s action of purchasing alcohol also was an action of criminal fraud; she used a stolen credit card to execute the purchase. Is there sufficient moral reason for the court to overturn *W*’s sanction, without further invalidating the no-alcohol rule?

The defender of the Direct Account wants to say that *W* has been treated unequally, relative to a class of similarly situated men. The puzzle lies in defining the class of men to whose treatment *W*’s

230. See, e.g., *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997) (“[The Equal Protection Clause] embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.”).

231. See Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 448, 456-60 (1989) [hereinafter Simons, *Overinclusion and Underinclusion*] (discussing Tussman and tenBroek’s model of classificatory fit); *id.* at 463-518 (proposing new variant); see also Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) (stating that equality rights are not empty, understood as comparative rights: “A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it”).

232. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-17 (1993) (discussing deference to social and economic regulation under Equal Protection Clause, and citing cases). “Special factors” is meant to cover the unusual cases in which the Supreme Court invalidates statutes under the rational-basis prong of equal protection scrutiny. See *supra* note 99.

should be compared.²³³ Is it (1) men who are similar to *W* in *all moral respects*, that is, men between eighteen and twenty-one who have purchased alcohol using stolen credit cards; or rather (2) men who are similar to *W* with respect to the purpose of the rule, that is, men between eighteen and twenty-one who have purchased alcohol? Relative to comparison class (2), *W* has indeed received unequal treatment: she has been sanctioned, while men between eighteen and twenty-one who purchase alcohol will not generally be sanctioned for doing so. But, relative to comparison class (1), *W* has *not* received unequal treatment: she has been sanctioned pursuant to the no-alcohol rule, while men between eighteen and twenty-one who purchase alcohol using stolen credit cards will presumably be sanctioned pursuant to the laws against fraud.²³⁴

In short, the problem of multiple description, which bedeviled the Direct Account earlier on — within a theory of justified sanctions — reappears within a theory of equality. For the retributivist, as we have seen, it is a matter of (nonepistemic) moral indifference whether the battering flag-desecrator is sanctioned pursuant to a law that prohibits “battery” or pursuant to a law that prohibits “flag desecration.” It is a matter of moral indifference for the retributivist whether the fraudulent alcohol-purchaser is sanctioned pursuant to a law that prohibits “fraud” or a law that prohibits “alcohol purchases by women between eighteen and twenty-one.” The defender of the Direct Account might hope that, by shifting ground from the pros and cons of retributivism to the terrain of equality, he can avoid the problem of multiple description. But he cannot. For the problem simply recurs, here, in a slightly different form. Now, the problem is whether the description under which some person is sanctioned shapes the comparison class of “similarly situated” persons, for purposes of deciding whether the sanctioned person has received equal treatment compared to that class.

233. Cf. Simons, *Overinclusion and Underinclusion*, *supra* note 231, at 465 (noting that “an equal protection claim necessarily compares the treatment of an identifiable plaintiff’s class with the more favorable treatment of some other identifiable class”). I would modify this, to say that the plaintiff compares *her* treatment with the treatment of some identifiable class. If the plaintiff is bringing a facial, anticipatory challenge to a statute, then her (known) relevant features are the features picked out by the statutory classification; if, however, she is bringing a different kind of challenge, more features of her may be known, which may place her within a different moral class, and we should not assume that her claim of comparative equality stands or falls depending upon the way others within her statutory class fare.

234. Of course, if *W* were sanctioned seriatim for purchasing alcohol and then for fraud, her multiple punishment would be unequal treatment whatever the comparison class; but I have assumed that our stylized actors are sanctioned *only* pursuant to the invalid rule. See *supra* text accompanying notes 163-64.

Only a description-dependent method for defining comparison classes can underwrite the Direct Account. Therefore, the defender of the Direct Account will want to adopt the view that the class of men similarly situated to *W* is (2) the class of men between eighteen and twenty-one who purchased alcohol. The purpose of the no-alcohol rule is to prevent the risk of drunk driving, a risk to which both male and female drinkers between eighteen and twenty-one are particularly prone. The purpose of the no-alcohol rule is *not* to prevent fraud, and so non-fraudulent as well as fraudulent male purchasers are relevantly similar to *W*. Or so the defender of the Direct Account will argue.²³⁵ But the difficulty with this view is that — if we were to sanction *W*, *for the very same action of hers*, under a different rule — the comparison class would change. Imagine that nothing in the world changes, except for the state's choice of rule. *W* has performed her action of fraudulent alcohol-purchase, as before; men between eighteen and twenty-one who perform otherwise-innocent actions of alcohol-purchase are not sanctioned, as before; and men between eighteen and twenty-one who perform fraudulent actions of alcohol-purchase *are* sanctioned, as before, pursuant to the laws against fraud. Now, however, the state prosecutes *W* for fraud rather than for breaching the no-alcohol rule. On the description-dependent view, *W* no longer has an equality complaint, for the correct comparison class is now (3) men who have committed fraud, that is, those similarly situated with respect to the anti-fraud purpose of the law pursuant to which *W* is sanctioned. But why should the state's choice of law have this kind of bedrock moral significance, in changing whether *W* herself has received what equality demands? Nothing in *W*'s own resources, opportunities, and welfare has changed — unless we are willing to make *further* claims about the “expressive” or “stigmatic” import of rule-descriptions — and nothing has changed in the resources, opportunities, or welfare available to men.

The exponent of the Derivative Account has a simple and elegant answer to this puzzle. *Whatever* the right method for defining comparison classes, the no-alcohol rule should be generally invalidated in some way — either repealed, or extended to include men

235. Cf. Tussman & tenBroek, *supra* note 229, at 346 (“[W]here are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law.”). But Tussman and tenBroek are concerned here with whether the enactment of a classification into law satisfies equal protection, and not whether a particular application of that law does. See *id.* at 344-45 (explicitly stating that their concern is enactment, not application).

between eighteen and twenty-one as well as women. For, whatever the right method, enforcing the no-alcohol rule as is will lead to violations of equal treatment. If the right method is description-dependent, then the rule should be repealed or amended: *all* women sanctioned pursuant to the rule — both otherwise-innocent women who do nothing more than purchase alcohol, and women who commit fraud, etc. — are treated unequally, relative to all or at least some men between eighteen and twenty-one who purchase alcohol. Conversely, if the right method is description-independent, then the rule should still be repealed or amended: otherwise-innocent women sanctioned pursuant to the rule are treated unequally, relative to those otherwise-innocent men between eighteen and twenty-one who purchase alcohol and will not be sanctioned under any laws. To put the point succinctly and generally: if a legislative classification, such as the classification in the no-alcohol rule, is indeed irrational relative to valid legislative purposes, then — regardless of the significance of the rule's purpose in defining comparison classes — the proponent of a Tussman/tenBroek type theory of equality will want to repeal or amend the rule.

I tend to believe that the proper method for defining comparison classes is *description-independent*. To think otherwise is to conflate a nonexpressive theory of equality, specifically a theory that demands the similar treatment of morally similar persons, with an expressive theory of equality that focuses on the problem of stigma and insult. But, in any event, the defender of the Derivative Account can remain agnostic on this issue. The defender of the Direct Account cannot; she must either establish a puzzling and controversial theory of description-dependent comparison classes, or else move on to a different theory of equality altogether.

2. *Stigma*

A second theory of equality, prominent within constitutional scholarship²³⁶ as well as the case law,²³⁷ focuses upon unfair stigma

236. See KOPPELMAN, *supra* note 219, at 57-76 (surveying stigma theory within scholarship on discrimination).

237. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). The Court, since *Brown*, has repeatedly invoked the notion of stigma in its race-discrimination case law — most recently, in seeking to justify strict scrutiny for affirmative action. See, e.g., *Adarand v. Peña*, 515 U.S. 200, 229 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). For earlier invocations, in the context of straight race discrimination, see, e.g.,

— paradigmatically, racial stigma — as a serious form of wrong and unequal treatment. Paul Brest produced the classic scholarly exposition of this theory in his 1977 article entitled *In Defense of the Antidiscrimination Principle*.²³⁸

[One] rationale for the antidiscrimination principle is the prevention of the harms which may result from race-dependent decisions. . . . Decisions based on assumptions of intrinsic worth and selective indifference [*inter alia*] inflict psychological injury by stigmatizing their victims as inferior.²³⁹

The theory goes back to the Court's decision in *Brown v. Board of Education*,²⁴⁰ and before that to Justice Harlan's dissent in *Plessy v. Ferguson*, in which Harlan indicted segregation as placing a "badge of servitude" upon blacks.²⁴¹

The theory helps explain why rules that employ "suspect" predicates, such as racial predicates, are uniquely subject to judicial invalidation under the Equal Protection Clause. It is intuitively plausible to think that where (1) the predicate of rule *R* picks out actors by virtue of their race (black) and (2) is morally suboptimal in scope (morality requires either an extension of the rule to include whites, or a repeal), which strongly evidences (3) the causal role of legislators' or constituents' false beliefs about the moral inferiority of black persons, in producing the rule, the upshot is that (4) a serious kind of wrong (a "stigma") is done to black persons who are sanctioned pursuant to the rule.²⁴²

Note, too, how a stigma theory of equality helps the defender of the Direct Account. Consider a variant of ALCOHOL with a racially discriminatory rule that prohibits the sale of alcohol to black persons between eighteen and twenty-one. A black person *B* is sanctioned for breaching the rule, and challenges his sanction on equal protection grounds. It turns out that *B* used a stolen credit card to purchase the alcohol. The defender of the Direct Account has here a straightforward and morally compelling explanation why it is *not*, all things considered, a matter of moral indifference whether *B* is

Freeman v. Pitts, 503 U.S. 467, 485 (1992); *Crawford v. Board of Education*, 458 U.S. 527, 544 (1982); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971).

238. Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

239. *Id.* at 8.

240. 347 U.S. at 493-94.

241. See *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).

242. It is possible that stigma ensues even where the rule's predicate is morally optimal in scope. But we then have an evidentiary question about the existence of prejudice in producing the rule — although that, too, may not be a necessary condition for stigma. In any event, the strongest case for stigma is where all of the first three conditions obtain.

sanctioned pursuant to a racially neutral anti-fraud rule, as opposed to the no-alcohol rule. *B* deserves, or may deserve, that sanction, under our general theory of sanctions; retributivism is, or may be, true. Thus, it is, or may be, a matter of indifference, for purposes of our theory of sanctions, whether *B* is sanctioned pursuant to the no-alcohol rule or an anti-fraud rule. But the choice of rule is not, *all things considered*, a matter of moral indifference, because to sanction *B* as a "black" (regardless of her fraud) is to do her serious wrong. When we add our theory of equality to our theory of sanctions, even the retributivist can agree that there is sufficient and compelling moral reason for a court to invalidate *B*'s sanction — and quite independent of further invalidating the no-alcohol rule.

Thus, the Direct Account has finally gained a secure foothold within constitutional law. By using a stigma theory of equality, the defender of the Direct Account can finally explain, in a plausible and persuasive way, a central part of our constitutional jurisprudence — the jurisprudence of race discrimination. But how widely can she extend the stigma theory, beyond that central part? Let us continue cycling through the variants of ALCOHOL. The defender of the Direct Account might plausibly extend Brest's theory to the case where a rule prohibits women between eighteen and twenty-one from purchasing alcohol, and a woman *W* who has breached the rule is sanctioned for doing so.²⁴³ But what about the case in which a man *M* is sanctioned pursuant to a rule prohibiting alcohol sales *to men*? I take this variant directly from the Court's decision in *Craig v. Boren*²⁴⁴ — remember that the Oklahoma statute invalidated in *Craig* prohibited the sale of low-alcohol beer to men between eighteen and twenty-one²⁴⁵ — and that feature of *Craig* is hardly unusual for the Supreme Court case law on gender discrimination. As one scholar has noted: "It has become notorious that in almost all the major sex discrimination cases decided by the Supreme Court, the prevailing plaintiff was a man."²⁴⁶

So explaining the *M* variant of ALCOHOL is a serious problem for the defender of Direct Account — and it cannot be resolved, I suggest, using the stigma theory. The enactment of a rule prohibiting the sale of alcohol to men is *not* plausibly taken as evidence of the causal role that false beliefs about the moral inferiority of men

243. See KOPPELMAN, *supra* note 219, at 118-27 (arguing that women are stigmatized by gender-discriminatory laws).

244. 429 U.S. 190 (1976).

245. See *Craig*, 429 U.S. at 191-92.

246. KOPPELMAN, *supra* note 219, at 133.

played in the enactment of that rule. Just the opposite: at most it is plausibly taken (if morally suboptimal), just like the enactment of the *W* variant, as evidence of the causal role that false beliefs about the moral inferiority of *women* played in the enactment of the rule. Andrew Koppelman, a leading advocate of the extension of the stigma theory from race to gender, argues thus in his discussion of *Michael M. v. Superior Court*²⁴⁷ — a case where the law, as in *Craig*, provided more stringent treatment for men than women.

[This case] involved a constitutional challenge to California's statutory rape law, which criminalized sexual intercourse with a female (but not with a male) under the age of eighteen. . . . The law's likely effect was "legitimizing stereotypes of male aggressiveness and female vulnerability, as well as double standards of morality that traditionally have served to repress women's sexual expression."²⁴⁸

Perhaps the stigma theory furnishes reason to invalidate the no-alcohol-for-men rule — but what this theory warrants is the invalidation of the *rule*, not merely *M*'s own treatment.²⁴⁹ Sanctioning *M* pursuant to the no-alcohol-for-men rule does not stigmatize *him*, in the way that sanctioning *W* pursuant to the no-alcohol-for-women rule stigmatizes *her*, and sanctioning *B* pursuant to the no-alcohol-for-blacks rule stigmatizes *B*.

So I take the stigma theory to have gained the Direct Account a secure, but only a small foothold within constitutional law. A stigma-based Direct Account explains only a portion of current equal protection law: the *B* and *W* variants of ALCOHOL. It does not explain the *M* variant of ALCOHOL, and it explains none of our remaining stylized cases, with the possible exception of ABORTION. "Moral inferiority" is an essential part of the stigma theory; it is what makes the theory powerful and persuasive.²⁵⁰ What constitutes a moral insult to *X*, sufficient to justify overturning her sanction even if the rule *R* is not further invalidated, and even if *X* herself has performed wrong, is the belief of the legislators who enacted *R* (or their ascription of such a belief to their constituents) that *X* is a moral inferior. No rule in our remaining stylized cases, with the possible exception of ABORTION, evidences such a belief about the sanctioned *X*s.

247. 450 U.S. 464 (1981).

248. KOPPELMAN, *supra* note 219, at 144-45 (quoting DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 102 (1989)). Even if a rule can be stigmatic independent of prejudice in the rule's history, *see supra* note 242, it is implausible that a rule discriminating against men (in our society, today) signals their inferiority.

249. *See infra* text accompanying note 276 (discussing problem of marginal contribution).

250. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (condemning race discrimination because it stigmatizes blacks as inferior); Brest, *supra* note 238, at 8-12 (same).

3. *Process Theories*

Our alcohol-drinking *M* may still have hope. A theory of equality that demands the equal treatment of "similarly situated" persons fails to explain why the Direct Account holds true for *M*, *W*, or *B* in ALCOHOL; a theory of equality that demands freedom from unfair stigma works for *W* and *B*, but not *M*; yet there remains the possibility that a "process" theory of equality can help *M*.²⁵¹ That kind of theory has its origin in the oft-quoted footnote four of *Carolene Products*,²⁵² and has been given its most salient scholarly exposition by John Hart Ely in his book *Democracy and Distrust*.²⁵³ As Ely explains:

In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of truth, when . . . though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.²⁵⁴

As the passage suggests, a process theory trades essentially on the political role of prejudice (which I would construe as false beliefs about the moral inferiority of the targeted group, and perhaps related types of false beliefs, for example, certain stereotypes). One can develop the theory in two different ways: (1) by arguing that it is intrinsically or instrumentally important for citizens to participate in the political process, and that prejudice prevents the targeted group from participating, or (2) by arguing that a rule that the legislator enacts by virtue of some prejudice of hers tends to be morally amiss, because prejudice is by definition a false belief and decisions predicated upon false beliefs tend to be wrong.

251. See KOPPELMAN, *supra* note 219, at 13-56 (surveying process theories within scholarship on discrimination).

252. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire [here] . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

253. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

254. *Id.* at 103.

Although Ely intends to argue for version one of the process theory,²⁵⁵ I believe that version two is the better one²⁵⁶ — and in any event it is version two that helps *M* in ALCOHOL. *M* can hardly say that, because women failed to participate in the process of enacting the no-alcohol-for-men rule, his own treatment is unfair.²⁵⁷ What *M* can say is that, because certain prejudices about women figured in the enactment of the rule, the rule's formulation does not meet minimum moral standards of epistemic reliability. Legislators who believe that men are superior to, or otherwise morally distinct from women, are likely to miscalculate the empirical effects, and normative significance, of the various actions that men and women perform. They may wrongly believe, for example, that young men are typically brash, or daring, or brave, and likely to run the risk of driving drunk.²⁵⁸ A false belief about *M*'s station, superior or not, may be tied up with false beliefs about his high willingness to take risks or do harm. *M* cannot complain of being stigmatized by a rule that discriminates against men, nor can he say necessarily that he has been treated unequally relative to similar actors, but *M* can say that he has been denied the minimum epistemic work to which he is entitled — the epistemic work of a legislature that knows, at least, the basic truth of the equal worth and station of men and women.

This is, of course, just the idea of epistemic₂ rights that I earlier considered and rejected.²⁵⁹ The problem with the idea, as I have suggested, is that it dilutes the case for judicial review, relative to the Derivative Account. The idea of epistemic₂ rights is feasible and nondilutive only in contexts where courts have direct, historical evidence about the prejudices that figured in a rule's formulation; and further where courts are not well-placed to determine whether morality requires a change in the rule's predicate. That may be true, for example, of nonconstitutional judicial review in the administrative law context; but it is *not* true in the equal protection con-

255. See KOPPELMAN, *supra* note 219, at 39 (noting that “Ely purports to offer a constitutional theory . . . in which judicial review is concerned solely with ‘what might capaciously be designated process writ large — with ensuring broad participation in the processes and distributions of government’” (footnote omitted) (quoting ELY, *supra* note 253, at 87)).

256. See *infra* text accompanying note 400 (describing counterintuitive consequences of first variant).

257. *M* could say, I suppose, that the existence of prejudice against women, by preventing women from participating in a rule's formulation, has the *instrumental* effect of making the rule less reliable. This construal of version one of process theory is subject to the same kind of objection that I advance, here, against version two. It merely provides *M* a kind of epistemic₂ right.

258. See *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (noting stereotype that “‘reckless’ young men [will] drink and drive”).

259. See *supra* text accompanying notes 218-25.

text, and Ely does not mean to claim otherwise.²⁶⁰ Rather, Ely suggests, courts should scrutinize rule-predicates as evidence of the prejudices that may have motivated rule-formulators.

[T]he "special scrutiny" that is afforded suspect classifications . . . insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. *Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of "flushing out" unconstitutional motivation . . .*²⁶¹

But Ely's claim gets matters quite backwards. It is like saying that, because a tortfeasor caused harm to a victim, we have evidence that the tortfeasor imposed a risk on the victim.²⁶² What matters morally about the tortfeasor — or at least what matters *more* — is harming, not risking. Similarly, what matters more about ALCOHOL — more than the fact that prejudices against women figured in the enactment of the no-alcohol rule, such that more epistemic work about *M* is needed — is that nonepistemic moral reason obtains to invalidate *the rule* and to replace it with some kind of gender-neutral rule. If the predicate of the no-alcohol rule is morally imperfect, which is what the Court concluded in *Craig v. Boren*,²⁶³ then the predicate may evidence the role of prejudices in the rule's enactment; but, more importantly, it shows that the rule should be repealed or amended. If the predicate of the no-alcohol rule is morally perfect (*pace Craig*), then we have not yet "flushed out" the prejudices that Ely would have us look for. A non-dilutive, predicate-based defense of the Direct Account does not exist.

4. *The Group-Disadvantaging Principle*

Finally, I consider the theory of equality Owen Fiss advanced in his well-known article *Groups and the Equal Protection Clause*.²⁶⁴

260. See, e.g., ELY, *supra* note 253, at 146 (noting the "proof problems of a . . . direct inquiry [into legislative motivation]"). For a real-world example, see *Craig*, 429 U.S. at 199-200 n.7 (noting that "[Oklahoma's] purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments").

261. Ely, *supra* note 253, at 146 (second emphasis added).

262. See Perry, *supra* note 223, at 330-39 (arguing that risk is not harm, and ought not be compensable as harm in tort law).

263. See *Craig*, 429 U.S. at 204 (holding that "the relationship between gender and traffic safety [is] far too tenuous to satisfy [the constitutional] requirement that the gender-based difference be substantially related to achievement of the statutory objective").

264. Fiss, *supra* note 108; see also KOPPELMAN, *supra* note 219, at 76-92, 76 (surveying group-disadvantage theory within scholarship on discrimination: "[T]he group-disadvantage

Fiss argues that the Constitution prohibits practices that aggravate the subordinate position of a "specially disadvantaged group," paradigmatically blacks.²⁶⁵ Blacks are a "social group"²⁶⁶ — a social entity with a "distinct existence apart from its members"²⁶⁷ — that "has been in a position of perpetual subordination," and whose "political power . . . is severely circumscribed."²⁶⁸ As a consequence, this social group falls within the protection of the Equal Protection Clause.

Some state laws or practices may just be a mistake — they make all groups and all persons worse off, and equally so. These do not seem to be the concern of a constitutional provision cast in terms of equality. Equality is a relativistic idea. The concern should be with those laws or practices that particularly hurt a disadvantaged group. Such laws might enhance the welfare of society (or the better-off classes), or leave it the same; *what is critical, however, is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.* This is what the Equal Protection Clause prohibits.²⁶⁹

Fiss intends this theory to be quite distinct from the other theories of equality that are current within constitutional law, and that I have here considered: a theory of equal treatment for similarly situated individuals, a stigma theory, and a process theory. Unlike the equal treatment theory, which focuses upon how individuals fare relative to others, Fiss's theory is explicitly a *non-individualistic* theory. His concern is with the effect of laws and practices on "specially disadvantaged" groups, not on particular individuals: "[T]he Equal Protection Clause should be viewed as a prohibition against group-disadvantaging practices, not unfair treatment. . . . [A] claim of individual unfairness [should be] put to one side"²⁷⁰ And, by contrast with the stigma and process theories, for which it is crucial that laws discriminate on the basis of race or be motivated by

theory looks beyond process and signification to the substantive social position of blacks and other disadvantaged groups").

265. See generally Fiss, *supra* note 108, at 147-70 (explicating and defending "group-disadvantaging principle").

266. *Id.* at 154.

267. *Id.* at 148. This, along with what Fiss calls "interdependence" ("[t]he identity and well-being of the members of the group and the identity and well-being of the group are linked," *id.*), are in Fiss's view the necessary and sufficient conditions for the existence of a social group.

268. *Id.* at 154-55.

269. *Id.* at 157 (emphasis added).

270. *Id.* at 160; see *id.* at 123, 148 (noting, and criticizing, individualistic cast of Tussman and tenBroek's theory).

racial prejudices,²⁷¹ discrimination is not central to Fiss. Part of the point of Fiss's article is to show that a racially neutral law that, nonetheless, aggravates the subordinate position of blacks, should be unconstitutional.²⁷²

As I have already explained, equal protection doctrine does *not* currently reflect this kind of view. A reviewing court will not invalidate the kind of law Fiss hopes to strike down — a racially neutral law that has a disparate impact upon blacks, and thereby aggravates their subordinate position. That has been the doctrine, for better or worse, since *Washington v. Davis*.²⁷³ So the defender of the Direct Account cannot hope to explain the current pattern of equal protection rights using a Fissian theory. But even if doctrine were to change, and disparate impact were to become the touchstone for equal protection law, the Direct Account would not hold true.

Let us consider, once more, the *B* variant of ALCOHOL, now using a Fissian lens. A rule prohibits “black persons between eighteen and twenty-one” from purchasing alcohol. A black person *B* purchases alcohol using a stolen credit card, and is sanctioned pursuant to the rule. Are there sufficient grounds for the reviewing court to invalidate *B*'s sanction, independent of further invalidating the no-alcohol rule? A Fissian defense of the Direct Account runs into two serious difficulties, here: the first concerns the *individuation* of legal practices, and the second concerns the problem of *marginal contribution*.

Fiss would invalidate legal practices that aggravate the subordinate position of blacks; if sanctioning *B* contributes to such a practice, then there is Fissian reason to overturn *B*'s sanction. But is the relevant legal practice: (1) enforcing the no-alcohol rule against those blacks whose actions are not sanctionable under other descriptions, or rather (2) enforcing the no-alcohol rule, period? This is very like the problem of defining comparison classes that I discussed above, in the context of the Tussman/tenBroek theory of equality. Sanctioning *B* is part of the second practice, but not the first.

Fiss stresses that his criterion for individuating “social groups” is natural, not artificial.

271. See ELY, *supra* note 253, at 145-70 (arguing for judicial focus on “suspect classifications” as evidence of unconstitutional motivation); Brest, *supra* note 238, at 26, 44-53 (arguing that discrimination, not disparate impact, is touchstone of Equal Protection Clause).

272. See Fiss, *supra* note 108, at 141-46, 157-60, 170.

273. 426 U.S. 229 (1976); see *supra* text accompanying notes 98-102 (discussing Court's rejection of disparate impact as sufficient condition for invalidating laws under Equal Protection Clause).

[It] strikes me as odd to build a general interpretation of the Equal Protection Clause . . . on the rejection of the idea that there are natural classes, that is, groups that have an identity and existence wholly apart from the challenged state statute or practice. There are natural classes, or social groups, in American society and blacks are such a group.²⁷⁴

Fiss continues: "[The] Equal Protection Clause [does not extend to] what might be considered artificial classes, those created by a classification or criterion embodied in a state practice or statute"²⁷⁵ If this nonartificiality principle carries over to the individuation of group-disadvantaging *practices* themselves, the Direct Account will likely fail. A criterion that confines the relevant "practice" to (1) enforcing that portion of the no-alcohol rule that covers only blacks whose actions are not sanctionable under other rules, is nonartificial in the following sense: *B*'s sanction will not contribute to the relevant Fissian "practice," whether she is sanctioned pursuant to the no-alcohol rule or instead for fraud. By contrast, a criterion that individuates the Fissian practice as (2) enforcing the entire no-alcohol rule, is artificial in the following, interesting sense: *B*'s sanction will contribute to the Fissian practice if she is sanctioned pursuant to the no-alcohol rule, but will not contribute if she is sanctioned *for the very same action of hers* pursuant to a rule prohibiting fraud.

But even if one individuates the Fissian practice along the lines of (2) rather than (1), the Direct Account likely fails. The problem here is the problem of marginal contribution.²⁷⁶ The relevant practice, let us assume, is (2) enforcing the no-alcohol rule. Relative to a world in which the no-alcohol rule is repealed, fully enforcing the no-alcohol rule aggravates the subordinate position of the black group. Only blacks are sanctioned pursuant to the rule, and only blacks are coerced not to purchase alcohol. *But* relative to a world in which the no-alcohol rule is fully in force, with the exception of *B*'s sanction, fully enforcing the no-alcohol rule only marginally ag-

274. Fiss, *supra* note 108, at 148.

275. *Id.* at 156.

276. The idea that a particular action (here, sanctioning *B*) might be innocent by virtue of its marginal contribution to some disfavored state-of-the-world, even though a general practice of performing actions "like this" (however precisely that is defined) has bad consequences, is hardly a new one. That idea is precisely what helped animate rule-utilitarianism. See LYONS, *supra* note 123, at 2-17; SCARRE, *supra* note 46, at 122-32. Lyons claims, famously, that act- and rule-utilitarianism are extensionally equivalent; but that does not entail that the enforcement of a textually entrenched rule cannot have overall consequences that are different from the consequences of an application. See SCHAUER, *supra* note 58, at 79-85 (arguing that Lyons's proof does not apply to "rules" understood as *entrenched* generalizations).

gravates the subordinate position of the black group. *B*'s sanction, taken alone, has only a vanishingly small effect on the social position of the black group. (The sanction is hard on *B*, but as we have seen, Fiss's concern is for blacks as a group, not for particular black individuals.) Therefore the Direct Account is false: the court does not have sufficient reason to overturn *B*'s sanction, independent of further invalidating the no-alcohol rule. After all, *B* is a wrongdoer under another description; if she is not sanctioned pursuant to the no-alcohol rule, she may not be sanctioned at all. The vanishing contribution that freeing *her* makes to the social position of blacks is not weighty enough to outweigh the demands of retributive justice.

The Fissian theory may provide a reviewing court reason to repeal or amend the no-alcohol rule, given the cumulative contribution that sanctioning and coercing lots of black individuals has on the subordinate position of the black group. But it does not provide the reviewing court a reason to invalidate *B*'s sanction, without more, regardless of how we individuate practices for Fissian purposes.

C. *Authority*

I have considered, under the rubric of a theory of justified sanctions, and the rubric of a theory of equality, a wide range of possible defenses of the Direct Account. A justified-sanction defense might be nonepistemic or epistemic. As for the first, I considered several plausible rule-dependent theories of sanctioning (specifically, expressive and deterrent theories); as for the second, I considered several plausible theories of epistemic rights (what I called epistemic₁ rights and epistemic₂ rights). And under the rubric of equality, I analyzed seriatim the four specific theories most visible within constitutional scholarship and doctrine: (1) a Tussman/tenBroek theory of equal treatment, (2) a stigma theory, (3) a process theory, and (4) a group-disadvantaging theory. I have argued that *none* of these defenses underwrites the Direct Account for *any* of our stylized cases, with the following exception: the stigma theory explains the *B* and *W* variants (but not the *M* variant) of ALCOHOL. This is a modest harvest, indeed, for the Direct Account.

Are there further moral arguments that the defender of the Direct Account might advance? If it is true in our stylized cases (leaving aside the *B* and *W* variants of ALCOHOL) that *X*'s sanction is

(*prima facie*)²⁷⁷ justified under a nonepistemic theory of sanctions; that constitutionally sufficient epistemic work has been done to determine *that*; and that *X* has no equality claim sufficient to warrant overturning her sanction independent of further invalidating the rule *R* under which it falls, then it is hard to see what further arguments (more or less connected to the moral criteria at stake in our stylized cases) remain for our defender. I see only one real possibility, and I will briefly consider that here.²⁷⁸

That possibility is a theory of *authority*. By "authority" I mean what the term means within contemporary jurisprudence: a rule has "authority" if the enactment of that rule, in some way, provides the actors and/or state officials subject to the rule additional reason (in particular, additional moral reason) to do what the rule authorizes or requires.²⁷⁹ "Reason" here is meant to encompass both

277. I say "*prima facie*" to leave open the possibility that the sanction might be, all things considered, unjustified, say because it violates an equality norm.

278. What about a defense of the Direct Account based on legislative motivation? The idea of illegitimate legislative motivation, or purpose, has long been popular within constitutional scholarship. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978). For a recent, important addition to this scholarship, see Pildes, *supra* note 166, at 761 (arguing that constitutional rights "are ways to channel the kind of reasons and justifications government can act on in different domains"). Note however that the idea of illegitimate legislative motivation is ambiguous and, without further elaboration, unhelpful. To say that the legislator's motivation is "illegitimate" is to say that it is, somehow, morally problematic — but how?

I see four cogent ways to cash out the illegitimate-motivation idea within the Direct Account. One might say that the rule-formulator's mental state (motivation, etc.) in formulating rule *R* has: (1) *direct moral import*, in rendering *X*'s otherwise-innocent treatment pursuant to *R* wrongful; or (2) *epistemic import*, in requiring that society do more work to determine the propriety of that treatment; or (3) *import for authority*, in depriving *R* of authority; or (4) *import for culpability*, in making the rule-formulator culpable for the wrong done to *X*. But I have considered, or will consider, each of the first three possibilities: the first maps onto the stigma theory, the second onto the idea of epistemic rights, and the third onto the notion of authority. As for the fourth: absent some independent explanation why *X*'s treatment is wrong, the rule-formulator's culpability does not explain why we should overturn it. At best it explains why we should punish the rule-formulator.

279. See Hurd, *supra* note 169, at 1615-20 (discussing "theoretical authority," "influential authority," and "practical authority"). Each of these represents a different way that an utterance might, arguably, change the moral reasons bearing upon the actor who receives the utterance. The utterance of a "theoretical" authority provides the actor with a first-order reason for belief; the utterance of an "influential" authority provides the actor with a first-order reason for action; the utterance of a "practical" authority provides the actor with a second-order reason for action. We should note a fourth possibility: that an utterance might provide the actor a second-order reason *for belief*.

Each of these four possibilities is indeed represented in the literature on authority. See *id.* at 1667-77 (arguing that authority consists of first-order reasons for belief); Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 871 (1989) (first-order reasons for action); Raz, *supra* note 169, at 23-69 (second-order reasons for action); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1001-18 (1989) (second-order reasons for belief). For other recent work on authority, see Larry Alexander, *Law and Exclusionary Reasons*, PHIL. TOPICS, Spring 1990, at 5;

reasons for belief and reasons for action — a distinction whose import will soon become apparent.

Authority, in this sense, is fundamental to law and legal systems. It is, obviously, a fundamental moral question whether and how the enactment of legal rules changes moral requirements. Is there a moral obligation to obey the law? We will need a theory of authority to answer that. Further, the concept of authority may have conceptual significance in delineating the very concept of law. One can plausibly say that a given deontic proposition — such as “No vehicles may be driven in the park,” or “All adult males must deliver a sacrifice for the Sun God” — only exists as a *legal* rule if, at a minimum, a sufficient number of actors, or at least state officials, take the proposition to be authoritative, claim to do so, or are instructed to do so by other rules.²⁸⁰ Relatedly, what it means to be sanctioned “pursuant to” a particular legal rule *R* is plausibly something like this: it means that state officials impose a sanction upon you, by virtue of the moral reasons that these officials take or claim *R*’s enactment to create.

The following idea might therefore seem tempting to the defender of the Direct Account:

Constitutional Rights as Authority-Rights

If *X* has been sanctioned pursuant to a rule *R* that truly lacks authority, for her²⁸¹ — if the enactment of the rule *R* does not create fresh moral reason for *X* to do what the rule requires, and does not create fresh moral reason for state officials to sanction *X* when she breaches the rule — then there is sufficient moral reason to overturn *X*’s sanction, independent of further invalidating *R*. For to say that state officials have sanctioned *X* “pursuant to” *R* means that these officials have taken or claimed *R* to be authoritative, with respect to *X*; and by hypothesis *R* is *not* authoritative in this way.

LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913 (1989); and SCHAUER, *supra* note 58, at 128-34.

280. See SCHAUER, *supra* note 58, at 126 (“[T]o say that a rule exists within some decisional environment is . . . to say that the decision-makers in that environment . . . treat the rule as relevant to the decisions they are called upon to make.”). Arguably, a legal rule can exist where state officials do not take or claim it as authoritative, but are simply instructed to do so, e.g., a conduct rule that is legally valid and enforceable under applicable rules governing the enactment and enforcement of conduct-rules, but that state officials and actors are now ignoring.

281. I say “for her” because authority may be piecemeal. See Moore, *supra* note 279, at 833-37 (discussing piecemeal cast of authority, within Razian account, for citizens if not state officials).

But this idea, tempting as it might seem, is flat wrong. I will assume, for the sake of argument, that the rules in our stylized cases lack true authority, for some or even all of the actors or state officials subject to these rules. Even so, the Direct Account does not obtain. Why not? Because the premise that rule *R* lacks authority, with respect to *X* and the officials who sanction *X* pursuant to *R* — the officials who, let us assume, *incorrectly* take or claim the rule to provide fresh reason for sanctioning *X* — does not in fact warrant the conclusion that there is sufficient moral reason to overturn *X*'s own sanction, independent of further invalidating the rule under which the sanction falls.

Let us back up a moment. Why might a legal rule *R* possess true authority? How might *R*'s enactment change the moral reasons bearing upon the actors and/or state officials subject to *R*? This is a question of much currency and controversy among legal theorists. One view of authority — the revisionist view — sees legal authority as merely *epistemic*.²⁸² On this view, the enactment of a legally authoritative rule merely changes the *reasons for belief* that actors and state officials subject to the rule possess. Because the rule-formulator is epistemically reliable, her enactment of *R* constitutes a fresh reason for those actors to believe that the actions identified by *R* are wrongful, and for state officials to believe that those actions are sanctionable. As Heidi Hurd explains:

One in a position to give good advice concerning how another ought to act in certain circumstances possesses theoretical authority, at least over some range of deontic propositions. The utterances of a theoretical authority provide reasons for belief, not reasons for actions. They function, that is, evidentially. When a theoretical authority makes a claim concerning right action, its utterance provides a reason to think that there are *other* reasons (besides the sheer fact that the authority has spoken) to act as recommended. The prescriptions of such a theoretical authority are thus heuristic guides to detecting the existence and determining the probable truth of antecedently existing reasons for action.²⁸³

Hurd argues that legal authority does this, *and no more*: an authoritative legal rule, issued by a sufficiently reliable legislator, simply evidences preexisting moral requirements.²⁸⁴

282. This is a little tricky. Someone who believes that authority entails reasons for action, as does Raz, might nonetheless believe that an authoritative utterance changes the subject's reasons for action by virtue of the authority's epistemic capacities — as does Raz. See *supra* note 169 (discussing epistemic strain in Raz). But Raz does not believe that authority is *merely* epistemic, in the sense of merely changing the subject's reasons for belief. Hurd does.

283. Hurd, *supra* note 169, at 1615.

284. See *id.* at 1667-77.

Assume Hurd is correct. Then to say that the flag-desecration rule, etc., lacks “authority” for *X* is simply to say that, for the particular action of flag-desecration *X* performed, the fact that this action fell under the flag-desecration rule created no reason for *X* to believe the action wrong, and now creates no reason for state officials to believe the action sanctionable. In short, all the Hurdian can say, in defense of the Direct Account, is that we ought to perform more epistemic work to determine whether *X* should be sanctioned. On the Hurdian view, authoritative legal rules function only to facilitate our moral inquiry; thus the claim that the flag-desecration rule, etc., lacks authority with respect to *X*’s sanction can only entail that we must inquire further into the wrongfulness of *X*’s action.

So a Hurdian authority-right must be some kind of epistemic right. But which *X*’s have this epistemic right *as a constitutional matter*? Surely not every *X* for whom a rule lacks authority. Again, if *Y* is sanctioned pursuant to a rule *R* that prohibits “the sale of filled milk” (enacted by legislators who have been “captured” by competing manufacturers), and *Y* is a nutritionist who appreciates the true benefits of filled milk, then this rule likely lacks Hurdian authority for *Y*.²⁸⁵ But sanctioning *Y* doesn’t violate his constitutional rights.²⁸⁶ Thus the Hurdian defender of the Direct Account must identify either some constitutionally special property of *X*’s action that works as an epistemic trigger, or some constitutionally special error-type that infects the process of formulating rules, and deprives them of authority. In short, a Hurdian authority-right will be very much like what I earlier called an epistemic₁ right or an epistemic₂ right. I have already discussed why these types of epistemic rights do *not* underwrite the Direct Account, and I will not belabor the discussion here.

What if Hurd is wrong? Hurd’s epistemic view of legal authority is, as I have said, revisionist. By contrast, on the traditional view, legal authority is more than epistemic. It involves *reasons for action*, and not just reasons for belief. For the traditionalist, the enactment of a truly authoritative rule actually changes — indeed, displaces²⁸⁷ — what morality requires of the actors and/or state offi-

285. Cf. RAZ, *supra* note 169, at 100 (noting that “[t]he authority of the state may be greater over some individuals than over others [One person] may prefer to decide for himself, and be willing to invest the time and effort it takes to enable himself to decide wisely”). It is hard to see how a Hurdian could disagree with this claim.

286. See *supra* text accompanying notes 206-10.

287. “Displaces” entails second-order reasons for action, while “changes” merely entails first-order ones. See *supra* note 279.

cials subject to the rule, rather than merely evidencing preexisting moral requirements. As Hurd explains, summarizing the traditional view:

One who utters a command certainly purports to give another a new reason for action. The mother who instructs her son to take his umbrella intends her son to take the very fact that she has issued such a command as itself a reason for using an umbrella. If the mother is asked by her son why he must carry the despised object, the mother can well be expected to invoke the time-honored reason, "Because I told you to," and to anticipate that this very fact will be a reason above and beyond the ones that the child antecedently had to take his umbrella. [Indeed] the "Because I told you to" purports to give more than just a new reason for action. . . . Rather [it] purports to give the son, by itself, a normatively sufficient reason to take his umbrella: it implicitly claims . . . to bar action on his part in accordance with the reasons that he previously possessed not to take his umbrella.²⁸⁸

This traditional view of authority might seem to give comfort to the defender of the Direct Account, for then the claim that the flag-desecration rule, etc., lacks "authority" for *X* does not reduce to the epistemic claim that we need to do more epistemic work about *X*. Rather, and more robustly, the traditionalist can say that the flag-desecration rule, etc., has failed to perform the morally transformative function — for *X* and the state officials sanctioning her — that truly authoritative rules perform.

But so what? If the rule was not traditionally authoritative, then it did not provide *X* moral reason to refrain from performing her action. But this does not mean that *X* lacked any moral reason *whatsoever* to refrain from performing that action. If the action was also an action of battery, etc., then *X* had moral reason not to perform it because (1) the action was morally wrong, quite independent of falling under any legal rule; and further (2) the action presumably violated another authoritative rule, viz., the rule against battery, etc. The traditional theory of authority is not a theory of the *necessary* conditions for moral wrongdoing; no one believes that, unless an action is illegal, it is not immoral.²⁸⁹ Rather, the traditional theory identifies a *sufficient* condition for moral wrongdoing: violating an authoritative legal rule. So, whether or not the rules in our stylized examples possessed traditional authority, *X*'s actions were morally wrong — and that is doubly true if they violated authoritative rules picking out "battery," etc.

288. Hurd, *supra* note 169, at 1618.

289. See Adler, *supra* note 4, at 803-04 (criticizing super-shallow moral conventionalism). As Joel Feinberg puts it: "One can wrongfully kill whether or not there is a criminal law of homicide." FEINBERG, *supra* note 57, at 20.

As for the decision by state officials to sanction *X*: if retributivism is true, then these officials had sufficient moral reason to sanction *X*, quite independent of whether the rule they took as authoritative possessed traditional authority, or satisfied other "expressive" or deterrent conditions. (If retributivism is true then these officials (1) had sufficient reason to sanction *X*, independent of her action falling under any rule, and further (2) sufficient reason to sanction *X*, by virtue of her breaching a rule that *was* authoritative, albeit a rule different from the one actually applied by the officials.) The traditional theory of authority does not displace theories of sanctioning, just as it does not displace theories of moral wrongdoing. It is, again, not a theory of the *necessary* conditions for state officials to impose a sanction, but a theory of the *sufficient* conditions. The traditional theory says that, if the state enacts an authoritative decision rule, state officials have sufficient reason to sanction actions violating the rule. It does not say that, absent such a rule, state officials have no such reason.

D. Duties Rather than Sanctions?

This Part has considered, at some length, whether the Direct Account holds true for *sanctions*: whether moral reason might obtain for a court to overturn *X*'s sanction pursuant to a rule *R*, independent of further invalidating the rule, and despite the fact that the action by virtue of which *X* has received that sanction is (or might be) proscribable under a different description. I have focused specifically upon sanctions, rather than discussing sanctions and duties together, because of the analytic clarity that a focused discussion brings; and, as between sanctions and duties, I have focused on sanctions, rather than duties, because (under Supreme Court doctrine) it is paradigmatically the imposition of a sanction upon *X* that gives her a justiciable, constitutional complaint. No one doubts that, where *X* has performed an action in breach of a rule *R*, and has been prosecuted, convicted, and sanctioned for that breach, the prerequisites for constitutional adjudication will be satisfied: *X* will have "standing" to challenge the sanction, her claim will be "ripe" and not "moot," and the judicial decision will not be merely advisory.²⁹⁰ By contrast, at least in the past, the justiciability of a constitutional challenge by some *X* to a legal *duty*

290. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* Ch. 2 (2d ed. 1994) (surveying justiciability requirements); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 86-94, 92 (1947) (dismissing as nonjusticiable a pre-enforcement free speech challenge to the Hatch Act, but permitting a challenge where the claimant had already been charged with a violation of the Act and a proposed sanction had been entered; "[t]his [post-enforcement] proceeding so lim-

that she has not yet breached has been open to question.²⁹¹ Does the duty imposed by *R* truly constitute a setback for *X*? Does it truly coerce *her*? Does *she* truly intend to perform actions that breach *R* and, if so, is there a realistic chance that *she* will be prosecuted and sanctioned for doing so? These kinds of questions, at least in the past, gave the Supreme Court some pause in permitting prospective constitutional challenges to duties; and although such justiciability concerns have over the last half century largely faded from view, there are signs that they may, yet again, become important.²⁹² These concerns make good sense within the Direct Account, because on that account the purpose of constitutional adjudication is to relieve *X* of an improper legal setback *to her*. If *X*'s duty is, in truth, no real setback at all, then on the Direct Account judicial intervention is unwarranted.

Thus my focus, in this Part, upon sanctions rather than duties. But, as we have seen, the sanction-focused Direct Account fails to measure up. It fails to explain why the paradigmatic setback to *X* — a sanction — should be invalidated in most of our stylized cases. This failure might prompt the advocate of the Direct Account to reconfigure her defense of that view. She might claim that duties, even more than sanctions, should be seen as the central treatment-types that constitutional claimants are entitled to challenge. For example, where a would-be flag-desecrator *X* brings a prospective challenge to a rule that stipulates "no person shall desecrate a flag of the United States," perhaps the Direct Account successfully explains why moral reason obtains for a court to free *X* from that duty, independent of further invalidating the flag-desecration rule?

Or perhaps not. A duty-focused reconfiguration of the Direct Account poses a number of serious difficulties. The first concerns the overall simplicity and coherence of such an account. The Derivative Account provides a simple and unified theory of judicial review: a constitutional challenge by *X* to *R*, whether a prospective or a retrospective challenge, is simply an occasion for judicial repeal or amendment of *R*. By contrast, even if the Direct Account succeeds in showing that *X*'s prospective challenge to *R* concerns the moral propriety of *X*'s own duty, the problem remains that (as I

ited meets the requirements of defined rights and a defined threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint").

291. See *Mitchell*, 330 U.S. at 86-91.

292. See *infra* text accompanying notes 588-97 (discussing justiciability of duties, particularly the ripeness of preenforcement constitutional challenges to conduct-regulating and other rules).

have argued at length) *X*'s retrospective challenge to her sanction under *R* cannot be equally "personal." What, then, is the function, within a duty-focused Direct Account, of a retrospective constitutional challenge? *X*'s retrospective challenge to his sanction must be an occasion for judicial repeal or amendment of rule *R* or, at best, for judicial invalidation of *X*'s duty (not merely his sanction). So we are left with a complex, hybrid account where challenges to certain legal setbacks (duties) concern the moral propriety of those particular setbacks, but challenges to other setbacks (sanctions) do not.

A second and even more serious problem is this: refocusing the Direct Account on duties rather than sanctions does not eliminate the problem of multiple description that our stylized cases are meant to exemplify, and that bedeviled the sanction-focused account. The problem was that the particular action, which *X* performed in breach of *R* and by virtue of which he was sanctioned, might be wrongful under another description. *X*'s action of flag-desecration might also be an action of pollution, arson, or battery, and yet his sanction pursuant to the flag-desecration rule would nonetheless violate the First Amendment. None of the defenses of the Direct Account that I explored could make sense of this crucial feature of constitutional rights. Now, it is tempting to think that the problem of multiple description disappears when we turn from sanctions to duties — the flag-desecration rule prohibits *X*, prospectively, from performing a *class* of actions, some of which may prove harmless — but this temptation should be avoided. Imagine two actors, *X*₁ and *X*₂. *X*₁ is a violent anarchist, who seeks to foment disorder by burning stolen flags, or by burning them in proximity to bystanders; *X*₁'s actions of flag-desecration are, virtually always, wrongful under other descriptions. *X*₂, by contrast, is a pacifist war-protester, who eschews physical violence and takes great care to ensure that his actions of flag-desecration are innocent of nonexpressive wrong. Morality might well require that *X*₂, but not *X*₁, be freed from the duty that the flag-desecration rule imposes upon these actors. The mix of actions that *X*₂ would perform, but for the existence of a legal rule prohibiting flag-desecration, is different from the mix that *X*₁ would perform; and the morality of subjecting each actor to the no-flag-desecration duty should, it seems, depend in part upon this personal mix.

This poses a dilemma for the defender of the Direct Account. Either she insists (1) that the constitutionality of *X*'s duty under rule *R* does *not* depend at all upon the personal mix of actions that

X would perform, but for *R*; or she says (2) that the constitutionality of *X*'s duty under *R* *does* depend in part upon *X*'s personal mix. The first alternative is unattractive, because the defender must then confront the problem of explaining why, as a moral matter, both *X*₁ and *X*₂ have a moral right to be freed from their respective duties pursuant to *R*, independent of their respective personal mixes. This is the precise analogue of the problem that, in the case of sanctions, the Direct Account was unable to resolve. The second alternative is unattractive because it forces a dramatic revision of existing constitutional practice: in practice, adjudication of prospective constitutional challenges does not involve a judicial inspection of the claimant's personal act-mix.²⁹³

Finally, a duty-focused Direct Account runs into serious difficulties with cases such as RESIDENTIAL PICKETING, ANIMAL SACRIFICE, and the *M* variant of ALCOHOL,²⁹⁴ where — quite apart from this issue of multiple description — there is no apparent moral reason to overturn the claimant's own duty.²⁹⁵ Consider RESIDENTIAL PICKETING: a rule provides that "no person shall picket a residence or dwelling, except for persons engaged in labor picketing." *X*, a nonlabor picketer, challenges his own duty pursuant to this rule. Assume that the actions *X* would perform, but for the rule, are not wrongful under other descriptions; freed from the rule, *X* would simply engage in otherwise-innocent actions of residential picketing. Even so, it is hard to see why it would violate *X*'s moral rights to subject him to the no-picketing rule, given that — as the Court has held — the constitutional problem in RESIDENTIAL PICKETING could be cured by a *broader* rule without the exemption for labor picketing.²⁹⁶

Can *X* say that he has been treated unequally, relative to labor picketers, and that *this* is why his own moral rights are violated by the narrower but not broader no-picketing rule? This equal treatment rationale might explain the *M* variant of ALCOHOL, which involves the Equal Protection Clause, but it is less responsive to the moral concerns underlying the First Amendment, and therefore less

293. See *supra* Part I (discussing morally limited, rather than morally complete, nature of judicial inquiry in constitutional cases).

294. In the *B* and *W* variants of ALCOHOL, a stigma argument works for duties, as it does for sanctions. See *supra* section II.B.2.

295. Specifically, there is no apparent nonepistemic moral reason. An epistemic account is available, for duties as for sanctions, but — as I have already discussed — the epistemic account is dilutive. See *supra* text accompanying notes 220-25; *supra* section II.B.3.

296. See *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding law generally barring residential picketing); *infra* text accompanying notes 370-83 (discussing rules that violate Discrimination Schema, such that these rules can be cured by broadening their scope).

persuasive for a case such as RESIDENTIAL PICKETING or ANIMAL SACRIFICE.²⁹⁷ Further, an equal treatment rationale for why the duties imposed in RESIDENTIAL PICKETING, ANIMAL SACRIFICE and ALCOHOL are morally problematic leads us back to the problem of personal mix. Take, for example, a nineteen-year-old male *M* who is obliged not to purchase alcohol pursuant to a gender-discriminatory rule. Whether he is in fact treated unequally compared to others will depend on how the comparison class of "others" is defined — as we have already seen.²⁹⁸ If the relevant "others" are defined as *M*'s moral equivalents in all respects (not just relative to the purposes of the rule), then the contours of that comparison class *will*, in turn, depend upon *M*'s personal mix. And we are then back to the dilemma sketched out above: either judicial review prescind from the prospective challenger's personal mix (leaving the Direct Account on shaky ground) or it does not (forcing a dramatic revision of existing constitutional practice).

In short: for reasons of overall coherence and simplicity, and because of problems internal to a duty-focused Direct Account, reconfiguring the Direct Account around duties rather than sanctions does not look to be a promising strategy for salvaging it.

III. THE DERIVATIVE ACCOUNT

The Direct Account makes robust moral demands on the content of constitutional rights. It claims that having a constitutional right entails the existence of sufficient moral reason for a court to overturn the rights-holder's duty or sanction, independent of further invalidating the legal rule that imposes this duty upon the rights-holder, as well as others, and authorizes state officials to sanction her, as well as others. But cashing out this claim has proved morally tricky. It has proved tricky to show how moral reason of this robust sort could obtain, at least for the substantive rights against conduct-regulating rules that now have currency within constitutional law: rights to free speech, free exercise, equal protection, and substantive due process. In Part II, I considered a variety of moral theories that might support the Direct Account: nonepistemic and epistemic theories of sanctioning; theories of equality; and theories of authority. These theories failed, singly and collectively, to do the requisite moral work.

297. I take the antidiscrimination component of the First Amendment to be concerned with morally irrelevant properties, such as viewpoint or religious status, and not with equal treatment. See *infra* section III.A.2 (defending Discrimination Schema).

298. See *supra* text accompanying notes 233-35.

It is time to defend a different view of constitutional rights: the Derivative Account. On that account, constitutional rights are morally derivative. To say that sanctioning *X* pursuant to rule *R*, or subjecting her to the duty that *R* imposes, is “unconstitutional” or “violates *X*’s constitutional rights” is simply to say this: there is sufficient moral reason to invalidate that *rule*. The Derivative Account conceptualizes judicial review as a legal institution whose function is the invalidation of rules, not merely the invalidation of the particular sanctions or duties of the rights-holders who happen to initiate the judicial process. By “invalidation,” I mean a judicial utterance roughly equivalent in legal import to a legislative *repeal*.²⁹⁹ A repeal is an utterance, by the rule-formulator (agency or legislature), that generally rescinds the legal force of the rule. It frees all actors from the legal duty that the enactment of the rule created, and deprives all state officials of the legal power to sanction actors pursuant to the rule. The Direct Account trades on a traditional, purist view of the powers of reviewing courts, that sees a court as empowered merely to rescind the duty of *X* and the power of state officials to sanction her. By contrast, the Derivative Account insists that — in order to make moral sense of constitutional rights — reviewing courts must be understood to have rule-repealing powers roughly equivalent to the repealing powers of agencies and legislatures, and to be exercising those broad powers whenever courts credit claims of “constitutional right” or hold the treatment of rights-holders to be “unconstitutional.”

Let me articulate the Derivative Account as clearly as possible:

The Derivative Account

To say that some rule *R* “violates *X*’s constitutional rights” entails the following: there is sufficient moral reason to change *R*’s predicate in some measure, and *X* has the legal power to secure some kind of judicial invalidation of *R*. To say, more specifically, that a treatment of *X* (being sanctioned pursuant to a rule *R*, or subjecting *X* to the duty that *R* announces) “violates *X*’s constitutional rights” entails the following: there is

299. “Roughly” is meant to signal certain technical differences between judicial invalidation and legislative repeals, such as these: a judicial invalidation might be a partial invalidation or an extension rather than a facial invalidation, *see infra* text accompanying notes 414-21; a judicial invalidation might leave open the possibility that a rule’s authoritative interpreter can revive it through a narrowing construction, *see infra* text accompanying notes 416-17; and a subsequent judicial overruling of the invalidation decision might “revive” the invalidated statute, *see* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902 (1993). But judicial invalidation is, crucially, like a legislative repeal in having general scope, rather than being confined to a particular claimant.

sufficient moral reason to change *R*'s predicate in some measure, and *X* has the legal power to secure some kind of judicial invalidation of *R*, *including the invalidation of X's own treatment*.

By a "rule," again, I mean a conduct-regulating, sanction-backed rule that has a canonical, written formulation and that becomes authoritative through enactment by a legislature or agency. I assume that rules are *individuated* in some kind of text-based way.³⁰⁰ That is, an "individual" rule is some textually-defined portion of the entire corpus of canonically formulated rules — a single deontic sentence, a single term in a deontic sentence, or a single provision made up of several sentences. How precisely to individuate rules is a technical problem that may depend in part on your precise conception of free speech, equal protection, free exercise, and the other moral criteria referenced by the Bill of Rights. My defense of the Derivative Account is agnostic within the family of text-based individuation criteria, and is meant to be consistent with all of them.

The Derivative Account says the following of a (textually individuated) rule: there is sufficient moral reason³⁰¹ to change in some measure the predicate of the rule. By this I mean the following: There is sufficient moral reason either (1) to narrow the scope of the rule *R*, that is, to exclude from the rule's coverage some class of actions now included within the rule, thereby freeing *all* actors from the duty not to perform that class of actions (except where covered by another rule) and disentitling *all* state officials from sanctioning actions within that class (except where covered by another rule); or (2) to broaden the scope of the rule, that is, to include within the rule's coverage some class of actions not now covered; or (3) to partly narrow and partly broaden the scope of the rule; or even perhaps (4) to replace the rule's predicate with a different but coex-

300. See *supra* text accompanying notes 137-39 (discussing individuation).

301. I emphasize again that "moral reason" is meant to encompass both consequentialist and deontological accounts. To say that "moral reason" obtains to change *R*'s predicate means either that this change is required by a deontological norm, or that it improves the world under applicable consequentialist criteria and is deontologically permissible. Whether the criteria set forth in the Bill of Rights are wholly consequentialist, partly consequentialist, or wholly deontological, cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (chronicling rise of "balancing" methodology in constitutional adjudication), the Derivative Account is morally straightforward. The deontologist will say that moral reason obtains to overturn a duty-imposing rule backed by sanctions, because that kind of threat violates a deontological constraint; the consequentialist will say that the threat causes or constitutes a worsening of the world.

tensive description of actions.³⁰² The Derivative Account does not, necessarily, envision that reviewing courts will secure the *particular* change in the predicate of the rule *R* that morality supports. Consider, for example, our stylized case ABORTION, where a rule prohibits any person from “procuring an abortion.” One variant of the Derivative Account might stipulate that the reviewing court should “facially” invalidate the no-abortion rule: it should issue a legal utterance whose import is to preclude the enforcement of the rule against anyone. Another variant of the Derivative Account might stipulate that the reviewing court should “partially” invalidate the no-abortion rule: it should specify some proper subset of the actions covered by the rule — for example, abortions of non-viable fetuses — against which the rule may not be enforced. What variant of the Derivative Account is correct is a matter for further discussion and debate, which I will pursue as needed below.³⁰³

My defense of the Derivative Account will proceed in two stages. The main attraction of the Derivative Account is that it is morally straightforward; it is straightforward that moral reason can obtain to change, in some measure, the predicate of a rule. Section A defends this claim, and in particular demonstrates how the moral criteria set forth in the Bill of Rights — criteria such as free speech, free exercise, equal protection, and substantive due process — can straightforwardly be understood as criteria by which to measure the predicates of rules. The Court’s current free speech, free exercise, equal protection, and substantive due process case law can be explained, in a simple and straightforward way, by the Derivative Account. We will have no difficulty accounting for the various stylized cases that are meant to exemplify this case law — ABORTION, CHILD PORNOGRAPHY, FLAG DESECRATION, and so on — and that proved so difficult for the Direct Account to explain.

Section B addresses the various issues left open by the moral arguments provided in section A. To say that rules can go morally awry is one thing; to say that a particular body should invalidate rules, by virtue of their being awry, is quite another. Do courts truly have the power to invalidate rules? How is this notion of their

302. This is the kind of replacement that a stigma theorist might, perhaps, demand. Again, I take the most powerful account of “stigma” to be where a rule’s predicate that is suboptimal in scope evidences the role of false beliefs in its production; but I leave open the possibility of a predicate being stigmatic *even though* its scope is morally optimal (and thus this predicate is properly replaced with a nonsynonymous, but coextensive predicate). See RICHARD L. KIRKHAM, *THEORIES OF TRUTH: A CRITICAL INTRODUCTION* 3-14 (1995) (distinguishing between the extensional equivalence of two terms, their necessary extensional equivalence, and their synonymy).

303. See *infra* section III.A.3.

role consistent with the concept of a "constitutional right" or the concept of adjudication? In what way do the legal utterances that issue from reviewing courts, and that often appear to be directed merely at particular litigants, function to repeal or amend rules? The critic of my view of constitutional rights might concede my *moral* point (that the moral criteria referenced in the Bill of Rights can be understood as criteria by which to measure the predicates of rules), but nonetheless raise further, *institutional* objections to the Derivative Account. I rebut these further objections in section B.

A. *Rules that Go Awry: The Moral Foundations of Judicial Review*

Rules can go morally awry in multiple ways. A rule might exacerbate distributive injustice, by having a disproportionate impact upon persons who already receive far less than distributive justice requires.³⁰⁴ It might produce certain unwanted states of affairs: for example, the state of affairs where citizens who have a particular, contestable viewpoint on a matter of public import are heard in disproportionate numbers, and "drown out" the opposition;³⁰⁵ or the state of affairs where members of different religious groups are engaged in civil strife, which distracts and even destabilizes the polity.³⁰⁶ A rule might violate the requirements of equality — not by exacerbating distributive injustice as above, but rather by producing differential treatment for actors whose actions are morally identical.³⁰⁷

All of these are possible — even constitutionally plausible — explanations of how rules go morally awry. But, in fact, constitutional law needs none of them. There are two basic moral *schemas*

304. Cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 338-46 (1993) (arguing that Equal Protection Clause embodies an anti-caste principle); FISS, *supra* note 108, at 157 (arguing that Equal Protection Clause prohibits laws that aggravate the subordinate position of a disadvantaged group).

305. See Stone, *supra* note 218, at 217 (noting that a "possible explanation for the content-based/content-neutral distinction [within free speech doctrine] derives from the fact that content-based restrictions, by their very nature, restrict the communication of only some messages and thus affect public debate in a content-differential manner"). I do not deny that content-based laws which go morally awry in biasing debate are properly invalidated; but I do deny that content-based laws are properly invalidated solely by virtue of their predictably biasing debate.

306. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996) (arguing that Religion Clauses have the "negative goal" of minimizing religious conflict, and the "affirmative goal" of "creat[ing] a regime in which people of fundamentally different views about religion can live together in a peaceful and self-governing society").

307. See Tussman & tenBroek, *supra* note 229, at 344 (arguing that the Equal Protection Clause requires "that those who are similarly situated be similarly treated").

— two different ways in which moral reason obtains to change the predicate of rules — that together suffice to explain the entire range of existing constitutional rights under the Free Speech Clause, Free Exercise Clause, Equal Protection Clause and the substantive component of the Due Process Clause, at least with respect to the central case of conduct-regulating rules backed by sanctions. These two schemas are the *Liberty Schema* and the *Discrimination Schema*. The Liberty Schema explains, in a crisp way, cases such as FLAG DESECRATION, ABORTION, and CHILD PORNOGRAPHY that together exemplify most (although not all)³⁰⁸ of the Court's free speech case law, and all of its substantive due process case law. The Discrimination Schema explains, in a crisp way, cases such as RESIDENTIAL PICKETING, ALCOHOL, and ANIMAL SACRIFICE that together exemplify the remainder of the free speech case law, and all of the Court's equal protection and free exercise case law.

In saying that these two schemas, the Liberty Schema and Discrimination Schema, suffice to explain the Court's free speech, etc., case law, I mean simply this: virtually all the cases in which the Court has recognized claims of constitutional right under the free speech, etc., clauses can be explained as cases in which the underlying rules fit the pattern of moral invalidity set forth by either the Liberty Schema, the Discrimination Schema, or perhaps both.³⁰⁹ Further, as we shall see, the schemas are grounded upon plausible and standard theories — articulated both by the Court and by constitutional scholars — about the right way to understand the moral criteria of free speech, etc. What I do *not* mean to say that is *all* constitutional doctrine or dicta, under the free speech, etc., clauses, are consistent with the Derivative Account. At a minimum, the standard and oft-articulated doctrine that constitutional rights are "personal" rights, in the sense elaborated by the Direct Account, will have to be abandoned.³¹⁰ Clearly — and indeed this is what animates my article — the Derivative Account is in part *revisionary*. It revises the standard view of constitutional rights, and whatever doctrine or dicta depend upon it. But the Derivative Account does not require revising our understanding of the moral criteria underlying constitutional law, or counting as misconceived those cases in which the Court has in fact honored rights-claims.

308. The free speech decisions that are not explained by the Liberty Schema — the decisions exemplified by RESIDENTIAL PICKETING — are in part what motivate the Discrimination Schema.

309. On "both," see *infra* note 369.

310. See *supra* note 148 (citing cases).

What if you are not convinced that the Liberty Schema and the Discrimination Schema, together, adequately cohere with the moral criteria of free speech, free exercise, equal protection, and substantive due process, and with the case law by which the Court has fleshed out these criteria? Or, what if you *are* convinced of this but further believe that the case law should be substantially overhauled? Then you may well want to develop some other schema or schemas for morally invalid rules: a distributive-justice schema, a balanced-debate schema, or whatever. You will flesh out the Derivative Account in a way that is, in its details, significantly different from my account. What you will *not* want to do is return to the Direct Account, unless you think that Part II's criticisms of that Account were ineffective. To accept those criticisms, but disagree with my two schemas, is not to reject the basic argument of this article: that constitutional adjudication essentially involves the invalidation of rules. For if you accept those criticisms, then you commit yourself to developing one or more schemas that explain how rules go morally awry, and cohere with plausible theories of the underlying moral criteria and (depending on your analytic project) with the constitutional case law as well.³¹¹

This section makes a two-stage argument. I demonstrate first, in sections III.A.1 and III.A.2, that rules can go morally awry — specifically, by violating the Liberty or Discrimination Schema. Moral reason can obtain to change, in some measure, the predicate of rules; this is true for each of the rules in our stylized cases. Then, in section III.A.3, I return to the puzzle with which we began the article, and which the facts of our stylized cases are meant to exemplify: How can it violate *X*'s constitutional rights to sanction or coerce her pursuant to rule *R*, even though the very same action for which she is sanctioned, or which she is coerced not to perform, is properly sanctioned or coerced under another rule? I resolve this puzzle and explain all of the stylized cases, as follows: *X*'s action can fall outside *R'*, where *R'* is the judicial revision of rule *R''* which the court issues after concluding that *R* breaches a constitutional rule-validity schema. The Direct Account proved unable to explain any of the stylized cases (except the *B* and *W* variants of ALCOHOL),

311. My analytic project is to show, not just that the Derivative Account is constitutionally better, but that it is a better account of current practices. Thus, I develop and argue for two rule-validity schemas that fit with and, together, fully explain the existing case law. I further believe that the schemas are justifiable in the light of constitutional criteria, quite apart from the case law — that will be evident in the presentation — but do not mean to claim that no other schemas are.

but the Derivative Account explains each and every one of them in a plausible way.

One final preliminary point. I should emphasize that the notion of moral reason obtaining to change the predicate of rules — the notion I will flesh out in a moment, using the Liberty Schema and the Discrimination Schema — does not presuppose a particular normative theory of authority. Let me distinguish between (1) the nonmoral or “social” fact that state officials *do* take enacted legal rules in the U.S. legal system as authoritative, sanctioning actions that fall within these rules’ scope by virtue of the rules’ enactment; and (2) the moral fact that state officials *ought* to take enacted legal rules as authoritative, either because legal rules by their enactment create reasons for belief, or because legal rules by their enactment create reasons for action.³¹² The Derivative Account presupposes (1) or something like it, but not (2), and is therefore neutral between the various normative theories of authority that explain why and to what extent (2) obtains. When, for example, the State of Texas has in force a legal rule prohibiting “procur[ing] an abortion” — the rule that was challenged in *Roe v. Wade*,³¹³ and that ABORTION stylizes — it is true as a matter of nonmoral fact that some Texan officials will prosecute women and doctors pursuant to this rule, whether or not these officials have moral reason to do so apart from, or together with, the rule’s enactment.³¹⁴ Some women and doctors, anticipating their prosecution, will refrain from performing abortions that, all things considered, they ought to be at liberty to perform. Thus, moral reason obtains to invalidate Texas’s rule in some measure (that is, moral reason obtains for a legal body, perhaps a court, to issue a legal utterance the Texan officials will take to deprive the invalidated rule of its authority), quite apart from the normative authority that the rule may truly have or lack. The idea of legal rules going morally awry, which grounds the Derivative Account, assumes that the enactment of legal rules changes the behavior of actors and state officials, to conform with the description of prohibited or required actions set forth by rule-predicates.

312. See GREEN, *supra* note 279, at 60 (distinguishing between de facto authority and legitimate authority); RAZ, *supra* note 169, at 46 (same).

313. 410 U.S. 113, 117-18 (1973).

314. It is itself a general if not universal legal rule, at least within the federal system, that “‘adjudication of the constitutionality of [statutes is] beyond the jurisdiction of administrative agencies.’” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). This sort of basic rule limits the extent to which enforcement officials are (legally) permitted to inquire into the moral authority of the rules they enforce.

Whether this change should morally occur, or indeed why precisely it *does* occur as a nonmoral fact, are matters that I need not address.

1. *The Liberty Schema*

One way that rules can go morally awry is by violating liberties. Consider the case with which we began the article, and which I have stylized as FLAG DESECRATION: *Texas v. Johnson*, where a flag-burner was sanctioned for violating a rule that provided, "A person commits an offense if he intentionally or knowingly desecrates . . . a state or national flag."³¹⁵ This rule includes within its scope some *otherwise-innocent* speech-acts — speech-acts that are not harmful or wrongful apart from what they say. The rule includes, for example, the particular action of a flag-desecrator *Y* who spits upon and burns his own pollutant-free flag, within the confines of his own property, with no persons next to him but lots of offended onlookers. *Y*'s action is not an action of battery, trespass, pollution, arson or destroying government property; it is simply an action of *speech*, and not harmful or wrongful beyond that.

But speech is one kind of constitutionally protected liberty.³¹⁶ To say this just *means* — on a standard and plausible account of "liberty" and, specifically, "free speech" — that there is sufficient, indeed strong moral reason that actors be left free to perform otherwise-innocent speech-acts,³¹⁷ excepting only speech-acts

315. 491 U.S. 397, 400 n.1 (1989) (quoting TEX. PENAL CODE ANN. § 42.09 (West 1989)).

316. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the *freedom of speech*") (emphasis added).

317. See FEINBERG, *supra* note 57, at 7-9 (defining liberty as absence of legal coercion; stating that "[l]iberty should be the norm; coercion always needs some special justification"; and noting possibility of moral reasons that sometimes override liberty and justify coercion). The Liberty Schema I will present does not entail Feinberg's robust claim that liberties are *only* infringed by coercion — merely that coercion is one way of infringing them. The focus of this article just is duty-conferring rules backed by sanctions; my analysis, and the Liberty Schema, is agnostic on whether (*pace* Feinberg) other sorts of laws, e.g., laws denying benefits, can infringe liberties.

Nor does the Liberty Schema entail Feinberg's robust claim that *every* type of action is a "liberty" (in the sense of demanding some overriding reason to be coerced). See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 266-72 (arguing against general right to liberty). Rather, the Liberty Schema entails the existence of *certain* act-types, such as speech-acts (or, more finely, political-speech-acts, or speech-acts-that-are-not-obscene, etc.), delineated by the liberty-protecting provisions of the Constitution, such that coercing actors not to perform these is morally and constitutionally impermissible, absent overriding reason.

And the standard explication of the First Amendment "free speech" clause — unlike, for example, the current *doctrinal* explication of the "free exercise" clause, see *Employment Div. v. Smith*, 494 U.S. 872 (1990) — does indeed construe the "free speech" clause as liberty-protecting, in this sense. It is seen, standardly, to be important that persons have the liberty to speak (or, more finely, that they have the liberty to perform certain types of speech-acts) — whether because of the intrinsic benefits for the speaker, or the instrumental benefits of

within a so-called "low-value" category (such as obscene speech, libel, incitement, or fighting words)³¹⁸ and, to some extent, excepting speech-acts within the category of "commercial speech."³¹⁹ As the Court stated in *Texas v. Johnson*: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."³²⁰ Therefore, by virtue of the moral concept of "free speech" set forth in the First Amendment, there is sufficient moral reason to change the scope of the flag-desecration rule. For by keeping the rule fully in force, in its current form, otherwise-innocent actors within the scope of the rule — Y, and similar actors — are coerced not to speak. In particular, there is sufficient moral reason to narrow the rule, so as to exclude otherwise-innocent actions of flag-desecration; and likely there is sufficient moral reason to invalidate the rule entirely, because any actions of flag-desecration that are harmful or wrongful because of their nonexpressive properties will fall within the scope of the independent rules against "battery," "arson" and so forth. A similar analysis works readily for the rule in CHILD PORNOGRAPHY: some actions of photo-display are neither obscene nor nonexpressively harmful or wrongful, for example, the action of a loving parent who places a photo of a naked infant in a family album, and displays the album to family members and close friends.

The idea I am articulating here — that free speech rights are violated by rules that include within their scope otherwise-innocent speech-acts — should be familiar to anyone acquainted with the Court's free speech jurisprudence. This idea is reflected, again and again, in the various free speech doctrines that require laws regulat-

speech in facilitating knowledge and democracy. For a survey and synthesis of standard "free speech" theory, see Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963) (defending free speech as necessary *inter alia* "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, [and] (3) as a method of securing participation by the members of the society in social, including political, decision-making"); see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 15-72 (1982) (surveying, to some extent critically, the view that free speech serves truth, democracy, individual well-being, and individual autonomy).

318. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (identifying main low-value categories); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (same). The term "low value" should be used advisedly, since the properties that bring speech-acts within some of these categories might make those actions worthless, rather than merely overriding their worth. See *infra* note 329 (distinguishing between canceling and overriding properties).

319. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557, 563-64 (1980) (setting out intermediate test for laws regulating commercial speech).

320. 491 U.S. at 414.

ing speech to be more or less “narrowly tailored.”³²¹ For example, under the strict scrutiny component of free speech doctrine (which is generally triggered by rules that pick out expressive properties of actions and that are “content based”), the State must show that the “‘regulation is necessary to serve a compelling state interest and that it is *narrowly drawn to achieve that end.*’”³²² Under the “time, place or manner” component of free speech doctrine (which is generally triggered by rules that pick out expressive properties of actions and that are “content neutral”), a law must be “justified without reference to the content of the regulated speech, [must be] *narrowly tailored to serve a significant governmental interest*, and [must] leave open ample alternative channels for communication of the information.”³²³ Under the “expressive conduct” component of free speech doctrine (which is generally triggered by rules that pick out nonexpressive properties of actions), a law must “further[] an important or substantial governmental interest; [must be] unrelated to the suppression of free expression; [and] the incidental restriction on alleged First Amendment freedoms [must be] *no greater than is essential to the furtherance of that interest.*”³²⁴ Finally, under the “commercial speech” component of free speech doctrine (which is triggered by rules that pick out actions under the description of communicating a commercial message, e.g., as an “advertisement” or an action of “solicitation”), the “‘asserted governmental interest [must be] substantial [and] the regulation [must] directly advance[] the governmental interest asserted [and be no] *more extensive than is necessary to serve that interest.*’”³²⁵

Let me formalize, and make more rigorous, the idea that I take to be embodied in these various “narrow tailoring” doctrines underlying the free speech case law. A rule that includes speech-acts or other types of liberties within its scope must be narrowly tailored to a sufficiently important interest: that is, the rule-predicate must pick out some property of action such that, for the speech-acts or other liberties within the rule’s scope, those encompassed liberties

321. See Monaghan, *supra* note 44, at 37-38 (noting centrality of “least restrictive alternative” concept to First Amendment doctrine); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969) (same, but criticizing concept).

322. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis added) (quoting *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

323. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added).

324. *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (emphasis added).

325. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (emphasis added) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557, 566 (1980)).

are connected to some harm or wrong sufficient to warrant prohibiting (or requiring) their performance. This is one schema or pattern for how rules might go morally awry; I will call it the Liberty Schema.

The Liberty Schema

A duty-imposing rule should be changed in scope (in particular, it should be narrowed, or invalidated entirely), if the duty includes within its current scope some subclass of "liberties" such that, all things considered, there is not sufficient reason to prohibit (or require) the performance of this subclass, under current law. "Liberties" are that class of actions, defined by the aggregate of liberty-protecting provisions in the Bill of Rights (free speech, substantive due process, . . .), such that actors should be left free by government to perform actions within this class, absent sufficient reason.³²⁶

Note a number of features of this schema designed to maximize its applicability. First, the schema leaves open why, precisely, a given type of action is understood to fall within the class of constitutional "liberties." It might be because the freedom to perform that type of action is important for the actor's own well-being (as on the familiar view that restricting *X*'s freedom to speak violates her "autonomy");³²⁷ or it might be because the freedom to perform that type of action is important for the well-being of others (as on the familiar view that restricting *X*'s freedom to speak deprives others of important information).³²⁸ The schema also leaves open how,

326. Note that this definition is, strictly speaking, consistent both with the highly coarse-grained view of act individuation that I use in my analysis — for example, in speaking of "the very same" action being an action of speech and of battery, trespass, and arson — and with finer-grained views. See MOORE, *supra* note 64, at 366-74 (discussing more or less coarse-grained views). A constitutional "liberty" delineates a complicated type of action. If an actor's performance of some instance of that type of action would violate a rule, then the rule includes liberties within its scope, whether one prefers to say that (1) the very same action of his would be an action of liberty, and an action of the kind identified in the rule-predicate; or (2) the very same bodily movement that would be the performance of the liberty, also would be the performance of the action identified in the rule-predicate. Because I see little to be gained, for purposes of my analysis, in (2), I stick to (1).

327. For well-known statements of this sort of view, see C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); and David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

328. Alexander Meiklejohn's famous defense of free speech, which points to the centrality of political debate to democratic government, falls partly in this category — insofar as, within a Meiklejohnian theory, the moral importance of *X*'s political statement lies (partly) in the information it brings *X*'s interlocutors. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1960); see also RAZ, *supra* note 169, at 245-63 (arguing that political liberties, such as liberty of speech, are often grounded in collective interests, and not merely in the interest of the actor).

precisely, the class of "liberties" is defined. For example, one might define the speech portion of this class as (1) all speech-acts, or (2) all speech-acts except obscenity, incitement, libel, and "fighting words," or even (3) all speech-acts except obscenity, incitement, libel, and "fighting words," *and* except speech-acts that are harmful or wrongful because of nonexpressive properties. The choice between these alternatives depends upon whether you think the act-properties enumerated in definitions two and three merely override the value of speech, or cancel it entirely.³²⁹ Whatever the precise definition of the speech portion of the liberty-class, there is reason to invalidate, in some measure, the rules in FLAG DESECRATION and CHILD PORNOGRAPHY.

The Liberty Schema further leaves open what "sufficient reason" means — what kinds of considerations are morally sufficient for government to prohibit (or require) the performance of liberties. At a minimum, government can prohibit liberties and other actions if they seriously *harm* others: the subclass of speech-acts comprised by speech-acts-that-also-constitute-battery or speech-acts-that-also-constitute-arson are surely proscribable (at least under a non-discriminatory rule, a point we will return to below). But liberties and other actions may additionally, perhaps, be prohibited if they constitute some kind of harmless wrong: say, the wrong of defacing the graves of the dead.³³⁰ Finally, there may be sufficient reason to prohibit a harmless and innocent subclass of liberties, under some rule *R*, if *R* also includes within its scope harmful or wrongful actions *and* there is no feasible way, given the epistemic limitations of state officials and actors, to exclude the subclass of harmless and innocent liberties without also excluding some of the proscribable actions.³³¹ This is why the Liberty Schema asks whether sufficient reason obtains to proscribe the subclass of liberties within a rule's scope, *under current law*. I recognize that, for a given subclass, the moral reasons to prohibit that subclass may depend upon, and be changed by, the shape of current law insofar as it covers other types of actions. One example is the one I just gave:

329. See RAZ, *supra* note 54, at 27 (noting that "[t]he notion of one reason overriding another should be carefully distinguished from that of a reason being canceled by a canceling condition").

330. See FEINBERG, *supra* note 57, at 10-14 (distinguishing between harm and harmless wrong).

331. See Alexander, *supra* note 7, at 552 (noting that "'conduct unbecoming an officer' is a phrase sufficiently vague to cover and deter speech . . . [b]ut the government's . . . interest in deterring all conduct on the unprotected side of that line may justify a law that chills protected speech" (footnote omitted)).

where the epistemic limitations of actors and officials in identifying certain harmful or wrongful actions may justify a rule that picks out both these actions and certain liberties as well.³³² Another example is where the subclass of liberties produces only a marginal harm, but is part of a larger class of actions that together produce much harm; prohibiting the subclass may be justifiable only as part of a general prohibition on the larger class.³³³

I do not intend my Liberty Schema to resolve any of these interesting issues — the kind of issues that constitutional and moral theorists hotly debate. Rather, my intention is simply to articulate one straightforward way in which morality might require changing the scope of a rule. Whatever the theorist's specific view about the role of liberties in benefitting the actors versus benefitting others; about the kinds of actions that are indeed protected liberties; and about the kinds of considerations that justify prohibiting (or requiring) the performance of liberties, the theorist should be able to agree that the Liberty Schema can explain how rules go morally awry.

Further, and somewhat less fundamentally, I wish to suggest that the Liberty Schema in fact maps onto a good bit of the constitutional case law. First, I suggest that most (although not all) of the decisions in which the Court has found violations of the right to free speech fit the Liberty Schema. Most (although not all) of these cases involved rules that included within their scope some subclass of constitutionally protected speech-acts such that sufficient reason did not obtain to prohibit (or require) the performance of this subclass. This is true, I suggest, whether or not the Court explicitly invoked a "narrow tailoring" doctrine; it is true whether the claimant raised a retrospective challenge to a sanction, or a prospective challenge to a duty; it is true whether the rule at stake picked out expressive or nonexpressive properties of actions; it is true for cases involving all the different categories of speech, such as core speech, commercial speech, and "low-value" speech; and it is true both for so-called "facial" challenges under the First Amendment, and for so-called "as-applied" challenges. Consider some illustrative exam-

332. See also Adler, *supra* note 4, at 775 n.52 (noting that the moral propriety of rules may depend upon epistemic and other deficits of state institutions).

333. It has become a truism within the literature on authority that the moral reasons against performing a particular action may depend upon whether other actions are prohibited. See GREEN, *supra* note 279, at 89-157 (discussing possible role of law in solving coordination problems and prisoners' dilemmas). For a possible example, within free speech case law, see *Rubin v. Coors*, 514 U.S. 476, 488-89 (1995) (invalidating ban on the disclosure of alcohol content by beer labels, notwithstanding government's argument that ban prevented "strength wars" in beer market, because no such ban existed for beer advertisements or for wine and spirit labels).

ples, drawn from the current case law, to supplement the FLAG DESECRATION and CHILD PORNOGRAPHY examples.

Boos v. Barry:³³⁴ a prospective challenge to a rule that the Court analyzed as content-based;³³⁵ the rule prohibited the display of signs, within 500 feet of a foreign government's embassy, that bring that government into disrepute.

Ladue v. Gilleo:³³⁶ a prospective challenge to a rule that the Court analyzed as content-neutral; the rule prohibited the display of residential signs.

United States v. Eichman:³³⁷ a retrospective challenge to a rule picking out nonexpressive properties of actions; the rule, passed by the federal government subsequent to *Texas v. Johnson*, prohibited the action of mutilating flags, independent of whether the mutilation was expressive.³³⁸

Rubin v. Coors:³³⁹ a prospective challenge to a rule regulating commercial speech; the rule prohibited the disclosure of alcohol content on beer labels.

Houston v. Hill:³⁴⁰ a prospective challenge to a rule that imperfectly described a category of "low-value" speech-acts, in

334. 485 U.S. 312 (1988).

335. See *Boos*, 485 U.S. at 318-21 (discussing difference between content-based and content-neutral laws). This article will not attempt to analyze that distinction or take a position on its cogency. The distinction is a distinction within the broader category of laws that pick out expressive properties of actions.

336. 512 U.S. 43 (1994).

337. 496 U.S. 310 (1990). Technically, the statute in *Eichman* made it unlawful to "muti-
late[], deface[], physically defile[], burn[], maintain[] on the floor or ground, or trample[]
upon any flag of the United States." *Eichman*, 496 U.S. at 314 (quoting Flag Protection Act
of 1989, 18 U.S.C. § 700(a)(1) (1994)). For simplicity, and without lack of generality, I de-
scribe and discuss *Eichman* as concerning a statute prohibiting flag mutilation.

338. Cf. 496 U.S. at 315, 318 (noting that the challenged rule "proscribes conduct (other
than disposal) that damages or mistreats a flag, without regard to the actor's motive, his
intended message, or the likely effects of his conduct on onlookers" but applying strict scru-
tiny because the rule "cannot be 'justified without reference to the content of the regulated
speech'" (quoting *Boos*, 485 U.S. at 320)). These two inquiries — (1) whether a rule picks
out expressive properties of actions, and (2) whether a rule can be adequately justified in-
dependent of the expressive properties of actions within its scope — should be kept distinct.
A rule may survive (1) but fail (2), as indeed was true of the rule in *Eichman*. The Liberty
Schema makes good sense of this. To say that speech is a liberty means that persons should
be free to speak, absent sufficient reason; it further and relatedly means that, in general, what
they say is *not* a sufficient reason for restricting this liberty. A rule may restrict speech by
picking out expressive act-properties (as in *Texas v. Johnson*) or nonexpressive properties (as
in *Eichman*); in either event, the problem of finding sufficient reason will come into play.

339. 514 U.S. 476 (1995).

340. 482 U.S. 451 (1987).

this case the category of fighting words; the rule prohibited interrupting a police officer in the performance of his duties.

In re R.M.J.:³⁴¹ a retrospective, as-applied case: the Court invalidated a rule prohibiting lawyer advertising, as applied to the claimant's advertisements.

For each one of these illustrative rules, one can readily show how the rule goes awry under the Liberty Schema. This is trivial in *Boos* and *Ladue*: some actions of displaying signs are independently harmful (for example, displaying a sign laced with poisonous evaporate); some actions of displaying signs fall within a "low-value" category (for example, displaying a sign with an obscene picture); but most are neither. A liberty analysis works readily for *Eichman* (some actions of flag-mutilation are both expressive and harmless apart from the disrespect they communicate), as well as for *Coors* and *Houston*.

Finally, my interpretation of *In re R.M.J.*, the as-applied case, is as follows: This decision invalidated the no-advertising rule with respect to the class of actions bearing the features specified by the Court in its analysis of the claimant's advertisements, viz., truthful and non-misleading advertisements.³⁴² In short, on the Derivative Account, so-called "as-applied" decisions are simply *partial invalidations*. The no-advertising rule ran afoul of the Liberty Schema, by including truthful, non-misleading, and otherwise innocent advertisements within its scope. The Court partly invalidated the rule, so as to cure the rule's moral flaw. I will discuss the partial vs. facial invalidation issue at greater length below, in section III.A.3. The Derivative Account can readily accommodate partial invalidations; what it *cannot* accommodate is a true "as-applied" invalidation — that is, a judicial decision to overturn *X*'s sanction or duty independent of further invalidating rule *R*. So-called "as-applied" decisions must be interpreted, within the Derivative Account, as partial invalidations. The *In re R.M.J.* example is meant to show the plausibility of this interpretation.

In sum, the Liberty Schema explains much of the free speech case law. It also explains the entirety of the substantive due process case law. Substantive due process cases, like free speech cases, are standardly defended on the grounds that the Due Process Clause delineates a class of liberties in the sense of my schema: a class of actions that persons ought to be free to perform (at a minimum,

341. 455 U.S. 191 (1982).

342. See *In re R.M.J.*, 455 U.S. at 205-07.

free from government coercion) absent overriding reason.³⁴³ This is the class of actions falling within what the Court, in *Griswold*, called the "zone of privacy."³⁴⁴ The Court in *Casey* reaffirmed the status of such actions as constitutional liberties, albeit without using the term "privacy":

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.³⁴⁵

Here, as with free speech, the specifics of the class of liberties demarcated by *Griswold*, and reaffirmed by *Casey*, are open to debate — as are the specific moral grounds for counting the exercise of a liberty more important than (some range of) conflicting considerations. In particular, we might say that the constitutional liberty of abortion would obtain even in a world of gender equality; or we might say, in line with some recent scholarship on the abortion right, that it now obtains by virtue of the existence of gender inequality.³⁴⁶ Similarly, we might disagree about whether measures short of prohibiting abortion — for example, waiting periods and informed-consent provisions — count as infringing the liberty of abortion or not.³⁴⁷

Bracketing these disagreements, it is quite straightforward to explicate the Due Process Clause as liberty-protecting, and to interpret the cases in which the Court has sustained substantive due pro-

343. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 742-54 (1989) (summarizing, but criticizing, standard view and citing literature).

344. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

345. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (emphasis and citation omitted) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

346. See SUNSTEIN, *supra* note 304, at 279 ("The argument for an abortion right built on principles of sex equality is thus straightforward. Restrictions on abortion burden only women and are therefore impermissible unless persuasively justified in gender-neutral terms. . . . [I]n our world [adequate justifications] are not [available] in light of the fact that the burden of bodily use, properly understood, is imposed only on women, [and] could not be enacted in the absence of unacceptable stereotypes about women's appropriate role . . ."). Sunstein states: "[M]ovements in the direction of sexual equality — before, during, and after conception, including after birth — unquestionably weaken the case for an abortion right." *Id.* at 280.

347. See *Casey*, 505 U.S. at 881-87 (upholding requirement of informed consent and 24-hour waiting period).

cess claims as cases where the underlying rules violated the Liberty Schema. To give the leading examples:

Roe v. Wade:³⁴⁸ the basis for ABORTION; an anticipatory challenge to a rule that prohibited procuring an abortion.

Planned Parenthood v. Casey:³⁴⁹ an anticipatory challenge to a rule that prohibited doctors from performing an abortion without obtaining spousal consent.

Griswold v. Connecticut:³⁵⁰ a retrospective challenge by doctors to a rule that prohibited using contraceptives or assisting others in doing so.

And to give a case in which, many believe, the Court should have sustained the constitutional challenge:

Bowers v. Hardwick:³⁵¹ a prospective challenge to a rule prohibiting sodomy.

For each of these cases, one can readily say: the rule includes, within its scope, some subclass of liberties (where the Due Process Clause liberties are understood to include actions by *physicians* of prescribing contraceptives or performing abortions)³⁵² such that for this subclass, sufficient reason does not obtain, at least under current law, to prohibit them. And the doctrinal formulations that the Court has used in its substantive due process case law — not only the “narrow tailoring” doctrine invoked in the early cases, but also the “undue burden” standard invoked more recently in *Casey*³⁵³ — can readily be understood as fleshing out the Liberty Schema.

* * *

My interpretive claims about the free speech and substantive due process case law are, to be sure, open to debate. In particular, one might argue that the central concept for free speech is *discrimination*, not liberty. After all, the Court surely *does* moot the problem of content- and viewpoint-discrimination in its cases;³⁵⁴ and as

348. 410 U.S. 113 (1973).

349. 505 U.S. 833 (1992).

350. 381 U.S. 479 (1965).

351. 478 U.S. 186 (1986).

352. See *infra* text accompanying notes 559-73 (discussing *jus tertii*).

353. See *Casey*, 505 U.S. at 869-80. The shift to this standard seems largely meant to signal the acceptability of fetal life as a moral reason for pre-viability abortion requirements that are not too burdensome. Thus it signals a change in the Court's assessment of the moral reasons pro and con pre-viability abortion regulation, but not in the status of abortion as a liberty.

354. See *Williams*, *supra* note 226, at 622-24.

we shall see below, there are some free speech decisions that can only be explained on a Discrimination Schema. For the discrimination theorist, the Free Speech Clause is centrally concerned with rules that set forth a *morally irrelevant* property — the property that the actor is *speaking* — rather than rules that include innocent speech-acts within their scope.³⁵⁵ This theorist will interpret the pervasive “narrow tailoring” doctrines within free speech law as testing whether “discrimination” — understood broadly, to mean the enactment of rules targeting speech³⁵⁶ — is justified, not as testing whether sufficient reason obtains to prohibit the speech-acts within a rule’s scope. Thus, the discrimination theorist will not want to recognize free speech claims against rules that pick out nonexpressive properties of actions: for example, the rule in *Eichman*, or, to use the clearer and classic example of *Marsh v. Alabama*,³⁵⁷ a rule that prohibits “trespass” and is applied to the trespassory actions of protesters, religious proselytizers, and other speakers within the boundaries of a company town. And it will be a matter of indifference, for the discrimination theorist, whether a rule prohibiting some kind of speech is reworked by invalidating the rule, or instead by *extending* the prohibition to cover some larger category of actions that is defined in nonexpressive terms and that includes all of the actions within the scope of the original, speech-targeted rule. For example, the discrimination theorist will be satisfied if a rule prohibiting “political demonstrations within

355. See *infra* text accompanying notes 385-89 (discussing centrality of morally irrelevant properties to Discrimination Schema).

356. This broad construal would be needed to make sense of the cases in which the Court strikes down “content-neutral” laws regulating speech, see, e.g., *Ladue v. Gilleo*, 512 U.S. 43 (1994). The discrimination theorist who wants to explain these cases will say that the potentially irrelevant property she is concerned with is the actor’s property of *speaking*, and thus that a speech-targeted, content-neutral, but unjustified rule counts as “discriminatory” for her.

Alternately, she may think the cases striking down content-neutral laws are wrongly decided. Cf. Larry Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 923 (1993) (arguing that courts should *not* strike down “track two” laws under the Free Speech Clause — laws “concerned with the noncommunicative impact of speech” — including laws picking out both nonexpressive and expressive properties).

357. 326 U.S. 501 (1946) (overturning trespass conviction of Jehovah’s Witness who distributed religious literature within “company town”). Admittedly, the Court in recent years has *not* struck down laws picking out nonexpressive properties, on free speech grounds, see Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200-11 (1996) (surveying case law), but the test for such laws remains an intermediate-scrutiny test, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984), and if the Liberty Schema truly reflects part of the content of “free speech,” this test should not be a dead letter. Cf. *Lee v. International Socy. for Krishna Consciousness*, 505 U.S. 830 (1992) (per curiam) (invalidating ban on distribution of literature in airport terminals, despite alleged risks of congestion posed by distribution).

public parks" is broadened to prohibit "all activities that produce a noise level above sixty decibels within public parks," even though political demonstrations, stump speeches, and so forth cannot feasibly take place at a noise level below sixty decibels.

I believe it is a mistake to view the Free Speech Clause as focused solely on discrimination. Standard moral accounts of free speech point to the benefits, for the actor *X* or her audience, of *X*'s being free to engage in speech.³⁵⁸ The concept of discrimination does not exhaust such accounts: the would-be protester, stump speaker, or proselytizer is no less coerced by an applicable rule prohibiting trespass or noisemaking than by a speech-targeted rule. And, relatedly, it would not be a matter of indifference, within the standard accounts, for government to restrict speech that has low-level nonexpressive effects (producing noise, damaging the grass in the public parks, or intruding onto private property) by stringently regulating all activities with those effects.³⁵⁹ Finally, the reason that rules picking out more serious nonexpressive act-properties — such as arson, battery, or pollution — do not violate First Amendment rights is simply that those harms are sufficiently serious to justify restricting speech-acts that produce them, particularly since it is (normally)³⁶⁰ feasible for speakers to say what they want to in a less harmful manner.

The best argument for reducing the Free Speech Clause to an antidiscrimination principle, and for dispensing with a separate liberty principle here, is that judicial attempts to protect the liberty of speech are self-defeating. The argument might be expressed as follows: The Liberty Schema entails judicial balancing of the nonexpressive harms and wrongs that speech-acts cause against the value of speech; yet this sort of balancing is the very kind of governmen-

358. See sources cited *supra* notes 317, 327-28.

359. See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 222 (1972) ("The Millian Principle [that speech ought not be prohibited by virtue of harms that flow from the expressive properties of speech-acts] is obviously incapable of accounting for all of the cases that strike us as infringements of freedom of expression. On the basis of this principle alone we could raise no objection against a government that banned all parades and demonstrations (they interfere with traffic), outlawed posters and handbills (too messy), banned public meetings of more than ten people (likely to be unruly), and restricted newspaper publication to one page per week (to save trees). Yet such policies surely strike us as intolerable.").

360. See *Clark*, 468 U.S. at 293 (stating that "time, place, or manner" restrictions on expression are valid if, *inter alia*, they leave open "ample alternative channels for communication"); 468 U.S. at 298 (stating that the "time, place, or manner" test is little different from the test under *United States v. O'Brien*, 391 U.S. 367 (1968), for the "regulation of expressive conduct," i.e., for laws picking out nonexpressive act-properties).

tal valuation of speech that the First Amendment prohibits.³⁶¹ But if it violates the First Amendment for courts to distinguish between the serious nonexpressive wrongs and harms that justify prohibiting speech, and the less serious nonexpressive wrongs and harms that do not, then *a fortiori* it should violate the First Amendment for courts to distinguish between different categories of expression, say, between obscene and non-obscene speech,³⁶² or between recklessly false and non-recklessly false statements about public figures,³⁶³ or between misleading and non-misleading advertisements.³⁶⁴ The implication of this argument against the Liberty Schema is that courts should automatically strike down *any law* picking out expressive act-properties. Unless that implication is correct — and I do not believe it is — a Liberty Schema for speech is not self-defeating.

What about a discrimination account of the abortion case law? One might argue that legislators are typically confused or mistaken about the moral relevance of the act-property “abortion” (for example, because legislators are motivated by religious views about abortion, which ought not figure in its regulation³⁶⁵); that courts invalidate no-abortion laws only by virtue of their greater competence to determine the moral relevance of this act-property; and therefore that a rule must target abortion in order to trigger the Due Process Clause. On this account, a rule requiring all abortions to be performed in hospitals rather than clinics might be unconstitutional; but a rule requiring all medical procedures to be performed in hospitals rather than clinics would not be unconstitutional, even as applied to the medical procedure of aborting a fetus.³⁶⁶ Indeed, given the distinct moral features of abortion — the involvement of a fetus — a liberty account of the abortion right may be problem-

361. See Alexander, *supra* note 356, at 932 (claiming that “the value of speech cannot be balanced against the government’s track two interests in any way that is principled and that respects the very freedom of thought that the First Amendment itself protects”). There is also a standard critical line that disputes the special role of speech, as opposed to nonexpressive conduct, in self-fulfillment, see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), but this critique leaves untouched the argument for a constitutional liberty, at least, of *political* speech.

362. See *Miller v. California*, 413 U.S. 15 (1973).

363. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

364. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557 (1980).

365. Cf. RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 10-29 (1993) (arguing that opposition to abortion is plausibly grounded not in “derivative” view that fetus has rights and interests, but in “detached” view that life is sacred).

366. See Dorf, *supra* note 357, at 1219-33 (discussing incidental burdens on right to privacy).

atic.³⁶⁷ But a *general* reduction of substantive due process case law from liberty to discrimination is neither doctrinally required (by contrast with the parallel reduction for free exercise) nor morally warranted. The idea of a zone of "privacy" — at a minimum, of self-regarding choices such that the freedom to make these is normally constitutive of autonomy (self-authorship) and fundamental to well-being — is morally plausible, indeed compelling.³⁶⁸

Liberty, not just discrimination, is central to free speech and substantive due process jurisprudence.³⁶⁹ But even if I am incorrect in advancing this claim, my error does not undermine the Derivative Account or the project of interpreting the constitutional case law within it. If the Liberty Schema is misplaced, then the right response is to reinterpret ABORTION, CHILD PORNOGRAPHY, FLAG DESECRATION, and the jurisprudence these stylized cases exemplify, within a second schema for how rules go morally awry. The best objections to a libertarian reading of free speech and substantive due process are objections that simply propel us forward — to a different, but equally derivative and rule-centered understanding of the moral content of constitutional rights. I call this the Discrimination Schema.

2. *The Discrimination Schema*

My claim has been that the Liberty Schema lays bare the moral content of constitutional rights in the large portion of the free speech case law epitomized by the stylized cases, FLAG DESECRATION and CHILD PORNOGRAPHY, and in the entirety of the substantive due process case law, as epitomized by ABORTION. But what of

367. Cf. SUNSTEIN, *supra* note 304, at 272 (claiming that "those who stress 'liberty' [in defending the abortion right] seem to have no way to respond to those who believe that abortion involves the death of a human being").

368. On self-regarding choices, see DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE* 58-63 (1986). On autonomy as self-authorship, and the connection between autonomy and well-being, see RAZ, *supra* note 169, at 369-99. I include the "self-regarding" proviso here to make the notion of a distinct zone of privacy maximally plausible; whether that proviso is truly needed is a separate question, see LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-14 (2d ed. 1988), which I leave open by saying that "at a minimum" self-regarding choices fall within the zone.

369. In saying this, I do not mean to ignore the possibility that the Liberty and Discrimination schema might *overlap*. A rule might go awry both because (1) the rule includes liberties within its scope without sufficient reason, and (2) the rule is discriminatory (in a sense to be made more precise below). Indeed, this may be true of most rules that give rise to successful free speech or abortion claims. But the moral difficulties with such doubly problematic rules will not be exhausted by their discriminatory cast; and extending their prohibitory scope will not (normally) be a moral cure. For a case that clearly illuminates this point, see *Ladue v. Gilleo*, 512 U.S. 43, 51-59 (1994) (invalidating rule prohibiting residential signs, but not under "discrimination" rationale, because such rationale would leave open possibility of curing rule by broadening it).

the remaining stylized cases: ALCOHOL, ANIMAL SACRIFICE, and RESIDENTIAL PICKETING? ALCOHOL is drawn directly from the Court's decision in *Craig v. Boren*,³⁷⁰ and exemplifies the current structure of equal protection doctrine: it is close to a necessary condition for a successful equal protection claim that the rule-predicate employ a "suspect" act-property (such as race or gender) or, failing that, employ an act-property that is deliberately selected by the legislature to match the scope of a "suspect" property.³⁷¹ ANIMAL SACRIFICE is drawn directly from the Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,³⁷² and exemplifies the current structure of free exercise doctrine, which is now isomorphic to equal protection doctrine.³⁷³ Unless and until the Court reverses its holding in the watershed *Smith* case,³⁷⁴ it will be a necessary condition for a successful free exercise challenge that the rule-predicate pick out actions by virtue of their *religious* cast, or, failing that, be designed to fall along religious lines. As the Court explained in *Smith*:

[T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."³⁷⁵

370. 429 U.S. 190 (1976) (holding gender-discriminatory ban on alcohol sales unconstitutional under Equal Protection Clause).

371. See *supra* text accompanying notes 98-108 (discussing current structure of equal protection doctrine).

372. 508 U.S. 520 (1993) (holding unconstitutional, under Free Exercise Clause, ordinance that prohibited animal killing and was targeted at Santeria religion).

373. See *supra* text accompanying notes 109-13 (discussing current structure of free exercise doctrine).

374. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160-61 (1997) (reaffirming *Smith*).

375. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). I note, again, the special proviso for neutral laws that allow for individualized exemptions. See *supra* note 110. The existence of this proviso does not suffice to bring free exercise jurisprudence within the Liberty Schema. If religiously motivated actions were constitutional "liberties" in the sense I've defined, i.e., a type of action that persons must be constitutionally free to perform absent sufficient reason, then a neutral law with no allowance for individualized exemptions could readily encompass and constitutionally infringe such liberties.

Why not argue that *Smith* is wrongly decided, and that the Free Exercise Clause creates "liberties," no less so than the Free Speech Clause and the substantive component of the Due Process Clause? See Laycock, *supra* note 306, at 313 ("Religious liberty is first and foremost a guarantee of liberty."). *Smith* may indeed be wrongly decided, but my basic claim here is that the Liberty Schema and the Discrimination Schema make sense of the Supreme Court's jurisprudence on free speech, free exercise, equal protection, and substantive due process, and fit with plausible construals of the underlying moral criteria. That claim does not depend upon *Smith*'s being wrong, and so I will not argue that it is.

Of course, if *Smith* were overruled, my claim would remain true; we would, then, simply swap the Discrimination Schema for the Liberty Schema as the basic schema for free exercise.

As for RESIDENTIAL PICKETING, that is drawn directly from the Court's decision in *Carey v. Brown*,³⁷⁶ and illustrates an important strand of the free speech case law: cases where the unconstitutional rule prohibits actions bearing a conjunction of two or more properties (such as residential picketing plus non-labor speech), even though a *broad* rule formed by *deleting* one of these properties would not be unconstitutional. The *Mosley* case³⁷⁷ and the majority opinion in *R.A.V.* provide further examples of this puzzling, but significant part of First Amendment jurisprudence.³⁷⁸

The Liberty Schema cannot account for ALCOHOL, ANIMAL SACRIFICE, or RESIDENTIAL PICKETING. In order to subsume the rules in these stylized cases under the Liberty Schema, we would need to identify appropriate subclasses of liberties that the rules encompassed without sufficient reason. But what subclasses would those be? The Equal Protection Clause is not standardly defended as delineating liberties — it protects blacks, women, and men from discriminatory rules; it does not protect actions by blacks, by women, or by men³⁷⁹ — and in any event the puzzle would remain that a rule prohibiting the purchase of alcohol by blacks (or women or men) between the ages of eighteen and twenty-one can be cured by extending the prohibition to all persons in that age group.³⁸⁰ If the initial rule went awry by including within its scope actions that, absent sufficient reason, persons should be free to perform, then extension would not (normally)³⁸¹ constitute a moral improvement. Given the structural isomorphism between equal protection and free exercise, the same points can be made about free exercise

376. 447 U.S. 455 (1980) (holding unconstitutional, under Free Speech and Equal Protection Clauses, statute that prohibited residential picketing but exempted labor picketing).

377. See *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (striking down, under Free Speech and Equal Protection Clauses, rule prohibiting picketing near school except peaceful labor picketing).

378. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96 (1992) (striking down ordinance prohibiting hate speech, as content- and viewpoint-discriminatory, despite assumption that ordinance had been narrowed to cover only "fighting words"). See generally Kagan, *supra* note 216, at 32-45, 39 (surveying this portion of free speech case law, viz., "content-based underinclusion": "the question [in such cases] is whether the government may voluntarily promote or protect some (but not all) speech on the basis of content, when none of the speech, considered in and of itself, has a constitutional claim to promotion or protection").

379. See *supra* section II.B (surveying theories of equal protection).

380. See *Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976). See generally Candace Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 40-46 (1986) (noting and discussing proposition that rules violating equal protection, or equality guarantees of statutory law or state constitutional law, can be cured through nullification or extension).

381. I say "normally" to leave open the unusual scenario where broadening a rule that violates the Liberty Schema has the effect of strengthening the moral reasons for prohibiting the liberties that fall within the rule's scope, and thereby tips the moral balance in favor of their prohibition. See *supra* text accompanying note 333 (noting this possibility).

rights. In *Smith*, the Court decisively rejected the proposition that the Free Exercise Clause delineates a class of liberties in the sense required by the Liberty Schema; relatedly, it is clear post-*Smith* that a rule prohibiting “the killing of animals for religious purposes” could be cured by replacing it with a prohibition against “the killing of animals for *any* purposes, except by a licensed producer of food.” Finally, what makes a case like RESIDENTIAL PICKETING puzzling, for free speech purposes, is that this case is structurally distinct from FLAG DESECRATION and CHILD PORNOGRAPHY, and structurally similar to ALCOHOL and ANIMAL SACRIFICE.³⁸² There is sufficient reason to justify prohibiting the class of speech acts, “picketing a residence”; indeed, the Court determined precisely that in *Frisby v. Schultz*, where it upheld a general prohibition on residential picketing over First Amendment challenge.³⁸³ But if this is true, then it should also (normally) be true that no First Amendment liberties are violated by prohibiting any proper subclass of the *Frisby* class, particularly the subclass “picketing a residence by non-labor speakers.”

I suggest that ALCOHOL, ANIMAL SACRIFICE, and RESIDENTIAL PICKETING should instead be explained by the following schema.

The Discrimination Schema

A rule the predicate of which contains some “morally irrelevant” property *I* of actions — that is, the rule expressly sets forth property *I* in delineating the actions that persons are obliged not to perform (or to perform), and that state officials are authorized to sanction — may have the wrong predicate. There may be sufficient reason, all things considered, to narrow the rule, or to extend it, or even to replace the predicate with a different but coextensive act-description. If so, constitutional reviewing courts should invalidate the rule. “Morally irrelevant” properties are properties such that (1) some moral criterion in the Bill of Rights is best understood to stand for the proposition that (2) an action’s having that property does

382. It is this puzzle that, in part, explains the flurry of scholarly reactions to the *R.A.V.* decision. See Akhil Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992); Kagan, *supra* note 216; Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873 (1993); Symposium, *Hate Speech after R.A.V.: More Conflict Between Free Speech and Equality?*, 18 WM. MITCHELL L. REV. 889 (1991); Laurence Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

383. See *Frisby v. Schultz*, 487 U.S. 474 (1988).

not, *at least in a certain way*, increase the moral case for sanctioning or prohibiting it.³⁸⁴

Note a few points about this schema. First, and most importantly, I intend it to provide a unified account of the equal protection case law, the (post-*Smith*) free exercise case law, and the free speech case law epitomized by *RESIDENTIAL PICKETING*. The basic idea is that an actor's race, his or her gender, his or her religion, and the viewpoint he or she expresses, is "morally irrelevant," at least in a certain way. Black persons and women are not moral inferiors to white men, and white men are not moral superiors to black persons and women. For none is it the case that, by virtue of his or her race or gender, his or her well-being counts for less or more. (Thus for none is it the case that his or her actions are the actions of a moral inferior or superior, and therefore more or less properly coerced or sanctioned.) The "moral irrelevance" of race and gender in this fundamental sense — what Dworkin calls the moral right to "equal concern and respect"³⁸⁵ — has been a central theme in scholarship about the Equal Protection Clause.³⁸⁶ My suggestion is that we might plausibly develop similar notions of "moral irrelevance" for the Free Exercise and Free Speech Clauses. At the very minimum, these clauses mean that the actions of a religiously-motivated actor are not morally worse, *qua* his religious motivation, and similarly that the actions of an actor expressing viewpoint *V* rather than *W* are not morally worse, *qua* his expression of *V*. Anyone who

384. This schema could be broadened to include facially neutral rules that are motivated by a discriminatory purpose, *see* *Personnel Admr. v. Feeney*, 442 U.S. 256, 271-80 (1979) (stating that such rules trigger heightened equal protection scrutiny) — for example, by understanding "discriminatory purpose" as the intention of legislators, in enacting the neutral rule, to match the extension of some rule having irrelevant property *I* in its predicate. For simplicity, however, I will not broaden the schema in this way.

385. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 272-78, 273 ("[Government] must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.").

386. Besides Dworkin, *see*, e.g., Brest, *supra* note 238, at 6 ("Race-dependent decisions are irrational insofar as they reflect the assumption that members of one race are less worthy than other people."); ELY, *supra* note 253, at 82 (stating that the Equal Protection Clause "preclude[s] a refusal to represent [minorities], the denial to minorities of what Professor Dworkin has called 'equal concern and respect'" (footnote omitted)); FISS, *supra* note 108, at 155 ("Blacks are what might be called a specially disadvantaged group, and I would view the Equal Protection Clause as a protection for such groups."); KOPPELMAN, *supra* note 219, at 9 ("Stigmatized social status and the concomitant withholding of respect are . . . the central evil the [antidiscrimination] project seek to remedy . . ."); SUNSTEIN, *supra* note 304, at 338-46 (arguing that the Equal Protection Clause incorporates anti-caste principle). Obviously, these authors develop specific theories of equal protection doctrine that are quite diverse — and indeed some develop theories focused upon race discrimination, rather than gender discrimination, *see* ELY, *supra*, at 164-70 — but the point remains that the moral equality of group *Z* (races or genders or other groups) is an animating principle behind each author's defense of an equal-protection doctrine protecting group *Z*.

adopts a more robust construal of the clauses — for example, as delineating “liberties” in the sense sketched out by the Liberty Schema, as protecting us from religious strife, or as guaranteeing a viewpoint-balanced public debate — can surely agree to this minimum claim.

Note, however, that the Discrimination Schema is quite careful not to define precisely what “moral irrelevance” means. For example, it is indisputable that race and gender are “morally irrelevant,” in the sense of not constituting persons as inferior or superior, and further that moral irrelevance in this foundational sense is part of the best understanding of the equal protection guarantee set forth in the Fourteenth Amendment. Whether race and gender are also “morally irrelevant” in the further sense that (1) these characteristics are never correlated with proscribable characteristics,³⁸⁷ (2) racist and sexist preferences have no weight, within a utilitarian calculus,³⁸⁸ or (3) the needs and capacities of men and women are no different, are matters for debate. Relatedly, the schema does *not* say that race or gender are “morally irrelevant” in the sense of *never* being properly set forth by a rule. That is clearly not the case for gender, in the Court’s view; the Court has upheld gender-discriminatory laws.³⁸⁹ Someone who wants *wrongful* gender-discriminatory rules to be invalidated, by constitutional reviewing courts, is not committed to the claim that rules should never discriminate by gender. All he is committed to is some, more foundational, sense of “moral irrelevance” such that the rightness or wrongness of gender discrimination is an appropriate issue for constitutional courts to consider.

Finally, the schema is careful not to specify exactly why sufficient reason obtains to change the predicate of some rule setting forth an irrelevant property *I*. Most simply: if a rule prohibits actions with properties *I* & *W*, and *I* neither serves in any way to make actions worse, nor correlates in any way with wrong-making properties, then there is presumably sufficient moral reason to narrow or extend the rule (with the moral choice of narrowing vs. ex-

387. See Brest, *supra* note 238, at 6 (claiming possible statistical correlation between race and legitimate bases for government regulation).

388. See SCARRE, *supra* note 46, at 162-66 (arguing that a debased preference, paradigmatically a preference to harm someone whom the holder takes not to be equally human, is not constitutive of happiness and therefore does not count within a utilitarian calculus).

389. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding draft registration of men but not women); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding gender-discriminatory statutory rape law); *Califano v. Webster*, 430 U.S. 313 (1977) (upholding gender-discriminatory provision of Social Security Act).

tending depending on the wrongfulness of *W* alone). But the schema also leaves open the possibility that a rule-predicate setting forth *I* should be changed *even if I* is correlated with wrong-making properties. The Court in *Craig v. Boren* apparently did just this, striking down Oklahoma's law prohibiting the sale of low-alcohol beer to men between the ages of eighteen and twenty-one, even though Oklahoma's statistics suggested that men were significantly more likely to drink and drive than women.³⁹⁰ One might explain *Craig* by appealing to the notion of stigma, or to the exemplary effects of gender-discrimination; one might say that, even though gender *is* a good proxy for Oklahoma, the Oklahoma law would serve as an (unfortunate) example that would encourage unjustified discrimination by other actors. The conditions under which the state properly relies upon race, gender, religion, or viewpoint as the basis for regulating actions is a matter for substantive debate within the jurisprudence of equality, religion, and speech. I mean the Discrimination Schema to anticipate, not to resolve such debates.

How else might cases like *ALCOHOL*, *ANIMAL SACRIFICE*, and *RESIDENTIAL PICKETING* be explained, within the Derivative Account, if not by appeal to the Discrimination Schema? One alternative is to describe particular, unwanted *outcomes*, one or another of which the rules in these cases allegedly produce; these rules stigmatize women or blacks, exacerbate the distributive injustice already suffered by low-status groups, skew public debate, ignite religious strife, and so on, or so the outcome theorist might argue.³⁹¹ The difficulty here is as follows: unless the outcome theorist can produce outcomes that are essentially connected to a rule's using particular, "suspect" predicates such as race, gender, religion, or viewpoint, she has not satisfactorily explained the case law. Stigma is this kind of outcome, but only works for *ALCOHOL*. The further outcomes I have listed — and others that plausibly fit the moral concepts of equal protection, free speech, and free exercise — are *not* essentially connected to particular rule-predicates. A race-neutral law can have a disproportionate impact on blacks;³⁹² a

390. See Simons, *supra* note 231, at 479 n.107 (discussing *Craig*) ("In the state's view, statistics indicated that 2% of the males posed the harm [drunk driving], but only 0.18% of the females. If the statistics were valid (and there were some serious problems with them) they indicated a ten fold geometric differential harm . . .").

391. See *supra* text accompanying notes 304-07 (noting possible outcomes, to ground possible rule-validity schema within constitutional law).

392. See *Washington v. Davis*, 426 U.S. 229 (1976) (upholding race-neutral qualifying exam, which had disproportionate impact upon blacks); *Personnel Adm. v. Feeney*, 442 U.S. 256 (1979) (upholding gender-neutral civil service preference for veterans, which had disproportionate impact upon women).

viewpoint-neutral law can have a disproportionate impact on speakers with a particular viewpoint;³⁹³ a neutral law that burdens one group's religious practices might well be perceived by that group as unfair.³⁹⁴

The reader might object that the case law is crazy; any decent rule-invalidity schema, she might claim, will identify certain important types of actions (liberties) that persons should be free to perform, or certain bad outcomes that there is strong moral reason to avoid, but not certain types of descriptions under which rules wrongly regulate actions. Yet I fail to see the craziness. A given rule-invalidity schema must, at a minimum, be one that courts are epistemically and otherwise competent to enforce.³⁹⁵ Further, it must be tied to the moral criteria set forth in the Bill of Rights. So we can argue about which liberties are thus tied (liberty of contract? liberty of religion?), and which act-properties are thus tied (viewpoint? religion? race?). But it is not crazy to think that the Bill of Rights, besides protecting certain liberties or safeguarding against certain outcomes, also stands for certain moral propositions: the propositions that particular natural or conventional properties of actors and actions do, or do not, have moral relevance, in various ways. To recur to Dworkin: the Equal Protection Clause might guarantee, not equal treatment, but equal concern and respect.³⁹⁶ It might require, not that blacks and whites be treated equally well, but that governmental decisions not be grounded upon the proposi-

Similarly, a race-neutral law can lead to the unequal *treatment* of blacks and whites, within a Tussman/tenBroek type theory. Imagine that the law is both irrational, relative to valid purposes, *and* has a disparate impact upon blacks.

393. A plausible example is *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding prohibition on destruction of draft cards), which presumably had a disproportionate impact upon anti-war speech. The outcome theorist might respond that courts are epistemically poorly suited to determine whether neutral laws skew debate; but unless they are epistemically well-placed to distinguish between speech-targeted laws that do and do not skew debate (which seems implausible, given the initial premise) this outcome theory turns out to be both extensionally equivalent to my Discrimination Schema, and a cruder explanation of the jurisprudence. Consider a case such as *R.A.V.*; it is very hard to believe that an imbalance in the class of viewpoints expressed by speakers of "fighting words" is a constitutionally problematic outcome as such. Rather, a morally suboptimal rule that picks out a viewpoint-based subclass of "fighting words" is unconstitutional because its predicate employs the morally irrelevant property of viewpoint. (How could such a rule be morally suboptimal? If, for example, the utterance of fighting words is truly harmful, extending the rule to include all speakers of fighting words would presumably constitute a moral improvement).

394. A plausible example is *Smith* itself. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (upholding sanctions against Native Americans who used peyote for sacramental purposes).

395. See Adler, *supra* note 4, at 771-80 (arguing that epistemic and other institutional defects are grounds to limit judicial enforcement of constitutional criteria).

396. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 227 (distinguishing between these two versions of "equality").

tion that blacks and whites are morally different simply by virtue of their race. Unless the concept of discrimination is constitutionally crazy, my schema and the case law are not. The concept of a rule or decision being discriminatory *just is* the concept of the decision having a particular unwarranted basis, grounds, or predicate, rather than having a particular unwarranted outcome.³⁹⁷

A rule must produce *some kind of* unwarranted outcome to satisfy the Discrimination Schema; there must be sufficient reason to change the predicate of the rule in some measure. But my schema is not tied to particular outcomes; it is tied, in a way that fits the case law, to a rule's use of "irrelevant" predicates such that, in the end, the rule somehow goes awry. The account is perched, as it were, between outcome theories and process theories of discrimination.³⁹⁸ Outcome theories are problematic, for the reasons I have just adduced. Process theories are even worse. At best the process theorist might try to defend the Direct Account, as against the Derivative Account. But this is morally dilutive, for reasons I have already explained. And once she moves to the framework of the Derivative Account — once she concedes that reviewing courts are essentially concerned with the repeal or amendment of rules, not the treatment of particular litigants — the process theory becomes even weaker. A rule such that (a) false beliefs figured in the enactment of the rule, but (b) the rule-predicate turns out, coincidentally, to be morally perfect, is not a rule that reviewing courts should repeal or amend. It is a rule that courts should affirm, insofar as courts can reliably determine the rule's perfection! False legislative beliefs should matter to reviewing courts just insofar as these beliefs lead legislatures to enact flawed outcomes, or partly constitute flawed outcomes (as in the case of stigma), or evidence flawed outcomes. They do not matter as such.

The only way around this is to argue that process is intrinsically valuable for groups, and that false beliefs about these groups hinders their political participation. This is one of the variants of process theory, which I briefly mentioned above.³⁹⁹ But this sort of participation-enhancing process theory has the deeply counterintuitive consequence that, if blacks and whites in a segregated society

397. See Brest, *supra* note 238, at 1 ("By the 'antidiscrimination principle' I mean the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected.").

398. See KOPPELMAN, *supra* note 219, at 16 (distinguishing between these two types of theories).

399. See *supra* text accompanying notes 251-55.

share prejudices against blacks, and together participate in the process of enacting a racially discriminatory law that, morally, ought to be changed, no violation of the Equal Protection Clause has ensued. A racially discriminatory rule can be morally wrong, and constitutionally awry, independent of black participation.⁴⁰⁰

3. *Rights for Wrongdoers*

Let us now return to the puzzle that my stylized cases are meant to exemplify, and that the Direct Account proved unable to resolve: How can it violate *X*'s constitutional rights to sanction him for performing a particular action *A*, or to coerce him not to perform that action, pursuant to rule *R*, even if that very action is wrongful and thus properly sanctioned or coerced pursuant to a different rule?

An initial point bears mention here. Nothing in the Derivative Account itself entails that the *only* persons who can secure the judicial invalidation of sanction-backed, duty-conferring rules are persons who secure the invalidation of their own sanctions or duties. To say that some rule *R* "violates *X*'s constitutional rights," within the Derivative Account, simply means that (a) the rule *R* fails a constitutional rule-validity schema (such as the Liberty Schema, the Discrimination Schema, or some other); such that (b) the court properly invalidates *R*, by issuing a revised rule *R'* (either a narrowing amendment, or a wholesale repeal, or even an extension⁴⁰¹), at the instance of *X*. *X* might, in theory, be just a concerned citizen.⁴⁰² Or *X* might be a victim of wrongdoers, who hopes to *broaden* the scope of *R*.⁴⁰³ Or *X* might be an actor sanctioned pursuant to *R*, which the Court partly invalidates, but without invalidating the por-

400. More precisely, this objection is problematic for an intrinsic-process theory that purports to be an *exclusive* theory of constitutional antidiscrimination norms. What about developing such a theory as a *supplement* to my Discrimination Schema, along the following lines: a morally optimal rule, such that prejudices among the rule-formulators hindered (intrinsically valuable) participation by disfavored groups in the rule-formulation process, is unconstitutional and should be invalidated? Whatever the independent merits of this supplementary theory, it is not a particularly good account of the case law insofar as that relies upon judicial assessment of rule-predicates rather than direct historical evidence of the beliefs that figured in the formulation of rules — for if a rule-predicate is morally optimal, the fact that it contains a morally irrelevant property *I* is little evidence of a prejudiced rule-formulation process.

401. See Kovacic, *supra* note 380, at 40-46 (noting that courts frequently remedy benefit-conferring rules that violate equal protection by extending their coverage).

402. But see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (rejecting, on standing grounds, challenge to administrative regulation despite statutory provision authorizing "any person" to bring suit).

403. But see *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (holding that mother has no standing to seek broader scope of criminal prohibition against nonpayment of child support).

tion of the rule applicable to *X*.⁴⁰⁴ These possibilities are not ruled out by the logic of the Derivative Account, itself. They may, to some extent, be ruled out by the standing component of Article III of the Constitution⁴⁰⁵ — but this standing requirement is *extrinsic* to the Derivative Account, in the sense that a personal setback to *X* himself is, on the Derivative Account, no precondition for *X*'s power to secure the judicial invalidation of a constitutionally invalid rule.

I believe, in truth, that Article III does *not* require *X* to secure an improvement in her own legal position (that is, judicial relief from a sanction or duty) for a court to invalidate rule *R* at *X*'s instance.⁴⁰⁶ Whatever else standing requires, it does not require that. But I will not attempt to defend this view of standing, for the Derivative Account is, strictly, agnostic on the issue⁴⁰⁷ — and, in any event, all of the constitutional cases in which the Court has invalidated sanction-backed, duty-conferring rules *have* been cases where the claimant's own legal position was improved.⁴⁰⁸ This is the scenario that our stylized cases are meant to exemplify — the scenario in which *X*'s *sanction or duty* pursuant to rule *R* violates her constitutional rights. On the Derivative Account, to say *that* means not merely that (a) the rule *R* fails a constitutional rule-validity schema (such as the Liberty Schema, the Discrimination Schema, or some other); and that (b) the court properly invalidates *R*, by issuing a revised rule *R'* (either a narrowing amendment, or a wholesale repeal, or even an extension), at the instance of *X*; but that *further* (c) *X*'s *treatment (her sanction or duty) is not authorized by R'*. Why does (c) occur, in our stylized cases?

404. Cf. *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 472-80 (1988) (holding that rule regulating direct-mail solicitation by lawyers violated commercial-speech test, and then separately considering whether claimant's own letter was "particularly overreaching," viz., whether that letter fell outside the properly-invalidated portion of the rule).

405. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (setting forth and explaining black-letter standing doctrine under Article III).

406. I say that, in part, because otherwise judicial nullification rather than extension of benefit-conferring rules also would violate Article III. See Kovacic, *supra* note 380, at 40-46 (noting that nullification sometimes chosen as remedy for benefit-conferring rules). But see Dorf, *supra* note 38, at 294 (claiming that "any constitutional challenge to a statute . . . is as-applied in the sense that adjudication in federal court . . . requires that the statute be applied to the litigant to create a case or controversy").

407. This is not to say that the truth of the Derivative Account has no implications for standing doctrine. It is rather to say that standing limitations must be defended on grounds other than the nature of constitutional rights. This very fact — the fact that standing is extrinsic to the Derivative Account, by contrast with the Direct Account — has very important implications. I discuss those implications a bit more below. See *infra* text accompanying notes 573-86.

408. I know of no counterexample. See *infra* note 426 and accompanying text.

Take FLAG DESECRATION as an example. A rule *R* provides that “no person shall desecrate a flag of the United States.” *X* burns a flag, and in the course of doing so batters a bystander, commits arson, and pollutes the environment. She is sanctioned pursuant to *R*, and brings suit challenging the rule and, specifically, her sanction. Rule *R* is unconstitutional: it violates the Liberty Schema. So on the Derivative Account the reviewing court should repeal, narrow, or perhaps even extend *R*: it should issue a revision *R'*. But what is *R'*? And why doesn't it authorize *X*'s sanction? Consider these possibilities:

— *R'* might be a retroactive and prospective repeal of *R*. If so, *X*'s sanction is not authorized by *R'* (which has zero scope), and the court overturns *X*'s sanction as part of its replacement of *R* with *R'*. FLAG DESECRATION is explained by the Derivative Account.

— *R'* might be a prospective-only repeal of *R*. If so, *X*'s sanction is authorized by *R'* — *R'* is identical to *R* for past actions such as *X*'s — and the court does not overturn *X*'s sanction as part of its replacement of *R* with *R'*. FLAG DESECRATION is *not* explained by the Derivative Account.

— *R'* might be a retroactive and prospective amendment of *R*, to the following effect: “No person shall desecrate a flag of the United States, if in the course of doing so she commits trespass, battery, arson, or pollution.” If so, *X*'s sanction is authorized by *R'*, and the court does not overturn that sanction as part of its replacement of *R* with *R'*. FLAG DESECRATION is *not* explained by the Derivative Account.

In short, to explain the stylized cases, we need a view about *R'* — that is, a *remedial* view. We need a view about the kind of revisions to an unconstitutional rule that a reviewing court should promulgate, once the court has determined that the rule fails a rule-validity schema.

A remedial view will have two components. One component, as the above examples suggest, is *temporal*. We need to decide whether the amendment, extension, or repeal of *R* should be solely prospective, retrospective as well as prospective, solely retrospective, or perhaps some esoteric combination (for example, prospective in general, retrospective for *X* as a incentive payment). This temporal structure might be the same across rule-validity schema; or it might vary from schema to schema. I noted earlier that the concept of liberty, and therewith the Liberty Schema, is essentially

forward-looking.⁴⁰⁹ A rule violates the Liberty Schema by coercing *future* actors not to perform some subclass of liberties such that, all things considered, the actors should be free to perform these. This cuts in favor of a prospective-only view of *R'*, at least for the Liberty Schema. On the other hand, an incentive argument may sufficiently explain why, for some *X* who is sanctioned pursuant to a rule that (solely) fails the Liberty Schema, *X*'s own sanction should be overturned (and not just *X*'s prospective duty, along with everyone else's).⁴¹⁰

It is well beyond the scope of this article to develop a specific theory of the temporal structure of judicial remedies in constitutional cases. It is plausible — although I will not develop or defend a firm position on this — that the correct theory makes remedies at least retroactive to the constitutional litigant. No less an authority than Ronald Dworkin has sketched out the pragmatic grounds for adjudicative retroactivity.

[I]f the pragmatist judge thinks the matter through, he will . . . reject [the] technique of "prospective-only" rulemaking, except in very special circumstances. For he will realize that if this technique became popular, people who might benefit from new, forward-looking rules would lose their incentive to bring to court novel cases in which these new rules might be announced for the future. People litigate such cases (which is both risky and expensive) only because they believe that if they succeed in persuading some judge that a new rule [for our purposes, a new ruling that a statute, etc., is unconstitutional] would be in the public interest, that new rule will be applied retrospectively in their own favor.⁴¹¹

Further, the Discrimination Schema — in my view a central part of constitutional law, along with the Liberty Schema — is *not* essentially prospective. The pattern of *sanctions* produced by a law prohibiting "the purchase of alcohol by men between eighteen and twenty-one" or "the sacrifice of animals for religious purposes," or "residential picketing by non-labor groups" is morally suboptimal. Such a pattern obtains because state officials have followed a decision rule that overweights the moral relevance of gender, religion, or speech. And the same can be said about the pattern of sanctions produced by ABORTION, CHILD PORNOGRAPHY, and FLAG DESECRATION, to the extent the rules here are seen to fail both the Lib-

409. See *supra* text accompanying notes 211-13.

410. See Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1083 & n.172 (1997) (noting incentive argument for retroactivity of judicial remedies).

411. RONALD DWORKIN, *LAW'S EMPIRE* 156 (1986).

erty Schema *and* the Discrimination Schema.⁴¹² Finally (although this doctrinal point may well rest, in part, upon a robust view of adjudication inconsistent with the Derivative Account) it is now Supreme Court doctrine for both criminal and civil cases that the federal courts cannot announce legal rights nonretroactively.⁴¹³ For all these reasons, it is likely or at least plausible that the remedies in our stylized cases will be retroactive; there will be no temporal bar to overturning *X*'s sanction, assuming his action *A* falls outside the predicate of *R*'.

But will it? The second component of the remedial view is *predicative*: a view about the appropriate judicial revision to the predicate of *R*.⁴¹⁴ The possibilities, here, are myriad but the two most salient alternatives are as follows. First, the court might *facially invalidate R*: it might issue an utterance which renders *R* a nullity (within the proper temporal range).⁴¹⁵ This could be a permanent nullification of *R*. More plausibly, though, the court's facial invalidation of *R* will leave open the possibility that the body responsible for issuing authoritative interpretations of *R* (be it an agency or a state supreme court) can cure *R*'s constitutional defects, and revive its legal authority, through a narrowing interpretation.⁴¹⁶ Second, the court might *optimally revise R*. The court might promulgate what it takes to be the morally optimal revision to *R*, whether that be a facial invalidation, a partial invalidation, an extension, a partial invalidation plus a partial extension, or a predicate-change without a scope change — subject again perhaps to subsequent re-revision by *R*'s authoritative interpreter.⁴¹⁷

412. See *supra* note 369 (discussing possibility of double violation).

413. See Fisch, *supra* note 410, at 1059-63 (summarizing doctrine).

414. The classic discussion of this remedial issue remains Robert Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 82-106 (1937).

415. See Dorf, *supra* note 38, at 251-81 (discussing Court's actual use of facial invalidation in various contexts, including free speech, privacy, and equal protection).

416. See Fallon, *supra* note 83, at 854-55 ("All that the Supreme Court says when it holds a state statute overbroad, and all that it could say, is that the statute as authoritatively construed by the state courts prior to the Supreme Court's judgment is too sweeping to be enforced through the imposition of civil or criminal penalties. Following the Court's decision, it remains within the discretion of state authorities to seek limiting constructions of the affected statute in state court actions for declaratory judgments."). This proviso is irrelevant where the federal court is, itself, the body responsible for authoritatively construing the statute, see *id.* at 853 n.3, although it is seriously questionable whether — given the Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) — that is ever the case. See, e.g., Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing for *Chevron* deference to Department of Justice with respect to federal criminal statutes).

417. I stress that this is a *salient* possibility — the purest alternative to a facial-invalidation view. Obviously, there are intermediate possibilities between facial invalidation and optimal revision, for example, that a court should either (1) promulgate a standard type

The moral considerations in favor of the *facial-invalidity* view go to the epistemic benefits of specialization. Society is made better off, morally, by having different legal bodies specialize in different types of moral questions.⁴¹⁸ Plausibly, then, federal constitutional courts should *only* be legally responsible for deciding whether a rule fails some rule-validity schema grounded in the Bill of Rights; while legislatures, agencies, and other bodies responsible for enacting or authoritatively interpreting rules should have the task of choosing between alternative rules, all of which satisfy the constitutional rule-validity schema.⁴¹⁹ For example, the advocate of this view will say, it is not the proper judicial role to decide whether the rule in *ALCOHOL* ("no black person between eighteen and twenty-one may purchase alcohol") should be extended to "no person between eighteen and twenty-one may purchase alcohol," or repealed (leaving intact a background prohibition on alcohol-purchase by all persons under eighteen). Both of these alternatives satisfy the Discrimination Schema and Liberty Schema, as does the alternative of repealing both the rule *and* the background prohibition; only one of these three is morally optimal, but *that* is not a constitutional question. Rather, the court should facially invalidate the racially discriminatory no-alcohol rule, leaving the choice between the various racially neutral alternatives to the legislature or agency. A constitutional reviewing court has no reliable basis to make this latter choice — or so the advocate of facial invalidation will argue.

The moral considerations in favor of the *optimal-revision* view go to the moral losses that ensue from facial invalidation of rules.⁴²⁰

of narrowing amendment to *R*, if such amendment cures *R*; or (2) failing that, facially invalidate *R* only if that is a moral improvement over *R*. Something like this intermediate possibility seems, in fact, to map onto current remedial practices within the free speech case law. The Court frequently relies here on facial invalidation, *see infra* note 425, but it does not do so universally, *see id.* (citing partial invalidations), and the requirement of "substantial" overbreadth, *see Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973), might be understood to map onto (2). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 882-911 (1970) (arguing for facial invalidation of substantially overbroad rules, except where there exists a clear, per se category within free speech doctrine such that a judicial narrowing of the rule to exempt that category cures the rule).

418. *Cf. supra* text accompanying notes 169, 282-86 (discussing epistemic basis for legal authority).

419. For a recent and exemplary expression of this kind of view, *see Reno v. ACLU*, 117 S. Ct. 2329, 2350-51 (1997) (facially rather than partly invalidating law restricting speech on internet, and arguing that to do otherwise would amount to an "invasion of the legislative domain," absent a "clear line" for redrafting the statute evident from its text or legislative history).

420. *See, e.g., Brockett v. Spokane Arcades*, 472 U.S. 491, 501-07 (1985) (stating that partial, rather than facial invalidation is normally the proper judicial response to an unconstitutional statute); Stern, *supra* note 414, at 101 ("[In remedying unconstitutional statutes] the

Facially invalidating the rule in ALCOHOL would leave persons between eighteen and twenty-one free to purchase alcohol; facially invalidating the rule in RESIDENTIAL PICKETING would leave householders at the mercy of picketers; facially invalidating the rule in CHILD PORNOGRAPHY would leave child pornographers free to exploit children; facially invalidating the rule in ABORTION would leave viable fetuses unprotected. These considerations are particularly pressing where the morally optimal revision of an unconstitutional rule is, or seems to be, a relatively small revision relative to the set of actions covered by the rule. For example, the morally optimal revision of a rule that picks out nonexpressive properties of actions, but violates the Liberty Schema by encompassing speech-acts, is normally to exclude speech from the rule rather than to repeal the rule entirely. No one wants to get rid of the trespass laws,⁴²¹ not even those who want proselytizers and political protesters to be free to trespass.

It is, again, beyond the scope of this article to choose among the facial-invalidation view, the optimal-revision view, and something in between. The issue merits an article on its own. Among other difficulties, I should note that the appropriate view may well depend on the constitutional clause or rule-validity schema at stake;⁴²² on the strategic incentives of actors who can secure facial, as opposed to partial invalidations of rules;⁴²³ and on the existence of a statutory or regulatory severability clause for *R* (guiding its revision in the event *R* is held unconstitutional).⁴²⁴ Let me merely suggest here that the facial-invalidation view is plausibly the correct one for a substantial portion of the rules that reviewing courts review. (This suggestion, like my temporal suggestion, is borne out by the Court's actual practices: many, perhaps even most of the cases in which the Court has sustained claims of constitutional right, against conduct-regulating rules, have been facial invalidations rather than

Court should look to the policy sought to be effectuated by the statute and decide whether that policy will be more nearly attained by partial application or by complete nullification of the law.").

421. See Alexander, *supra* note 7, at 552.

422. See *supra* note 144 (discussing Court's reliance on as-applied challenges within free speech, but not equal protection case law).

423. Cf. JERRY MASHAW, GREED, CHAOS AND GOVERNANCE 177 (1997) (noting, in administrative-law context, that parties may use preenforcement review to thwart necessary rulemaking, given the cheapness of preenforcement litigation as opposed to compliance).

424. See Stern, *supra* note 414, at 100-01. For recent discussions of severability clauses, see Mark Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

partial invalidations.⁴²⁵ And the Court has never, to my knowledge, *extended* a conduct-regulating rule.⁴²⁶ To the extent that the facial-invalidating view holds good, we have a simple explanation of the stylized cases. These rules go morally awry, breaching constitutional rule-validity schema. The reviewing court's legal role is to repeal (facially invalidate) a rule that does so, rather than changing the rule's predicate to what the court takes to be morally optimal. In particular, it is not the court's legal role to decide whether the optimal cure of *R* encompasses *X*'s particular action *A*. Therefore, *X* has the legal right to trigger the complete repeal of rule *R* and therewith the invalidation of his own sanction, quite independent of whether *X*'s action happens to be wrongful under another description.

425. To check the frequency of facial invalidation, I identified and examined the cases during the 10 Terms from 1987-88 to 1996-97 in which the Court invalidated conduct-regulating rules against private parties, under the Free Speech Clause (leaving aside vagueness), Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause. I identified 23 such cases. Fourteen, a majority, are best categorized as facial invalidations (i.e., cases where the Court invalidated an entire provision or sentence, an entire textually-defined portion thereof, or some other block of canonical text). See *Reno v. ACLU*, 117 S. Ct. 2329 (1997); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Ladue v. Gilleo*, 512 U.S. 43 (1994); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Lee v. International Socy. for Krishna Consciousness*, 505 U.S. 830 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); *Riley v. National Fedn. of the Blind*, 487 U.S. 781 (1988); *Boos v. Barry*, 485 U.S. 312 (1988).

Nine, a minority, are best categorized as partial invalidations. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Florida Dept. of Bus. & Prof'l. Regulation*, 512 U.S. 136 (1994); *Edenfield v. Fane*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *United States v. Eichman*, 496 U.S. 310 (1990); *Peel v. Attorney Registration & Disciplinary Commn.*, 496 U.S. 91 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988). Notably, all nine are free-speech cases.

Obviously, this is a small sample, and (even within this sample) categorizing judicial holdings as facial versus partial invalidations involves some judgment, but the results still suggest that many, perhaps even most of the Court's constitutional decisions sustaining rights-claims against conduct-regulating rules are facial invalidations. I should stress that my definition of "facial" invalidation, here — invalidating an entire rule, on *some* kind of text-based individuation criterion — is considerably broader than the special definition appropriate for the notion of "facial" invalidation within the context of the Countermajoritarian Difficulty and other legislature-centered arguments for judicial restraint. See Adler, *supra* note 4, at 794 n.104.

426. See Kovacic, *supra* note 380, at 42. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942) (holding unconstitutional a state statute providing for sterilization of habitual criminals, under Equal Protection Clause, and remanding for state supreme court to decide whether to cure unconstitutionality by extension or invalidation of statute); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (holding unconstitutional state rape and sodomy statutes exempting married persons and women, under Equal Protection Clause, and curing unconstitutionality by extension).

Is this appeal to judicial role question-begging? No and yes. No, in the following sense. In this article, I have discussed various possible legal practices — various specific conceptions of the legal practice of judicial review. One possible practice is act-shielding: constitutional courts determine whether particular actions should be protected by legal shields and, if so, issue shielding orders. Another possible practice is rule-centered: constitutional courts determine whether particular rules should be invalidated and, if so, issue invalidation orders. The facial-invalidation practice is a specific variant of this latter, rule-centered view; the optimal-revision practice is another. *As between* these various possible practices, we can decide which one is morally optimal. Would a world in which courts follow Practice₁ be better or worse, morally, than a world in which they follow Practice₂? I assume there are good arguments in favor of the rule-centered practice, since that is, in fact, ours; I further suggest that there are good arguments in favor of the facial-invalidation version of a rule-centered practice.

Let us assume these arguments are right. The facial-invalidation practice is morally optimal, as between the various review-practices. The Supreme Court, or some other body which possesses legal power to define the practice of judicial review, promulgates this one. It still remains an open *moral* question why a particular judge, faced with a particular litigant, should *adhere* to this legally binding (and, by hypothesis, morally optimal) practice.⁴²⁷ This is just the problem of legal authority, in another guise. What if the particular judge is a moral expert, and knows that about himself, and further knows that *X* has done wrong, and finally knows that upholding *X*'s particular sanction is more important morally than invalidating the particular rule *R* at stake, even though *in general* a (retrospective) facial-invalidation practice is morally optimal? Nothing in my moral arguments for the optimality of promulgating this practice guarantees that each and every participant in the practice in fact has conclusive, moral reason to adhere to it. How to generate moral reasons at the participant-level, from moral reasons at the practice-level, remains one of the deepest and most difficult questions of jurisprudence. I will not try to answer *that* question. What

427. See SCHAUER, *supra* note 58, at 128-34, 129 (discussing "asymmetry of authority": the existence of "a (good moral) reason for imposing" a rule does not, or may not, entail the existence of "a (good moral) reason for obeying" it); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994) (discussing "asymmetry of authority" and concomitant use of "deception" by rule-formulator); see also Rawls, *supra* note 198, at 3 (distinguishing between moral justification for a general practice, and moral justification for a particular application of the practice).

can be said is that, if our expert judge upholds *X*'s sanction despite the official promulgation of a retrospective, facial-invalidating practice, the judge has acted *illegally*. He may have acted morally, but (if the facial-invalidating practice, by its terms, contains no moral escape clause) the judge has not honored *X*'s *legal rights*.

In short: I cannot show, and will not suggest, that particular judges, faced with particular litigants, always have conclusive moral reason to honor the litigant's legal rights. What I might show, and will suggest, is that it is plausibly morally best for litigants to have the following legal right: the legal right to trigger a retrospective facial invalidation of rules that fail constitutional rule-validity schema.

But what if this latter suggestion is wrong? The Supreme Court does not universally follow a facial-invalidating practice. Sometimes the Court partly invalidates rules instead of wholly repealing them;⁴²⁸ and, albeit not in the case of conduct-regulating rules, the Court sometimes remedies an unconstitutional rule by *extending* the rule's scope.⁴²⁹ I have synthesized these various alternatives, to a facial-invalidating practice, with the notion of an optimal-revision practice. *Optimal revision*, again, says this: the proper judicial remedy, upon a judicial determination that a rule *R* breaches one or another constitutional rule-validity schema, is to issue an utterance promulgating (if only temporarily, pending legislative or administrative action) a rule *R'*, which the court takes to be the morally optimal revision to *R*.

If this practice (or something close to it) obtains, we will have a difficult time explaining RESIDENTIAL PICKETING and CHILD PORNOGRAPHY. The optimal *R'* in RESIDENTIAL PICKETING is likely a rule that prohibits "residential picketing," rather than no rule at all;⁴³⁰ the optimal *R'* in CHILD PORNOGRAPHY is likely a rule that is tailored to cover obscene displays of naked children, rather than no rule at all.⁴³¹ Thus, in both these cases, the action *A* of our stylized *X* remains covered by the optimal revision *R'*; it will *not* be the case that *X*'s sanction should be overturned, as part of the judicial issuance of *R'*. But the remaining cases can perhaps be explained, even on an optimal-revision view. The optimal revision *R'* of the rule in

428. See *supra* note 425.

429. See Kovacic, *supra* note 380, at 40-46.

430. See *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding law banning residential picketing).

431. See *Osborne v. Ohio*, 495 U.S. 103, 112-14 (1990) (upholding rule designed to combat child pornography); *New York v. Ferber*, 458 U.S. 747, 764-74 (1982) (same).

ABORTION is likely “no person may procure an abortion of a viable fetus except for maternal life or health” (or something narrower than that), *not* “no person may procure an abortion of a viable fetus except for maternal life or health, or an abortion of a non-viable fetus by means of coercive threats.” The optimal revision R' of the rule in FLAG DESECRATION is likely a repeal, as opposed to “no persons shall desecrate flags, if they do so by means of arson, battery, or pollution.” As for ALCOHOL, it seems that the optimal revision R' is either a general extension of R to include all persons between eighteen and twenty-one, or a repeal; it is *not* a rule that provides, “persons between eighteen and twenty-one may not purchase alcohol, if they do so fraudulently.” Similarly, the optimal revision R' in ANIMAL SACRIFICE is likely either a general extension to prohibit the killing of any animals, or a repeal; it is *not* a rule that prohibits “the killing of pandas” or “cougars” or “eagles” (the specific animal killed in ANIMAL SACRIFICE), given the existence of a preexisting rule prohibiting the killing of endangered species. If repeal is morally better than general extension, in ALCOHOL and ANIMAL SACRIFICE — and that is, at least, a real possibility — then X 's action in these cases will not be covered by the optimal revision R' , and he will have the legal right to have his sanction overturned.

Let me put the point this way. X 's action A is harmful or wrongful in our stylized cases; that is their very essence. But given the epistemic limitations of actors and state officials, it is likely or at least plausible that the optimal revision R' does not include A . This is likely the case in FLAG DESECRATION and ABORTION, and may well be the case in ANIMAL SACRIFICE and ALCOHOL (if, in fact, the actions of animal-killing and alcohol-purchase-by-a-person-between-eighteen-and-twenty-one are, without more, not harmful or wrongful). An action of battering flag-desecration is wrongful, *but only* because it is battery, not because it is flag-desecration. And enacting a rule that prohibits “flag-desecration by battery” would be silly. The existence of this rule would increase legal complexity, without apparent countervailing benefit. Given the epistemic limitations of state officials and actors, legal complexity without countervailing benefit is not morally indifferent, but morally negative. (Speakers might be deterred from desecrating flags, if they knew that the flag-desecration laws remained on the books with various complex provisos.⁴³²) Similarly for the remaining rules:

432. Cf. Note, *The First Amendment Overbreadth Doctrine*, *supra* note 83, at 883-84 (arguing that “rule of privilege” applied to revise overbroad statute must be sufficiently clear to enable an actor to predict whether her conduct falls within revised rule).

provisions that cover "abortions of non-viable fetuses, by means of coercive threats," "the fraudulent purchase of alcohol by persons between eighteen and twenty-one" or "the killing of pandas" would not figure in the various R' , because these hypothetical provisions are not needed to cover any harmful or wrongful actions that otherwise would escape legal rules. If legal terms were costless to apply, and if officials applied them perfectly, and if actors anticipated that state officials would apply provisions perfectly, then the hypothetical provisions would not matter, morally. But given the epistemic limitations of actors and state officials, moral reason obtains not to include the provisions in R' . Therefore, for at least some of the stylized cases, X will plausibly have the legal right to overturn his sanction, even though his action is wrongful or harmful, and even if a court's legal role is to enact what it takes to be the morally optimal revision R' of the invalid rule R .

B. *Institutional Objections*

I have completed the *moral* defense of the Derivative Account. Moral reason can obtain to change, in some measure, the predicate of rules — specifically, of rules that fail the Liberty Schema or the Discrimination Schema. This explains why the rules in our stylized cases are unconstitutional. And, on plausible remedial views (such as a retroactive facial-invalidating view or even a retroactive-optimal-revision view), X can have a legal right to secure the invalidation of a rule, including his own sanction or duty, even if X 's very action is properly sanctioned or coerced under a different description. This explains why, on the facts of our stylized cases, the actors' constitutional rights are violated.

What is there left for the defender of the Direct Account to say? She might raise certain *institutional* objections to the Derivative Account.⁴³³ She might concede the moral plausibility of the account, but argue that courts are the wrong institutions for invalidating rules. Thus we must return to the Direct Account, however morally implausible it might be. In the remainder of this section, I will consider and rebut two institutional objections to the Derivative Account: (1) that the concept of "adjudication" embodied in Article III of the Constitution requires constitutional rights to be morally

433. On the importance of institutional considerations in shaping and limiting the practice of judicial review, see Adler, *supra* note 4, at 771-80; Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190-95 (1988).

direct, not morally derivative; and (2) that even if this is untrue, the remedies employed by reviewing courts in constitutional cases are too weak for the Derivative Account.

1. *Article III and the Concept of Adjudication*

Imagine that Congress enacts the following act, styled the "Invalidation Act."

The Invalidation Act

Any person whose conduct is regulated by a state or federal statute (currently in force) that is subject to a colorable challenge under the First Amendment, the Equal Protection Clause, or the Due Process Clause may, if subject to a clear threat of prosecution under the statute, bring suit in federal district court against the officials responsible for enforcing the statute. If the plaintiff adequately represents the class of persons subject to the challenged statute, the court shall certify the suit as a class action; shall hear the suit; and, if the court concludes that the challenged statute is morally invalid under the First Amendment, etc., shall enter appropriate declaratory and injunctive relief in favor of the class of persons subject to the statute.

The position I am advancing in this article is that constitutional rights, in general, are neither more nor less morally robust than the legal rights conferred by this hypothetical Invalidation Act. The Invalidation-Act plaintiff has the legal right to secure the judicial invalidation of a (state or federal) statute that goes morally awry — independent of the full details of her own conduct and the strength of her personal moral claim. My position is that constitutional rights are, in general, legal rights with *precisely* this moral content.

As an initial matter one might object that constitutional "rights," thus conceptualized, are not really rights at all. The objection might be framed thus: Rights are, by definition, trumps; a right, by definition, identifies some aspect of the rights-holder's *own* moral position — for example, an important interest of hers, or a valid claim she possesses under corrective or distributive justice — that outweighs the general good.⁴³⁴ But surely the Derivative

434. Cf. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for . . . imposing some loss or injury upon them."). In fact, I do not believe that Dworkin's subtle conceptualization of rights-as-trumps supports the Direct Account. A rights-as-trumps thesis does so only if *legal* rights must incorporate *moral* trumps. But to require this conflates the legal and the moral. See WELLMAN, *supra*

Account should not be defeated at the definitional stage, through a narrow and demanding definition of "rights." As I explained earlier, in Part I, my concept of a constitutional right is deliberately catholic; it is designed to leave open, for substantive debate, the merits of the Direct and Derivative Accounts. A constitutional right, understood in this catholic sense, is simply a legal power to secure the invalidation, in some measure, of a rule — of the rights-holder's own treatment under the rule, on the Direct Account, and of the rule overall, on the Derivative Account. It is a legal "right" in the broad sense of constituting a legal *advantage*: a Hohfeldian position that is advantageous to the holder.⁴³⁵

If the defender of the Direct Account insists that legal advantages are not truly *rights* unless they fit a more narrow and demanding definition, then my response is that "constitutional rights" are not necessarily rights within the meaning of a more narrow and demanding definition. Nothing in the so-called "Bill of Rights"⁴³⁶ — a name the Constitution itself does not use — demands that the legal mechanism by which to secure the values of free speech, free exercise, equal protection, and due process must be a mechanism that provides narrowly-defined rights to narrowly-defined rights-holders. Indeed, the relevant provisions of the "Bill of Rights" are framed, not as "rights," but as moral constraints upon government decisionmaking. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."⁴³⁷ The Fifth Amendment provides that "No person shall . . .

note 45, at 3-11 (distinguishing between legal and moral rights); DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 90-94 (distinguishing between institutional and background rights); *id.* at 94-95 (noting that an institutional right to free speech is possible within a background theory of utilitarianism).

In any event, my claim here does not rest upon the best exegesis of Dworkin's rights-as-trumps thesis, or the best understanding of "rights." If legal "rights" must indeed incorporate moral trumps, then the Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause ground legal powers, and other legal advantages for claimants, but not "rights."

435. See *supra* note 45; *supra* text accompanying notes 90-91.

436. Dworkin himself has taken some care on this textual point. See DWORKIN, *FREEDOM'S LAW*, *supra* note 1, at 7 ("The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights — the first several amendments to the document — and the further amendments added after the Civil War."). But cf. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

437. U.S. CONST. amend. I. The First Amendment goes on, of course, to refer to the "right of the people peaceably to assemble," U.S. CONST. amend. I, but this cuts against the Direct Account. If the advocate of the Direct Account wants to argue that (1) rights are morally robust, and (2) the text of the Constitution creates morally robust rights, then the First Amendment's reference to the "right" of assembly, but not the "right" of free speech or

be deprived of life, liberty, or property, without due process of law.”⁴³⁸ The Fourteenth Amendment provides that “[no] State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴³⁹ The Derivative Account is perfectly consistent with these provisions, standing alone — that is, taken apart from Article III of the Constitution.

The better objection to the Derivative Account is one that relies, not upon the concept of constitutional rights, but rather upon the concept of *adjudication* embodied in Article III. What the Derivative Account claims is not merely that (1) rules can go morally awry; and not merely that (2) persons can possess legal powers (which are “rights” in my catholic sense) to secure the invalidation of rules that go morally awry; but further that (3) the rights-holder is entitled to secure the invalidation of a morally invalid rule *by a federal court*. How is this last part of the Derivative Account consistent with the institutional limits on federal courts that are set forth by Article III of the Constitution? Article III constrains federal courts to be *adjudicatory* bodies; it vests them with the “judicial Power of the United States,”⁴⁴⁰ and authorizes them only to hear “Cases” or “Controversies.”⁴⁴¹ How is it consistent with Article III, and the concept of adjudication therein embodied, to conceptualize the practice of judicial review by federal courts as the invalidation of rules?

This question brings us back to my hypothetical Invalidation Act. The Invalidation Act creates a mechanism by which federal courts effectively invalidate rules: the anticipatory class-action that culminates in a declaratory judgment and injunction. A declaratory judgment and injunction against an invalid rule, when entered in favor of the entire *class* of persons subject to the rule, will operate roughly like a repeal of the rule: this remedy will rescind the legal authority of enforcement officials to prosecute *anyone* for violating the rule, and will preclude future courts, under the principle of res

free exercise, hardly supports claim (2) with respect to free speech or free exercise. The best that its advocate can say is that the First Amendment was loosely drafted.

438. U.S. CONST. amend. V.

439. U.S. CONST. amend. XIV.

440. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

441. See U.S. CONST. art. III, § 2.

judicata, from sanctioning actors pursuant to the rule.⁴⁴² Further, the Invalidation-Act mechanism appears to comport with the various Article III constraints upon federal courts. The plaintiff's suit will be constitutionally ripe, because the duty of compliance with the challenged rule, backed by a clear threat of prosecution for its breach, constitutes an immediate setback for her.⁴⁴³ The plaintiff will have standing, because she can "allege personal injury fairly traceable to the defendant's unlawful conduct" — the setback to her own interests constituted by the sanction-backed duty that the rule imposes upon her — such that this setback is "likely to be redressed by the requested relief."⁴⁴⁴ The suit will not be moot or advisory, because the challenged rule is currently in force.⁴⁴⁵ Finally, the plaintiff class-action has become a standard⁴⁴⁶ and consti-

442. See Fallon, *supra* note 83, at 880-81, 902-03 (discussing legal force of classwide relief in constitutional challenges to state statutes); David Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. REV. 759, 777-79 (1979) (same). My claim here about the legal force of classwide relief should be qualified by a point I alluded to above, see *supra* text accompanying notes 416-17: the classwide declaratory judgment and injunction may explicitly, and arguably should implicitly, leave open the possibility of a salvaging narrowing construction of the rule by its authoritative interpreter.

443. See Lujan v. National Wildlife Fedn., 497 U.S. 871, 891 (1990) ("The major exception [to ripeness constraints on preenforcement review] is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once" (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967))). The *Abbott Laboratories* ripeness test also looks to the temporal fitness of the legal issues raised by the claimant, see 387 U.S. at 149, but this latter component of ripeness is arguably prudential not constitutional, see *CHEMERINSKY*, *supra* note 290, § 2.4.1, at 116, and in any event the question whether the challenged rule satisfies a constitutional rule-validity schema is temporally "fit." I have added the proviso that there be a "clear threat" of prosecution, so as to assure the ripeness of the preenforcement Invalidation-Act suit even under a ripeness doctrine more stringent than current doctrine. See *infra* text accompanying notes 587-98 (further discussing ripeness).

444. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("The requirement of standing . . . has a core component derived directly from [Article III of] the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). On the existence of standing for the Invalidation-Act plaintiff, which hypothetical statute I will argue below just embodies the overbreadth doctrine, see Note, *The First Amendment Overbreadth Doctrine*, *supra* note 83, at 847-48 ("An overbreadth claimant must ask that normal rules of standing be relaxed, only if 'standing' is taken to include canons about the kinds of constitutional claims a party may raise, as well as such basic requisites of a justiciable controversy as actual grievance and a lively dispute. The former conception of standing is not a deduction from article III." (footnote omitted)); Fallon, *supra* note 83, at 868-69 (same).

445. See generally *CHEMERINSKY*, *supra* note 290, §§ 2.2, 2.5 (discussing Article III prohibitions on a federal court's issuance of an advisory opinion, or its adjudication of a moot dispute).

446. See Shapiro, *supra* note 442, at 777 (noting, but criticizing, frequent use of class-action device in constitutional challenges to state statutes).

tutionally unremarkable⁴⁴⁷ device by which federal courts properly consolidate the adjudication of legal rights.⁴⁴⁸

Nonetheless, it might be objected, the Invalidation Act violates Article III. The violation is subtle, but important — or so the defender of the Direct Account might argue. The argument would run as follows: “The legal rights that *federal courts adjudicate* must, by virtue of Article III, have a minimally robust moral content. Where a plaintiff P_1 brings a meritorious nonclass suit in federal court against some defendant D , claiming a violation of a legal right, and seeking a remedy that benefits only her, the following holds true: there exists a *moral* reason sufficient to provide P_1 that remedy, independent of the remedies provided to other plaintiffs $P_2, P_3 \dots P_n$ against D or against other defendants. The ancient, common-law rights that courts classically adjudicate — the common-law right of an injured person to collect damages from a tortfeasor; the common-law right of a disappointed promisee to collect damages from the breaching promisor — do indeed have this kind of robust moral content. These common-law rights are the exemplars for the types of legal rights that federal courts may permissibly adjudicate. Now, if there exists a class of plaintiffs $P_1, P_2, P_3 \dots P_n$ such that each P_i standing alone can advance a robust legal right against the same defendant D , and there are common issues of law or fact, the federal courts can consolidate the plaintiffs’ suits through the class-action device. But it would subvert the very concept of adjudication, and the constraints set forth in Article III, to *aggregate* the moral claims of the class of persons purportedly represented by the Invalidation-Act plaintiff, and effectuate a remedy that is morally justified *in the aggregate* — repealing a morally invalid rule — even though the plaintiff herself may have no moral claim to a personal remedy.” Or so the argument might go.⁴⁴⁹

It is plausible to think that the classic, common-law rights of the injured tort victim, or the disappointed promisee, do indeed have a fairly robust moral content. Consider, for example, the corrective-justice theory of tort law that Jules Coleman has recently defended

447. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 697-706 (1979) (upholding certification of nationwide class and entry of injunctive relief in suit, predicated on Due Process Clause, against federal agency).

448. See generally Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193 (describing and defending federal prospective relief — including class relief — against state criminal statutes).

449. See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 309-12 (1988) (noting possible Article III objections to the adjudication of a class action, where individual class members do not, standing alone, have justiciable cases).

in his book *Risks and Wrongs*.⁴⁵⁰ Coleman argues, plausibly, that the plaintiff's legal claim in a classic torts case has the following moral content: the plaintiff *P* claims that the defendant *D* is a moral wrongdoer who has the distinct moral responsibility, by virtue of corrective justice, to repair the losses to *P* that her wrongdoing has occasioned.

In the typical action tort suits bring victim-plaintiffs together with injurer-defendants, and only within this structure do questions regarding who should bear a particular accident's costs arise. That is, the goals of tort law are pursued only within a structure of case-by-case adjudication between individual victims and their respective injurers. It is not as if victims are free to bring suit against anybody. Normally, the victim is not free to argue that he should be compensated for his loss by someone simply because that person is a good risk spreader or reducer. . . . Instead, the injurer is held liable simply because she is responsible for the loss. She is the one who has the duty in corrective justice to make good the loss.⁴⁵¹

We might construct a parallel corrective-justice account for the contract-law rights or property-law rights that courts classically adjudicate.⁴⁵² But it would be mistake, I suggest, for constitutional scholars to extrapolate from the private-law analogy and insist that court-enforced *constitutional* rights must be equally robust. The concept of adjudication, insofar as it figures in Article III, does not require the legal rights that federal courts adjudicate to possess the kind of moral content that private-law rights typically, or sometimes, possess.

In defending the Derivative Account from the Article III objection, I will rely upon the view of Article III famously developed by Owen Fiss, most trenchantly in his 1978 article *The Forms of Justice*.⁴⁵³ Fiss's aim in *The Forms of Justice* was to vindicate what he called the "structural reform"⁴⁵⁴ suit: the kind of suit, exemplified by desegregation suits against school systems and by prison-reform litigation, "in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by

450. COLEMAN, *supra* note 189.

451. *Id.* at 374.

452. Cf. Moore, *supra* note 171, at 182 (grouping together deontological theories of the institutions of punishment, tort compensation, property, and contract as alternatives to utilitarian accounts of these institutions).

453. Fiss, *supra* note 20. A contemporaneous article that, like Fiss's, famously rejects a dispute-resolution view of federal adjudication, is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

454. Fiss, *supra* note 20, at 2.

which these reconstructive directives are transmitted.”⁴⁵⁵ Specifically, Fiss wanted to vindicate the procedural devices characteristic to the structural-reform suit — the class-action form, and the entry of a permanent injunctive decree against the defendant bureaucracy (by which to create an ongoing supervisory role for the federal judge).⁴⁵⁶

Fiss’s analysis of the class action helps the Derivative Account tremendously. As Fiss put it: “The victim of a structural suit is not an individual, but a group.”⁴⁵⁷

Once we take the group perspective on the victim, it . . . becomes clear that the spokesman need not — indeed, cannot — be the victim. A group needs people to speak on its behalf. An individual member of the victim group can be a spokesman, but there is no reason why individual membership should be required, or for that matter even preferred. . . .

. . . [Thus] certain technical qualifications for the victim — that he be subject to a risk of future harm, or that he be subject to irreparable injury — need not be satisfied by the spokesman. For the structural suit it is sufficient if these requirements are satisfied by the victim group. What the court must ask of the spokesman is whether he is an adequate representative⁴⁵⁸

The Fissian view — of the structural-reform plaintiff as a *representative* for a class of persons to whom the state has done moral injury — is just the kind of view set forth by the Derivative Account.⁴⁵⁹ But how can we square this representative conception of the structural-reform plaintiff with the concept of adjudication and the requirements of Article III? Fiss’s answer was to reconceptualize adjudication itself — to deny that a more traditional conception, what Fiss called the “dispute-resolution” view of adjudication, was the right one.

455. *Id.*

456. *See id.* at 18-22, 27-28, 44-58.

457. *Id.* at 19.

458. *Id.* at 19-20 (footnotes omitted).

459. With the exception, of course, that the Derivative Account need not include a Fissian conceptualization of the class as a “group” in the strong sense of Fiss’s work on equal protection. *See* Fiss, *supra* note 20, at 147-70 (defining groups as “natural” entities distinct from their members, and defending “group-disadvantaging principle”). For example, the class of persons protected by the plaintiff who challenges a rule that violates the Liberty Schema is simply those persons within the scope of the rule who are coerced not to perform actions that, constitutionally, they should be free to perform. *See supra* text accompanying notes 315-33 (discussing Liberty Schema). They need not, and likely do not, have a “group” identity in Fiss’s strong sense. And indeed, while Fiss adverts to this strong conceptualization of groups in *The Forms of Justice*, he also weakens it somewhat. *See* Fiss, *supra* note 20, at 19 (noting that group benefitted by structural-reform suit may have an identity apart from the suit-targeted institution, or may be defined in terms of the institution, e.g., as “welfare recipients”).

There is nothing in the text of article III — in the rather incidental use of the words “cases” or “controversies” — that constitutionally constricts the federal courts to dispute resolution. The late eighteenth century was the heyday for the common law, and . . . the function of courts under the common law was paradigmatically not dispute resolution, but to give meaning to *public values* through the enforcement and creation of public norms, such as those embodied in the criminal law and the rules regarding property, contracts, and torts. . . . The judicial function implied by contemporary constitutional litigation, of which structural reform is part, is continuous with and maybe even identical to that of the common law.⁴⁶⁰

In short, for Fiss, “[t]he function of a judge is to give concrete meaning and application to our constitutional values.”⁴⁶¹

Think of this as a *custodial*, rather than a structural view of adjudication.⁴⁶² On the Fissian view, the legal body we call a “court” is defined by the particular moral criteria that are entrusted to this body for protection and care — what Fiss calls “constitutional values” or “public values”⁴⁶³ — and *not* by the particular moral relations that may obtain between plaintiffs and defendants, or by the fact that judicial activity may be occasioned by concrete disputes.

Now, I should emphasize that the exponent of the Derivative Account need not adopt a wholly Fissian view of adjudication and the requirements of Article III. Fiss’s claim is particularly strong. He claims that “adjudication” is nothing but a custodial concept, and that Article III constrains federal courts only to eschew those procedures and devices that undermine their care for and protection of “constitutional values.”⁴⁶⁴ This may or may not be true, but, in any event, all that the Derivative Account requires is a weaker claim: *The concept of adjudication, standing alone, does not take lexical priority, over the custodial role of federal courts, in the interpretation of Article III.* Imagine that the concept of adjudication, standing alone, does entail a robust moral relation between plaintiff and defendant of the kind Coleman describes. Even so, Article III cannot be read on its own, any more than other constitutional pro-

460. Fiss, *supra* note 20, at 36-37 (emphasis added) (footnote omitted).

461. *Id.* at 9.

462. *See id.* at 36 (distinguishing between “form” and “function” of adjudication, and giving conceptual priority to latter).

463. *See generally id.* at 5-17 (defending “public values” or “constitutional values” view of adjudication).

464. *See id.* at 13 (defending certain formal features of adjudication, e.g., existence of judicial opinion, and absence of judge’s control over her agenda, as integral to judicial function).

visions.⁴⁶⁵ Federal courts have the dominant or at least a co-equal role⁴⁶⁶ in safeguarding, from governmental infringement, the parts of morality set forth with sufficient specificity in the Bill of Rights.⁴⁶⁷ Article III should not be interpreted to compromise this role in a serious way. But I have demonstrated that the Direct Account does indeed seriously dilute and compromise the moral criteria set forth in the Bill of Rights. Therefore, the Derivative Account does not violate Article III, all things considered.

I have formulated the argument this way so as to avoid a lengthy detour into the theory of adjudication. Fiss might be right: the concept of adjudication must just be custodial. Or, Fiss might be wrong, but the proper non-custodial concept might *not* entail a robust moral relation between plaintiff and defendant. (For example, in his well-known article *The Forms and Limits of Adjudication*,⁴⁶⁸ Lon Fuller focuses upon *participation* as the essential ingredient of adjudication — “[a]djudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments”⁴⁶⁹ — and not upon the moral robustness of the participants’ legal claims.) The exponent of the Derivative Account can, if she wishes, develop a matching theory of adjudication. I will not try to do that, for my point is that — given the moral flaws in the Direct Account — Article III and the Bill of Rights should not, jointly, be read to require it.

Note that a negative response to the Article III objection is well-supported by existing doctrines. If the Article III objection holds true, then my hypothetical Invalidation Act is unconstitutional. *But of course the Invalidation Act is not unconstitutional!*

465. See generally CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1965) (arguing that the Constitution should be read holistically, not as sequence of discrete provisions).

466. The advocate of judicial supremacy will say that courts have the dominant role. The advocate of departmentalism will say that other institutions, such as Congress, or the President, have a coequal role. See *infra* text accompanying notes 503-05 (discussing departmentalism). The Derivative Account is consistent with both. See *id.* But to accord courts the truncated role accorded by the Direct Account — safeguarding the epistemic rights of particular claimants — while Congress and the President repeal or amend rules that do nonepistemic wrong, is to make courts neither dominant nor coequal.

467. Let me emphasize again that the originalism-nonoriginalism debate, and other such debates about the requisite specificity, etc., of constitutionalized moral criteria, see Adler, *supra* note 4, at 780-85, are independent of the debate between direct and derivative views of constitutional rights. The advocate of the Derivative Account can, if she wishes, demand a highly specific textual warrant for the criteria that courts enforce against rules, and require them to enforce the Framers’ rather than their own conceptions of those criteria.

468. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

469. *Id.* at 369.

This hypothetical act is simply the First Amendment overbreadth doctrine in a thin disguise. The legal rights held by Invalidation Act plaintiffs have precisely the moral content of the legal rights that federal courts actually *do* enforce, under the rubric of the overbreadth doctrine. The official exegesis of that doctrine runs as follows:

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . . . Litigants, therefore, are permitted to challenge a statute *not because their own rights of free expression are violated*, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

....
The consequence [of the overbreadth doctrine] is that any enforcement of a statute [declared overbroad] is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.⁴⁷⁰

Thus the Court in *Broadrick v. Oklahoma*, the font of current overbreadth doctrine.⁴⁷¹ To be sure, that doctrine is seen as an "exception" to the normal type of constitutional right — the overbreadth litigant is seen to rely, exceptionally, upon the moral claims of other persons covered by the statute she challenges, rather than upon her own moral claims — but my point here is that this purported exception must nonetheless be consistent with Article III. Exceptional or not, the overbreadth doctrine conceives the litigant as holding a legal power to secure the invalidation of the rule under which she falls, despite the absence of moral reason to protect *her*.

Indeed, the idea of courts invalidating statutes goes back well before the First Amendment overbreadth doctrine, which entered the Court's jurisprudence after the New Deal. The idea was sufficiently entrenched, by 1935, to prompt the legal scholar Oliver Field to write an entire treatise on the topic, *The Effect of an Unconstitutional Statute*. Field began the treatise by observing that:

470. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973) (emphasis added) (citations omitted).

471. For similar statements by the Court, which go both to the proposition that the overbreadth claimant is not asserting his own moral claims and to the related proposition that an overbreadth holding prevents the enforcement of the invalidated statute against anyone, see cases cited *supra* note 148. The classic scholarly statement of this view is Note, *The First Amendment Overbreadth Doctrine*, *supra* note 83, at 844-47, 852-58.

"For over a hundred years, state and federal courts in the United States have been declaring statutes unconstitutional."⁴⁷² Field contrasted the view that a statute declared unconstitutional is "void ab initio" — "entirely abrogated, except for the formality of a repeal"⁴⁷³ — with the view that courts merely invalidate the application of statutes to particular litigants. Strikingly, Field found the first view to be dominant.⁴⁷⁴ As Field put it: "It is no exaggeration to say that this theory that an unconstitutional statute is void ab initio is the *traditional doctrine* of American courts as to the effect of an unconstitutional statute."⁴⁷⁵ And he continued: "[U]nder the void ab initio view . . . the rule is properly applied that a statute, once declared unconstitutional, need not be pleaded and assailed in subsequent cases."⁴⁷⁶

To be sure, specifying the conditions under which courts exercise the sweeping power described by Field has, both before and since the New Deal, been a matter of some dispute. In particular, there has been a heated and long-running controversy about the conditions for federal judicial invalidation of *state* statutes.⁴⁷⁷ The dispute goes back to the Court's 1908 decision in *Ex parte Young*,⁴⁷⁸ which crafted an Eleventh Amendment fiction to permit federal courts to enjoin state officials from enforcing statutes. It continued, in the pre-New Deal period, with the enactment of three-judge-court acts (requiring injunctions to be entered by panels of judges, rather than a single federal judge) and then the passage of the Declaratory Judgment Act⁴⁷⁹ (intended in part as a less coercive technique for judicial invalidation of state statutes).⁴⁸⁰ And it was carried forward, in the post-New Deal period, with the line of cases from *Dombrowski v. Pfister*⁴⁸¹ to *Younger v. Harris*⁴⁸² to, finally,

472. OLIVER P. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 1 (1935).

473. *Id.* at 10.

474. *See id.* at 2-8.

475. *Id.* at 2 (emphasis added).

476. *Id.* at 4.

477. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 134-36 (1991) (describing this long-running controversy).

478. 209 U.S. 123 (1908).

479. 28 U.S.C. §§ 2201-02 (1994).

480. *See* *Perez v. Ledesma*, 401 U.S. 82, 112-15 (1971) (Brennan, J., concurring in part and dissenting in part) (discussing history and purpose of three-judge-court acts and Declaratory Judgment Act).

481. 380 U.S. 479 (1965).

482. 401 U.S. 37 (1971).

Steffel v. Thompson,⁴⁸³ and *Wooley v. Maynard*⁴⁸⁴ (all of which concern the proper timing of federal injunctive and declaratory relief against the state).⁴⁸⁵ But this dispute merely proves my point. Its fervor simply reflects the fact that a federal court's entry of a declaratory or injunctive order prohibiting the enforcement of a state statute, in a class-action suit or even (as we shall see in a moment) in an individual suit, will effectively repeal the targeted statute.

The Court, in crafting the First Amendment overbreadth doctrine, combined the judicial power to invalidate statutes, with the notion that invalidation might be justified at the instance of a litigant whose own moral claims were attenuated. "[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution"⁴⁸⁶ The proper scope of this "exceptional" doctrine has, again, been a matter of considerable dispute: from the initial enthusiasm during the Warren Court, to the Burger Court's retrenchment in cases such as *Broadrick v. Oklahoma*⁴⁸⁷ and *Brockett v. Spokane Arcades*⁴⁸⁸ that require "substantial" rather than merely *some* overbreadth.⁴⁸⁹ But the dispute about the scope of overbreadth — among the Justices and among constitutional scholars writing in this area⁴⁹⁰ — has generally taken for granted the permissibility of *some* such doctrine, under Article III.

To put the point another way: the official view sees constitutional rights as morally robust, but it does not see this robust cast as entailed by Article III. The Direct Account is traditional, in maintaining the robust content of constitutional rights; but an *Article III* defense of the Direct Account would dramatically revise the official view, and rescind doctrines (such as overbreadth⁴⁹¹) that presume

483. 415 U.S. 452 (1974).

484. 430 U.S. 705 (1977).

485. See CHEMERINSKY, *supra* note 290, ch. 13 (discussing *Younger* abstention, and availability of federal declaratory and injunctive relief absent pending state proceeding, as per *Steffel* and *Wooley*).

486. *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985).

487. 413 U.S. 601 (1973).

488. 472 U.S. 491 (1985).

489. See Redish, *supra* note 83 (describing this history).

490. See sources cited *supra* note 83.

491. Other "prophylactic" constitutional doctrines, such as the exclusionary rule, may be similar to overbreadth, in conferring a legal right upon one person so as to protect the moral rights of others. See Fallon, *supra* note 83, at 869 n.96 (discussing ubiquity of prophylactic

the permissibility of morally minimal litigants. For the reasons I have discussed — the reasons most trenchantly articulated by Fiss — the official view of Article III is right.

2. *The Strength of Judicial Remedies*

The second institutional objection to the Derivative Account is that the remedies employed by reviewing courts, in constitutional cases, are too weak: the judicial decision simply reverses the treatment pursuant to a rule of a particular litigant, and does not generally rescind the legal authority of state officials to enforce the rule, or generally relieve actors of the duty to comply with it. This second objection is easily parried, now that I have rebutted the first and deeper objection: that judicial invalidation of rules at the instance of morally minimal litigants violates Article III and the concept of adjudication therein embodied. Given the failure of the first objection, the second objection becomes merely technical. For the various kinds of constitutional cases in the federal courts — class-action cases, Supreme Court cases that are not class-actions, and non-class cases in the lower federal courts — I simply need to explain how the remedies entered in these cases operate to repeal the rules against which those remedies are targeted. The question, now, is not whether courts *can* (consistent with Article III) invalidate rules, but merely how they *do*.

For the sake of simplicity, I will focus on the techniques by which federal courts invalidate state or federal *statutes*. My analysis readily extends to the invalidation of non-statutory rules (for example, regulations enacted by state or federal agencies, or rules announced in administrative adjudications) but because the thrust of this article is theoretical, not technical, a discussion of the most salient type of rule-invalidation — the invalidation of statutes — should suffice.⁴⁹² Further, because the standard judicial remedy with respect to conduct-regulating rules (at least as evidenced by Supreme Court case law) is a facial or partial invalidation, not an extension, I will not belabor matters by discussing the issue of extension here.

Let us begin with the easiest case: a class-action suit in the federal courts that challenges a state or federal statute on constitu-

rules in constitutional law); Strauss, *supra* note 433 (same). Certainly the *jus tertii* doctrine is similar to overbreadth in this way. See *infra* text accompanying notes 558-72 (discussing *jus tertii*).

492. See Adler, *supra* note 4, at 806-10 (emphasizing that judicial review is not solely or mainly comprised by the invalidation of statutes).

tional grounds and that terminates with declaratory and perhaps injunctive relief. The declaratory judgment — to the effect that the statute is either facially invalid, or partly invalid to the extent specified in the court's judgment⁴⁹³ — will, under accepted principles of *res judicata*, protect the class members from being sanctioned pursuant to the (invalidated portion of the) statute, in any subsequent enforcement suits that state officials might try to bring.⁴⁹⁴ If the Derivative Account is correct, then the following also holds true: this class-wide declaratory judgment should be taken by enforcement officials as rescinding their legal authority to enforce the statute (within its invalidated scope), and by actors (within that scope) as rescinding their duty to comply with the statute. The declaratory judgment may or may not be accompanied by a permanent injunction — the effect of which would be to back up the court's rescission of official authority, with the clear threat of criminal or civil sanctions for contempt of court if state enforcement officials ignore the rescission.⁴⁹⁵ It remains open to debate, within the Derivative Account, whether injunctions should normally accompany declarations when courts invalidate statutes. (The Derivative Account will reject a conceptual attack on injunctions, to the effect that courts lack the power to rescind the powers of state officials, but there might be pragmatic grounds against routine injunctive relief.⁴⁹⁶) Further, the class-wide declaratory judgment, with or without injunction, will not operate as a precise repeal of the targeted statute, in the following sense: As scholars such as Richard Fallon and David Shapiro have quite properly emphasized, this remedy should not necessarily be taken to prevent enforcement officials from securing (through means other than an enforcement suit) an authoritative and narrowing *interpretation* of the statute, from the bodies responsible for interpreting it, that renders the thus-narrowed statute constitutionally valid.⁴⁹⁷ But the Derivative Account can read-

493. See Shapiro, *supra* note 442, at 767 (noting this possibility).

494. See *id.* at 762-70 (generally discussing *res judicata* effect, for parties to a non-class federal declaratory suit, of a declaratory judgment holding a state statute to be partly or wholly unconstitutional); *id.* at 777-79 (extending discussion to class actions).

495. See *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (noting that “‘noncompliance [with a declaratory judgment] . . . is not contempt’” (quoting *Perez v. Ledesma*, 401 U.S. 82, 126 (1971) (Brennan, J., concurring in part and dissenting in part))).

496. See 415 U.S. at 460-72 (describing differences between declaratory judgments and injunctions, in particular less coercive cast of former).

497. See Fallon, *supra* note 83, at 854-55, 898-903; Shapiro, *supra* note 442, at 768-70. Shapiro and Fallon agree — consistent with the Derivative Account — that the curative effect of this narrowing interpretation should only be prospective.

ily incorporate this point:⁴⁹⁸ the truly optimal response to a statute that goes morally awry might be not its facial invalidation, nor the revision *R'* that the reviewing court takes to be optimal, but the re-revision that the statute's authoritative interpreter subsequently chooses under the rubric of statutory interpretation.

What about a non-class case that reaches the Supreme Court — perhaps an appeal from a state or federal enforcement action, or perhaps an appeal from a individual's declaratory or injunctive suit in state or federal court? Here, too, the Derivative Account is straightforward. A holding by the Supreme Court that a state or federal statute is facially or partly invalid operates to rescind the legal authority of enforcement officials and lower courts to apply the statute (within the invalidated portion) to *anyone*, at least pending an authoritative narrowing construction of the statute. Professor Fallon, in his thorough recent study on overbreadth, explains: "Supreme Court holdings of overbreadth . . . should confer immunity on all conduct occurring after the judgment is entered and before a constitutionally adequate narrowing construction is obtained."⁴⁹⁹ The doctrinal basis for Fallon's rightful confidence in the authority of the Supreme Court to invalidate state or federal statutes is the Court's famous announcement in *Cooper v. Aaron*.⁵⁰⁰ The Court in *Cooper*, in the face of a defiant refusal by the Arkansas authorities to desegregate the Arkansas schools, announced that the holding of *Brown v. Board of Education* was binding law for government officials everywhere, not just for the particular parties in *Brown*.

[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁵⁰¹

498. As it can the proposition that a federal court should perhaps *abstain*, pending construction of the statute by its authoritative interpreter, or *certify* the interpretive question to that body. See generally *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1072-74 (1997) (discussing techniques of certification and "Pullman" abstention to obtain authoritative constructions of state statutes challenged in federal courts on constitutional grounds).

499. Fallon, *supra* note 83, at 908. Professor Shapiro, who shares Professor Fallon's skepticism about the scope of judicial remedies in non-class suits in the lower federal courts, agrees with Fallon about the broad scope of a Supreme Court holding. See Shapiro, *supra* note 442, at 777.

500. 358 U.S. 1 (1958).

501. *Cooper*, 358 U.S. at 18.

Cooper means that the Court's constitutional utterance has far greater scope than, as a matter of *res judicata* alone, it should: the utterance binds the world.

In recent years, the *Cooper* doctrine has ignited a fair amount of scholarly controversy. One, radical objection is that courts simply cannot bind non-parties.⁵⁰² This objection trades upon a conceptual point about "adjudication" and Article III, of the kind that, I have already argued, we should reject. The second, less radical objection points to the co-equal and "dialogic" role of institutions other than the Supreme Court — for example Congress, or state legislatures — in interpreting the Constitution.⁵⁰³ The Derivative Account can readily incorporate this less radical objection. It is consistent with the Account to stipulate that Congress can permissibly engage in constitutional dialogue with the Court by re-enacting the very same statute that the Court has previously invalidated; or even perhaps that the President can trigger a dialogue on his own, by directing the Department of Justice to enforce an invalidated statute.⁵⁰⁴ What is inconsistent, and implausible, is the claim that governmental bodies beneath this top tier — specifically, enforcement agencies operating in the absence of a legislative, presidential or gubernatorial mandate to defy the Supreme Court, and lower state or federal courts — are also free to ignore the Court's utterances, when the Court declares statutes to be constitutionally invalid.⁵⁰⁵

We come, finally, to the toughest case for the Derivative Account: a non-class case in the lower federal courts, whether an en-

502. For opposition to *Cooper* that trades upon a general opposition to the idea of judicial decisions binding non-parties (as against a specific opposition to decisions binding certain institutions, e.g., legislatures), see Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993). See also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 272-76, 274-84 (1994) (arguing that judicial decisions do not bind executive branch with respect to nonparties, but also asserting that judicial judgments are not binding against executive).

503. See ROBERT BURT, *THE CONSTITUTION IN CONFLICT* (1992). For an overview of departmentalism, including this less radical, "dialogic" view, see Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986).

504. Note, however, that a departmentalist who espouses some degree of Presidential autonomy in interpreting the Constitution need not go so far. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906-11, 913-16 (1989-90) (distinguishing between less and more controversial types of presidential nonacquiescence).

505. I should note that Professors Estreicher and Revesz — the leading proponents of federal agency nonacquiescence — are specifically concerned with agency nonacquiescence in *statutory* decisions by federal courts, and have been unwilling to extend their arguments to support agency nonacquiescence on *constitutional* matters. See Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 720 & n.214 (1989).

forcement action, or a declaratory and injunctive action by the claimant in federal district court, or an administrative review proceeding commenced in the federal court of appeals, or a habeas suit in district court. The difficulty here is that: (1) as a matter of res judicata, the lower federal court's purported invalidation of the statute (even in the shape of an injunction prohibiting its enforcement) binds state officials *only* with respect to the claimant, not with respect to the other actors covered by the statute;⁵⁰⁶ and (2) *Cooper v. Aaron* does not apply.⁵⁰⁷ As Professor Fallon notes, in the case of a purported lower-court invalidation of a state statute for overbreadth:

Because state courts and lower federal courts stand in a coordinate, rather than a hierarchical, relationship, the binding effect of the federal judgment extends no further than the parties to the lawsuit. Against nonparties, the state remains free to lodge criminal prosecutions. Civil actions can also go forward.⁵⁰⁸

Fallon concludes that "[t]he familiar vocabulary of 'voidness,' 'invalidation,' and 'striking down' thus does more to mislead than describe."⁵⁰⁹

But Fallon's skeptical conclusion must, somehow, be wrong. The basic premise of the First Amendment overbreadth doctrine is that a federal court, by invalidating a statute, protects nonparty speakers within the statute's scope. If lower federal courts cannot, in fact, invalidate statutes (outside of class actions), then an overbreadth challenge should be unavailable in lower federal court (outside of a class action). *That* is not the official doctrine, at all.⁵¹⁰ The way to avoid Fallon's skeptical conclusion, and more generally to explain lower court utterances within the Derivative Account, is by conceptualizing these utterances as partial steps in a multi-step, temporally extended process of judicial repeal. We might say, for

506. This is true, at least, if the res judicata effect of the federal judgment is itself a matter of federal law, *see* Shapiro, *supra* note 442, at 763 (arguing that it is), and if the Supreme Court's decision in the *Mendoza* case, *see* *United States v. Mendoza*, 464 U.S. 154 (1984) (nonmutual collateral estoppel generally unavailable against federal government), protects state governments as well, *see* Note, *Nonmutual Issue Preclusion against States*, 109 HARV. L. REV. 792 (1996) (discussing applicability of *Mendoza* to state governments).

507. *See, e.g.,* Dorf, *supra* note 38, at 283 n.219 (stating that "on questions of federal law, the state courts are bound only by the United States Supreme Court, and not by the lower federal courts," and citing sources).

508. Fallon, *supra* note 83, at 853-54 (footnotes omitted); *accord*, Shapiro, *supra* note 442, at 770-76. The Supreme Court has said the same quite explicitly, *see* *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) (noting that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute").

509. Fallon, *supra* note 83, at 854.

510. *See supra* text accompanying note 470 (official statement of doctrine).

example, that a federal district court utterance purporting to invalidate a state statute is not generally binding on state officials, except in the case of a class action, until the holding is concurred in by the state supreme court or (some or all) of the state courts of appeals. Or, for a federal statute, we might say that federal prosecutors, absent a class action, are bound (beyond the scope of *res judicata*) only to refrain from enforcing statutes that have been held unconstitutional in all, or a majority of, the federal circuits. The basic idea is that, for a particular rule *R*, there are multiple lower courts (by which I mean, here, courts other than the federal Supreme Court) with jurisdiction to adjudicate a federal constitutional challenge to *R*: lower federal versus state courts, or lower federal courts with different geographic jurisdictions. For epistemic reasons, it may well make sense to require something approaching unanimous agreement among the relevant lower courts, before enforcement officials should count themselves under a legal obligation not to enforce the invalidated statute; and to use the federal Supreme Court as the institution for resolving disagreements among the lower courts. Legal scholars outside of constitutional law, addressing the issue of federal agency nonacquiescence in the non-constitutional rulings of federal appellate panels, have advanced this kind of suggestion: the suggestion is that federal agencies are free to “nonacquiesce” in appellate rulings, but only given nonunanimity among the circuits.⁵¹¹

The idea of intertemporal repeal — of a voting process among the relevant lower courts, those with jurisdiction over some rule *R* — fits comfortably with the Derivative Account. The proponent of that account can concede the epistemic benefits of requiring something approaching unanimity among the relevant lower courts prior to holding enforcement officials obligated (beyond the scope of *res judicata*) not to enforce a rule. This helps explain why the law of *res judicata* has not been changed:⁵¹² why judicial rulings against the government are not, technically, *res judicata* beyond the particular prevailing litigant. What the proponent of the Derivative Account will *not* concede is that if, for example, both the state courts

511. I take this, essentially, to be the view of Professors Estreicher and Revesz. See Estreicher & Revesz, *supra* note 505, at 753 (arguing that “agencies should not engage in intracircuit nonacquiescence unless [*inter alia*] the agency is reasonably seeking the vindication of its position both in the courts of appeals and before the Supreme Court”).

512. It also explains perhaps why lower courts ought not automatically certify class actions in constitutional cases, even assuming representative plaintiffs. See Shapiro, *supra* note 442, at 779 (arguing for judicial caution in certifying classes if that would “unfairly deprive state courts of the opportunity to express their views”); Estreicher & Revesz, *supra* note 505, at 721 n.218 (making a similar suggestion for statutory challenges to federal agency action).

and the lower federal courts concur in deciding that a state statute should be invalidated, and there is no reasonable chance of federal Supreme Court review, state prosecutors should nonetheless consider themselves legally free to continue enforcing it. And Fallon presents no argument to the contrary.⁵¹³

It is a further question whether, absent a Supreme Court ruling on point or a class-wide injunction, a state or federal official enforcing a statute that the relevant lower courts have declared invalid should be subject to sanction in the shape of criminal penalties under 18 U.S.C. § 241⁵¹⁴ and § 242,⁵¹⁵ or monetary damages under § 1983⁵¹⁶ and *Bivens*.⁵¹⁷ Perhaps the line between an incomplete and a completed intertemporal repeal is too fuzzy to warrant sanctions against enforcement officials who may innocently stray across the line. (Innocent straying may need to be corrected by a subsequent class-action suit.⁵¹⁸) Nonetheless, enforcement officials have a constitutional, legal duty (sanction-backed or not) to observe the line. Legal duties can exist without sanctions;⁵¹⁹ for example, a sanctionless duty could be a *legal* duty because it is grounded, via the legally correct methods of derivation, in some legal text. The Supreme Court, the legal body responsible for interpreting the Bill of Rights, has announced (at least in the context of overbreadth doctrine) that enforcement officials have a legal duty not to enforce statutes that the federal courts invalidate. To quote the Court: "The consequence of [a judicial declaration invalidating a statute as overbroad] is that *any enforcement of a statute thus placed at issue is totally forbidden* until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."⁵²⁰ And this an-

513. See Fallon, *supra* note 83, at 880-82 (discussing limited scope of lower court relief in non-class cases).

514. See 18 U.S.C. § 241 (1994) (prohibiting conspiracy to deprive persons of constitutional rights).

515. See 18 U.S.C. § 242 (1994) (prohibiting deprivation of constitutional rights under color of law).

516. See 42 U.S.C. § 1983 (1994).

517. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See generally Kent Greenawalt, *Constitutional Decisions and the Supreme Law*, 58 COLO. L. REV. 145, 171 (1987) (noting these possibilities, with respect to nonacquiescence in Supreme Court decisions).

518. See Estreicher & Revesz, *supra* note 505, at 758 (stating that class-action device is warranted in event of unjustified agency nonacquiescence).

519. See RAZ, *supra* note 54, at 154-62, 158 (discussing generally the conceptual possibility of sanctionless legal norms, and noting that, although mandatory norms addressed to ordinary individuals are always in practice sanction-backed, there exist "mandatory norms addressed to officials which are not backed by sanctions").

520. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (emphasis added).

nouncement is indeed legally correct. The legally correct method of deriving legal rights and duties from the moral criteria set forth in the Bill of Rights is (some kind of) moral reasoning; the Derivative Account is the morally best account of those criteria; and the legal implication of the Derivative Account is that state and federal officials have a legal duty not to enforce statutes that the federal courts have invalidated, whether through a class action, a Supreme Court announcement, or what I have called an intertemporal lower-court repeal.

Professor Fallon, who undertook an empirical survey of state prosecutorial responses to lower-federal-court holdings of overbreadth, found the following:

[The survey identified] 45 cases [in the relevant time period] in which lower federal courts held state statutes unconstitutionally overbroad, but only three cases — two involving the same statute — in which state prosecutors, following federal holdings of overbreadth, brought actions to enforce the affected statutes. . . . This sample suggests . . . that overbreadth holdings by lower federal courts may be far more potent in practice than the surrounding legal doctrines would require them to be.⁵²¹

My conclusion would be a bit different. To my mind, the overwhelming incidence of prosecutorial compliance with lower-federal-court overbreadth holdings demonstrates that the remedial techniques available to the federal courts are, in practice, quite potent enough to support what legal doctrine should be, namely, the Derivative Account.

CONCLUSION

What is the moral focus of judicial review? Are constitutional-reviewing courts essentially concerned with the treatment of particular litigants? Or is their task essentially legislative? Are they focused, not on the morality of the particular sanction, duty, or other negative treatment that the litigant at hand has received, but rather on the moral reasons for and against the underlying *rule*? And is the litigant's case, then, merely an occasion for judicial amendment or repeal of rules that go morally awry? The aim of this article has been to address and answer, as rigorously as possible, these foundational questions about the nature of judicial review. I have tried, here, to get straight our basic picture of constitutional adjudication. The right picture, unfamiliar though it may be, is what I have called

521. Fallon, *supra* note 83, at 888 n.219.

the Derivative Account.⁵²² Constitutional rights are morally derivative, not morally direct (at least insofar as rights are substantively infringed by sanctions or coercive duties, those most elementary sources of rights-violation).⁵²³ And this revision to our basic picture of constitutional adjudication should, in turn, have wide doctrinal implications — for the wide variety of doctrines, both procedural and substantive, that a basic picture informs. The availability of facial challenges to rules; the contours, indeed very existence, of the overbreadth doctrine; the proper timing for the adjudication of constitutional claims; the proper parties to litigate such claims; the scope of judicial remedies; the content of substantive constitutional doctrines governing the predicate and history of rules under the Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause — these matters, and others, will depend crucially upon whether the Direct Account or the Derivative Account of constitutional rights holds true.

Given the breadth and diversity of such matters, it is beyond the scope of this article to specify, in detail, the doctrinal changes that flow from the Derivative Account. A full discussion of the affected doctrines would require at least as much space and effort as the basic theorizing that this article has tried to complete. Rather, in this Conclusion, I will simply describe, in a brief and general way, the main areas of constitutional doctrine implicated by the morally derivative cast of constitutional rights. It is these areas, principally, that the Derivative Account will require us to rethink and to revise.

Let us begin with the problem of facial challenges. This is a problem that, in recent years, has excited great controversy at the Court, in areas of constitutional law ranging from commercial speech, to political speech, to equal protection, the Establishment Clause, the Takings Clause, and, finally, substantive due process (both abortion rights and, just recently, assisted suicide).⁵²⁴ Indeed, the controversy over facial challenges now rivals, in intensity and breadth, the controversy over standing that became acute during the 1980s.⁵²⁵ What triggered the now-familiar disputes over stand-

522. See *supra* Part II (arguing against Direct Account); *supra* Part III (arguing in favor of Derivative Account).

523. See *supra* text accompanying notes 56-57 (discussing and defending article's focus on sanctions and sanction-backed duties).

524. See *supra* note 39 (citing cases in these areas).

525. The scholarly literature from this period that was animated by the resurgent importance of the standing requirement includes: Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1

ing was the Court's adoption of a highly restrictive approach — an approach linked to the Direct Account — that threatened to close the courthouse doors to large classes of constitutional litigants.⁵²⁶ Similarly, the current debates (equally ardent and wide-ranging)⁵²⁷ about facial challenges have been triggered by the Court's announcement and repeated affirmation of a doctrinal test that threatens to eviscerate the practice of facial invalidation.

This is the *Salerno* test. In *United States v. Salerno*,⁵²⁸ the Court announced:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute reviewed in *Salerno*] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.⁵²⁹

Salerno says, or appears to say, the following: Given some rule *R*, a court should facially invalidate *R* only if, for every person *X* against whom *R* might be enforced, the application of *R* to *X* would be unconstitutional.⁵³⁰ And indeed this is the correct test if the Direct Account holds true. *Salerno* starts with the notion that constitu-

(1984); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Steven L. Winter, *The Metaphor of Standing*, 40 STAN. L. REV. 1371 (1988).

526. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing); *Allen v. Wright*, 468 U.S. 737 (1984) (same); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (same); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (same); *Warth v. Seldin*, 422 U.S. 490 (1975) (same). On the link between a restrictive approach to standing and the Direct Account, see *infra* text accompanying notes 584-85.

527. To be sure, the ardent and wide-ranging debates about facial challenges have, hitherto, remained debates within the *judiciary*. There has not, yet, been a broad scholarly appreciation of the depth and import of this judicial debate. Although there is a well-developed scholarly literature on overbreadth, see sources cited *supra* note 83, this focuses on facial challenges in the First Amendment context, and largely predates the current judicial debates. The only general scholarly piece on facial challenges is Professor Dorf's *Facial Challenges to State and Federal Statutes*. See Dorf, *supra* note 38. A number of student notes have been written recently on the problem of facial challenges in the abortion area. See Ruth Burdick, Note, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825 (1996); John Christopher Ford, Note, *The Casey Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443 (1997); Skye Gabel, Note, *Casey "Versus" Salerno: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes*, 19 CARDOZO L. REV. 1825 (1998).

528. 481 U.S. 739 (1987).

529. *Salerno*, 481 U.S. at 745.

530. See Dorf, *supra* note 38, at 241 ("Under [*Salerno's*] 'no set of circumstances' test, the government need only produce an example in which the statute could be applied constitutionally to defeat the facial challenge.").

tional adjudication is, centrally, as-applied adjudication.⁵³¹ What concerns the reviewing court, first and foremost, is whether *X*'s own treatment is unconstitutional. If it turns out that the application of rule *R* to *X* is *not* unconstitutional, then what claim — asks the *Salerno* Court — does *X* have to judicial relief? *X*'s only claim would be an overbreadth claim: a claim that *R* should be facially invalidated because it is unconstitutional as applied to too many *other* litigants. But, officially, there is no overbreadth doctrine outside the First Amendment;⁵³² the Court has never said otherwise. So, outside the First Amendment, a rule should be sustained over a facial challenge if there is some set of circumstances under which an as-applied challenge to the rule fails. This is currently the official doctrine for facial challenges, and it follows inexorably from the morally direct cast of constitutional rights that the *Salerno* Court, quite standardly, takes to obtain.

To see the import of *Salerno*, consider a sweeping law regulating abortion. I pick abortion as an example because the implications of *Salerno*, here, are particularly counterintuitive — at least for lawyers, scholars, and jurists who accept the justiciability of abortion rights⁵³³ — and, relatedly, because the judicial disputes here about facial challenges have been particularly fiery.⁵³⁴ Consider, for example, Guam's statute outlawing all abortions except in cases of medical emergency, which the Ninth Circuit held to be facially invalid.⁵³⁵ The Supreme Court thereupon denied Guam's petition for

531. See *Ada v. Guam Socy. of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of certiorari) (defending *Salerno* by describing as-applied adjudication as central and standard type of judicial review).

532. See *Ada*, 506 U.S. at 1012 (Scalia, J., dissenting from denial of certiorari); *Salerno*, 481 U.S. at 745. In its First Amendment overbreadth cases, the Court has consistently described overbreadth as a First Amendment exception to the normal practice of adjudication. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 112 n.8 (1990); *New York v. Ferber*, 458 U.S. 747, 767-69 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-15 (1973); see also *Ford*, *supra* note 527, at 1450-55 (discussing Court's use of an *unarticulated* overbreadth doctrine in its abortion cases).

533. See *Ford*, *supra* note 527, at 1445-46 (noting that "[i]f the Supreme Court were faithful to *Salerno*, it would reject every facial attack on statutes restricting access to abortions").

534. See *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (denying certiorari) (memorandum of Stevens, J.); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1013 (1993) (denying stay) (O'Connor, J., concurring); *Ada*, 506 U.S. at 1011 (denying certiorari) (Scalia, J., dissenting from denial of certiorari); *Planned Parenthood v. Casey*, 505 U.S. 833, 972-73 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Indeed, the problem of reconciling *Salerno* with the Court's willingness (most recently, in *Casey*) to sustain facial challenges to laws restricting abortion has generated a circuit split. See *Burdick*, *supra* note 527, at 872-75 (describing circuit split); *Ford*, *supra* note 527, at 1447-48 (same); *Gabel*, *supra* note 527, at 1837-41 (same).

535. See *Guam Socy. of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 506 U.S. 1011 (1992).

certiorari, prompting a vigorous dissent by Justice Scalia,⁵³⁶ who argued that *Salerno* precluded a facial invalidation of even this highly restrictive statute.

Under this Court's current abortion caselaw, including *Casey*, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge.⁵³⁷

The same might be said of a law prohibiting all previability abortions; we can imagine instances of previability abortion that would be wrongful under other descriptions (for example, a previability abortion secured through a coercive threat, as in *ABORTION*). *Salerno* implies that *most* of the major cases, up to and including *Casey*,⁵³⁸ in which the Court has sustained abortion-rights claims, were wrongly decided — for most of these cases involved facial invalidation of rules that, one would imagine, had *some* morally acceptable applications.⁵³⁹

Not surprisingly, then, the applicability of *Salerno* to laws regulating abortion has been rejected by Justice O'Connor, who (along with Justices Souter and Kennedy) authored the joint opinion for the Court in *Casey*. As Justice O'Connor has explained:

In striking down Pennsylvania's spousal-notice provision [in *Casey*], we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."⁵⁴⁰

536. See *Ada*, 506 U.S. at 1011 (Scalia, J., dissenting from denial of certiorari).

537. 506 U.S. at 1013 (Scalia, J., dissenting from denial of certiorari).

538. 505 U.S. at 887-99 (facially invalidating spousal-consent provision of statute regulating abortion).

539. The cases I mean are: *Casey*, 505 U.S. 833 (1992); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); and *Roe v. Wade*, 410 U.S. 113 (1973). All of these are, I suggest, best categorized as involving facial invalidations.

The only exception to the Court's reliance on facial invalidation, in sustaining abortion-rights claims, is its occasional narrowing of statutes under the rubric of statutory interpretation, see, e.g., *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. at 490-93, which is properly seen as a kind of partial invalidation, see generally Adler, *supra* note 4, at 834-39.

540. *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay and injunction) (second alteration in original) (quoting *Casey*, 505 U.S. at 895). Interestingly, Justice Souter joined Justice O'Connor's concurrence in *Fargo*, but Justice Kennedy did not. See 507 U.S. at 1013.

But the proponent of *Salerno* is entitled to ask: Why *should* Justice O'Connor's be the test? Why *should* a rule be facially invalidated if there is some context in which an as-applied challenge to the rule would fail? Neither the judicial nor the scholarly critics of *Salerno* have, in my view, given a satisfactory answer to that question. The answer, I suggest, is simply this: *There is no such thing as a true as-applied constitutional challenge.*⁵⁴¹ The very idea is a mistake. Until we get rid of that idea, our doctrines for adjudicating facial challenges will remain confused. The concept of unconstitutionality does not attach to the treatment of particular litigants; it attaches, on the Derivative Account, to the enactment of statutes and other rules. *Salerno* conceives of the facial invalidity of a rule as the limiting point of as-applied invalidity: a rule is facially invalid if, for every application of the rule, that application is constitutionally invalid. Justice O'Connor, in her response to *Salerno*, tries to soften the test somewhat: a rule is facially invalid if, for many applications of the rule, those are constitutionally invalid.⁵⁴² But both tests are mistaken, because both trade upon the mistaken, albeit standard, notion that rule-applications can be properly described as unconstitutional.

Let me put the point this way. On the Derivative Account, every constitutional challenge involves the facial scrutiny of rules. In every constitutional case (at least where claimants substantively challenge sanctions or sanction-backed duties), the court's task is to assess the predicate and history of the underlying rule against one or more rule-validity schema. Substantive constitutional doctrines, such as the narrow-tailoring doctrines familiar from free speech

541. By this I mean just that constitutional litigation does not concern the morality of the application of a rule to a particular claimant; it does not concern whether the claimant's treatment should be overturned, independent of further invalidating the rule. "As-applied" adjudication in the (less robust) sense of adjudication that depends, in part, on facts about the claimant rather than depending exclusively on the predicate and history of the rule, is quite consistent with the Derivative Account, as I have already explained, *see supra* text accompanying notes 140-45, 414-21.

542. One might object that Justice O'Connor's test means to ask, not whether a large fraction of an abortion-regulating rule's applications are unconstitutional, but rather whether a large fraction of the rule's applications (say, sanctions) are morally wrong. If so, the O'Connor test is consistent with the facial rather than as-applied cast of constitutional adjudication; but one can still debate whether the absolute or relative number of morally problematic applications should be a factor in constitutional rule-validity schema. A rule breaches the Liberty Schema or the Discrimination Schema if the rule, without sufficient reason, restricts liberties or includes a discriminatory predicate, *see supra* text accompanying notes 326, 384; there is no further question of the rule being largely, or only a little bit, wrong. But perhaps a further question of this kind is appropriate for courts to ask, e.g., if docket-congestion or the exigencies of judicial efficacy in constitutional cases, *see* GERALD N. ROSENBERG, *THE HOLLOW HOPE* 336 (1991) (questioning efficacy of judicial remedies), require limiting judicial intervention to the most serious cases of morally problematic rules.

law,⁵⁴³ the “undue burden” doctrine announced in *Casey* for abortion rights,⁵⁴⁴ or the antidiscrimination doctrines for free exercise and equal protection,⁵⁴⁵ are *all* facial doctrines, in the following sense: these doctrines serve to determine whether morality requires some change in the canonical language of the scrutinized rule. Now, it remains an interesting *remedial* problem how the reviewing court should remedy a rule that fails the moral scrutiny subserved by these familiar rule-validity tests. This is the problem I adverted to in section III.A.3. One possible remedy is facial invalidation, another is partial invalidation or even extension, and there are pros and cons to each. Facial-challenge doctrine, properly understood, is a doctrine that addresses this remedial problem — and no more than that. It is a doctrine that answers the question: Where a rule is constitutionally invalid, should the reviewing court *repeal* the invalid rule, or should the court instead *amend* the rule in some way? The answer might be that courts should never repeal rules if there exists a narrower, curative amendment — which would have the effect of making facial invalidation quite rare. But if that is the correct answer, it is correct because of the moral losses that flow from facial invalidation, the skill of courts in crafting curative amendments, and so forth, and *not* because of the morally direct cast of constitutional rights.⁵⁴⁶

The flip side of the Court’s confusion about facial challenges is its confusion about the overbreadth doctrine.⁵⁴⁷ The overbreadth doctrine, as the Court conceptualizes it, purports to create a special, bonus right with respect to laws regulating speech. “Outside the area of free speech, a litigant merely has the right to challenge the application of a rule to himself. However, in the area of free speech, the litigant has the bonus right — a right he can invoke, even if his as-applied challenge fails — that the reviewing court facially invalidate a rule which is substantially overbroad.” Or so the standard conceptualization goes. As the Court has explained:

The First Amendment doctrine of overbreadth was designed as a “departure from traditional rules of standing,” to enable persons who are themselves unharmed by the defect in a statute nevertheless “to challenge that statute on the ground that it may conceivably be ap-

543. See *supra* text accompanying notes 321-25.

544. See *Casey*, 505 U.S. at 869-79.

545. See *supra* text accompanying notes 98-113.

546. See *supra* text accompanying notes 414-21 (discussing pros and cons of facial vs. partial invalidation of rules).

547. See *supra* notes 470-91 and accompanying text (describing overbreadth doctrine, and citing leading cases and scholarly articles).

plied unconstitutionally to others, in other situations not before the Court." . . .

It is not the usual judicial practice . . . to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. . . . [T]he lawfulness of the particular application of the law should ordinarily be decided first.⁵⁴⁸

But the overbreadth doctrine is just as empty as the idea of an as-applied challenge, and for the same reason. Every constitutional claimant has one and the same type of legal right: a right to secure the invalidation (whether a partial invalidation, a facial invalidation, or something else) of a rule that goes morally awry. This is the kind of right that the overbreadth doctrine purports to describe, but it is not in fact special to free speech, nor is it a bonus above and beyond a more basic as-applied right. Consider our stylized case, CHILD PORNOGRAPHY, which is meant to exemplify a classic overbreadth case: the case where a child pornographer is sanctioned pursuant to a sweeping rule that prohibits pictures of naked children. It is indeed true in CHILD PORNOGRAPHY that the claimant has no as-applied claim; moral reason does not obtain for a court to invalidate the claimant's sanction, independent of further invalidating the rule under which that sanction falls. But the same, I have argued, is true of the claimants in FLAG DESECRATION, ABORTION, RESIDENTIAL PICKETING, ALCOHOL, and ANIMAL SACRIFICE. And if the Derivative Account is correct, the same is always true (or might be true) of every constitutional litigant. A constitutional litigant always lacks, or might lack, a valid moral claim; the strength of the litigant's own moral claim is simply not an issue for the constitutional reviewing court; and therefore the idea of a special overbreadth right, for litigants whose own moral claims misfire, is nonsense.

Indeed, I am not the first scholar to criticize the standard conceptualization of overbreadth. Henry Monaghan, in his well-known article on *Overbreadth*, has done just this.⁵⁴⁹ Monaghan argues that laws regulating free speech, just like other rules, are unconstitu-

548. *Board of Trustees v. Fox*, 492 U.S. 469, 484-85 (1989) (citations omitted) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 613 (1973)) . For a similarly clear description of the right to raise a First Amendment overbreadth challenge as a bonus right, additional to the claimant's right to raise an as-applied challenge, see *Renne v. Geary*, 501 U.S. 312, 323-24 (1991). And what *Fox* and *Geary* say explicitly is implicit in other standard discussions by the Court of the overbreadth doctrine. See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) ("In [overbreadth] cases, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned [i.e., who lacks a successful as-applied challenge] is permitted to challenge a statute on its face because it also threatens others not before the court . . .").

549. See Monaghan, *supra* note 44.

tional if and only if they fail applicable rule-validity schemas.⁵⁵⁰ In the area of free speech, the relevant schema simply demands that the rule be narrowly tailored or (equivalently) that it not be overbroad. There is no special overbreadth doctrine for free speech, above and beyond the basic requirement — true both of rules regulating speech and of other rules — that such rules be constitutionally valid.

[T]he dominant idea [overbreadth] evokes is serious means scrutiny. Wherever [the Constitution] mandates strict or intermediate scrutiny, a requirement of regulatory precision is involved Thus the Court has reacted interchangeably to “overbreadth” and “least restrictive alternative” challenges both inside and outside the First Amendment context.⁵⁵¹

Like Monaghan, I agree that constitutional adjudication always and only involves judicial assessment of the predicate and history of rules against applicable rule-validity schema. Unlike Monaghan, I think it is a grave mistake to conceptualize this judicial task as resting upon the proposition that, in his words: “[A] litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.”⁵⁵² This is the proposition that the Direct Account tries to prove: the Direct Account tries to demonstrate that sanctioning some *X*, pursuant to a rule that is constitutionally “invalid,” violates *X*’s moral rights. But the Direct Account is unpersuasive — rule-validity schema are *not* best construed as identifying improper features of rules such that to apply a rule with that kind of feature is, itself, to violate a moral right of the sanctioned person, independent of the proscribability of her action under another description — and to attempt a rescue of Monaghan’s claim by saying that a litigant has the *legal*, if not moral, right to be judged in accordance with a constitutionally valid rule of law is a confusion. A litigant has that legal right only because, in turn, her case is an occasion for judicial repeal or amendment of the rule rather than merely the litigant’s own treatment.

550. As Monaghan puts it:

[There is] little support for viewing overbreadth as a special, speech-protective standing doctrine. Rather, . . . overbreadth methodology simply applies the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule. What is different from the conventional run-of-the mill case is not standing but the substantive content of the applicable constitutional law.

Id. at 37.

551. *Id.* (footnotes omitted).

552. *Id.* at 3; see also Henry Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 196-97 (reiterating claim that litigant has the right to be judged in accordance with a constitutionally valid rule); Dorf, *supra* note 38, at 242-49 (concurring in Monaghan’s claim); Fallon, *supra* note 83, at 874 (same).

In short, the overbreadth doctrine is quite correct (*pace* Monaghan) in stating that the role of reviewing courts is to repeal and amend rules at the instance of morally minimal litigants. Where the overbreadth doctrine goes wrong is in thinking that this is a *special* role, reserved for the Free Speech Clause, and that the ordinary role of reviewing courts outside the area of free speech is something other than this.

Is there any way to salvage the overbreadth doctrine? Perhaps it might be reconceptualized, not as a doctrine that confers bonus rights upon litigants in the area of free speech, but as a special *remedial* doctrine — a doctrine that makes facial invalidation an especially accessible remedy here.

A Reconceptualized Overbreadth Doctrine?

If a law fails a rule-validity schema, except for a free-speech schema, then facial invalidation is an appropriate remedy under conditions *Q*. If, however, a law fails a *free speech* rule-validity schema, then facial invalidation is an appropriate remedy under conditions *Q* or *Q'*.⁵⁵³

But even this remedial reconceptualization of overbreadth is problematic, given the Court's actual remedial practices. In practice, many and perhaps *most* of the cases in which the Court has sustained constitutional challenges to conduct-regulating rules have eventuated in facial invalidation: not just free speech cases, but also abortion rights cases, free exercise cases, and equal protection cases.⁵⁵⁴ And, even more strikingly, the overwhelming bulk of the cases where the Court has cured invalid conduct-regulating rules through some remedy other than facial invalidation, have in fact been *free speech cases*!⁵⁵⁵ The partial invalidation or, for that matter, the extension of conduct-regulating rules that violate equal protection is virtually unheard of;⁵⁵⁶ now that the Free Exercise Clause closely parallels the Equal Protection Clause, the same should generally hold true there; and, in practice, as I have already noted, the standard remedy for conduct-regulating rules that violate substan-

553. Cf. Stern, *supra* note 414, at 82-106 (describing, circa 1937, Court's varying practices of facial versus partial invalidation, and discussing the choice between those alternatives as a remedial problem).

554. See *supra* note 425.

555. See *supra* note 425. Notably, these include not just commercial-speech cases, where the overbreadth doctrine is formally inapplicable, see *Board of Trustees v. Fox*, 492 U.S. 469 (1989), but "core" speech cases as well.

556. See *supra* note 144.

tive due process has been facial invalidation.⁵⁵⁷ So a remedial reconceptualization of First Amendment overbreadth is, at the very least, quite problematic.

A third doctrine that — like the *Salerno* test for facial challenges and the First Amendment overbreadth doctrine — must be dramatically reconceptualized is the doctrine of *jus tertii* standing.⁵⁵⁸ The Court has repeatedly invoked this doctrine in cases where a person who falls within the scope of a conduct-regulating rule seeks to invalidate the rule, even though that person is not, or may not be, the moral beneficiary of the constitutional clause upon which he relies. For example, the doctrine was invoked in *McGowan v. Maryland*,⁵⁵⁹ where department store employees were prosecuted for making sales in violation of a Maryland Sunday-closing statute, and challenged their convictions on free exercise grounds;⁵⁶⁰ in *Griswold v. Connecticut*,⁵⁶¹ where doctors who prescribed contraceptives were sanctioned as “aider and abettors” pursuant to a Connecticut statute prohibiting the use of contraceptives, and challenged their sanctions on substantive due process grounds;⁵⁶² in *Eisenstadt v. Baird*,⁵⁶³ where a distributor of contraceptives was sanctioned for violating a Massachusetts statute that prohibited their distribution (not their use), and raised an equal protection challenge;⁵⁶⁴ and in *Craig v. Boren*,⁵⁶⁵ where the statute prohibited the sale of low-alcohol beer to men but not to women

557. The standard response in abortion cases, which have comprised the bulk of substantive due process cases with respect to conduct-regulating rules, has been facial invalidation. See *supra* note 539. In other types of substantive due process scenarios, the Court has resorted to partial invalidation. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down law prohibiting contraception, with respect to use of contraceptives by married persons); *Carey v. Population Servs. Intl.*, 431 U.S. 678 (1977) (striking down law restricting distribution and advertisement of contraceptives, with respect to nonprescription contraceptives).

558. See generally Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (discussing *jus tertii* standing doctrine); Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982) (same); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974) (same).

559. 366 U.S. 420 (1961).

560. See *McGowan*, 366 U.S. at 429-30 (holding that employees lacked *jus tertii* standing with respect to free exercise challenge).

561. 381 U.S. 479 (1965).

562. See *Griswold*, 381 U.S. at 481 (holding that doctors had *jus tertii* standing).

563. 405 U.S. 438 (1972).

564. See *Eisenstadt*, 405 U.S. at 443-46 (holding that distributor had *jus tertii* standing); see also *Carey v. Population Servs. Intl.*, 431 U.S. 678, 682-84 (1977) (holding that distributor had *jus tertii* standing to challenge statute restricting distribution and advertisement of contraceptives).

565. 429 U.S. 190 (1976).

between the ages of eighteen and twenty-one, and a beer vendor challenged the statute on equal protection grounds.⁵⁶⁶

The Court has conceptualized these kind of cases as posing a question of prudential (not Article III) standing:⁵⁶⁷ Did the employee in *McGowan*, the doctor in *Griswold*, the distributor in *Eisenstadt*, and the vendor in *Craig* have “third party” standing to raise the constitutional rights of, respectively, the department store patrons, the doctor’s patients, the distributees of contraceptives, and the vendor’s customers? As the Court explained in *Craig*:

The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory [command], thereby incurring a direct economic injury . . . or to disobey the statutory command and suffer . . . “sanctions and perhaps loss of license.” This Court repeatedly has recognized that such requirements establish the threshold requirements of a “case or controversy” mandated by Art. III.

As a vendor with [Article III] standing to challenge the lawfulness of [the statute prohibiting the sale of beer, she] is entitled to assert those concomitant rights of third parties that would be “diluted or adversely affected” should her constitutional challenge fail and the statutes remain in force. Otherwise, the threatened imposition of governmental sanctions might deter [the vendor] from selling 3.2% beer to young males, thereby ensuring that “enforcement of the challenged restriction . . . would result indirectly in the violation of third parties’ rights.”⁵⁶⁸

The Court concluded that the vendor had “standing to raise relevant equal protection challenges to Oklahoma’s gender-based law.”⁵⁶⁹

But if the Derivative Account is correct, cases such as *Craig*, *Eisenstadt*, *Griswold*, and *McGowan* do not create a standing problem — any more than, say, *R.A.V.*⁵⁷⁰ (where a trespassory and as-

566. See *Craig*, 429 U.S. at 192-97 (holding that vendor had *jus tertii* standing). The doctrine also arises in areas other than substantive challenges to conduct-regulating rules. For recent examples, see *Miller v. Albright*, 118 S. Ct. 1428, 1442 (1998) (O’Connor, J., concurring) (arguing that child lacked *jus tertii* standing to raise equal protection claim of citizen father with respect to naturalization scheme distinguishing between the children of citizen fathers and citizen mothers); *Campbell v. Louisiana*, 118 S. Ct. 1419, 1422-24 (1998) (holding that white criminal defendant had *jus tertii* standing to raise equal protection claim of discrimination against blacks in the selection of grand jurors).

567. On the prudential, rather than constitutional, nature of *jus tertii* standing doctrine, see, e.g., *Craig*, 429 U.S. at 193 (stating that “limitations on a litigant’s assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary ‘rule of self-restraint’ designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative”).

568. 429 U.S. at 194-95 (citations omitted) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

569. 429 U.S. at 197.

570. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

saultive speaker was prosecuted pursuant to a no-hate-speech law) or *Eichman*⁵⁷¹ (where flag burners who took and destroyed flags belonging to others were prosecuted for flag mutilation). In what sense is the vendor in *Craig*, and her counterparts in *Eisenstadt*, *Griswold*, and *McGowan*, relying on the "rights" of other persons, rather than "her own" rights? If "rights," here, are taken to be *moral* rights, then the fact that the vendor and her counterparts are not asserting their own moral rights is not distinct to these cases. Rather, as I have argued at length, the morally derivative cast of constitutional litigants is a pervasive feature of constitutional law. What about saying that the vendor and her counterparts are not asserting their own *legal* rights? This, too, would be a mistake, because if the statutes in *Craig*, *Eisenstadt*, *Griswold*, and *McGowan* do indeed violate constitutional rule-validity schema, there is no reason to think that (morally-minimal) litigants *other* than the persons sanctioned pursuant to those statutes should have the primary legal right to secure the statutes' invalidation.

In short, the issue in *Craig*, *Eisenstadt*, *Griswold*, and *McGowan* is simply an issue about the content of constitutional rule-validity schema. Does the substantive component of the Due Process Clause merely proscribe a rule that prohibits the *use* of contraceptives, or does it also proscribe a rule that prohibits the sale of contraceptives? Does the Equal Protection Clause proscribe rules that discriminate, not on the basis of the actor's race or gender, but rather on the basis of the race or gender of the actor's customers or clients? These are important questions, that go to the content of the moral criteria set forth in the Bill of Rights, and to the role of courts in enforcing these criteria — but the questions have nothing to do with *jus tertii* standing. Framing them in "standing" terms threatens to obscure their correct answers — for example, by suggesting that the vendor in *Craig* and her counterparts in *Eisenstadt*, *Griswold*, and *McGowan* can only proceed to court if the "rights-holders" they purportedly represent are unable to do so themselves.⁵⁷² On the Derivative Account, there is no better litigant to

571. See *United States v. Eichman*, 496 U.S. 310 (1990).

572. See, e.g., *Campbell v. Louisiana*, 118 S. Ct. 1419, 1423 (1998) (stating that the preconditions for *jus tertii* standing are "injury in fact" on the part of the claimant, a "close relationship" between her and the rights-holders, and "some hindrance to [their] asserting their own rights"); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (stating that "the case for according standing to assert third-party rights is strong[] . . . because unmarried persons denied access to contraceptives in Massachusetts . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights"); *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) (denying *jus tertii* standing to employees because "[t]hose persons whose religious rights are allegedly impaired by the statutes are not without effective

challenge a law prohibiting sale, prescription, or distribution, than a vendor, doctor, or distributor.

What about Article III standing itself? The Article III standing requirement, as the Court announced in the leading case of *Allen v. Wright*,⁵⁷³ is the following: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."⁵⁷⁴ Here, too, the Derivative Account has important implications. There is no inconsistency between that account and the existence of an Article III standing requirement. One might say, for example, that it is important to have litigants with interests sufficiently affected by the rules they challenge, so that these persons are likely to litigate with full vigor their claims that the challenged rules do not satisfy applicable rule-validity schema.⁵⁷⁵ Crucially, however, as I have already noted,⁵⁷⁶ a standing requirement is *extrinsic* to the Derivative Account. Constitutional adjudication, intrinsically, involves the repeal or amendment of rules, and *X*'s "constitutional right" is a legal right to secure the invalidation of an invalid rule; it is no entailment of such a right that, further, *X* have a personal interest in that invalidation. *X could* just be a concerned citizen. By contrast, on the Direct Account, *X*'s "constitutional right" is a legal right to secure the invalidation of her own treatment; if she fails to identify some such treatment, some "personal injury," then a necessary condition for the very practice of constitutional adjudication has failed.⁵⁷⁷ The notion of standing is intrinsic to the Direct Account, but not the Derivative Account, and this difference means that the proponents of the two accounts are likely to flesh out *Allen*'s standing requirement in quite different ways.

ways to assert these rights"); RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 195 (4th ed. 1996) (noting that existence of "obstacles to third parties' asserting their own rights" is a recurrent theme in *jus tertii* case law).

573. 468 U.S. 737 (1984).

574. *Wright*, 468 U.S. at 751.

575. Cf. Sunstein, *supra* note 525, at 1448 (noting that a standing requirement has been defended, *inter alia*, as ensuring sincere and effective litigants, but denying that such a requirement is well-matched to that goal).

576. See *supra* text accompanying note 405.

577. For discussions by the Court that link the injury-in-fact, causation, or redressability components of standing to the (allegedly) personal nature of adjudication, see, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992); *Wright*, 468 U.S. at 759-61; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-39 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

The various aspects of Article III standing are too complex to discuss seriatim here.⁵⁷⁸ Rather, I will illustrate my point about the differing implications of the Direct and Derivative Accounts by discussing one aspect that has been particularly salient and contested in recent years. That concerns whether persons who seek more stringent government regulation have Article III standing to challenge a regulatory regime that, they claim, is not stringent enough.⁵⁷⁹ For example, in *Allen v. Wright* itself, black schoolchildren claimed that the Internal Revenue Service's failure to ensure a denial of tax exemptions to racially discriminatory private schools violated the Equal Protection Clause as well as statutory requirements.⁵⁸⁰ The Court held that the schoolchildren lacked standing, given the absence of a clear causal link between the IRS's tax-exemption policies and any concrete harm the schoolchildren might suffer — for example, the harm of attending segregated public schools.⁵⁸¹ And a broadly similar scenario has arisen in other leading Supreme Court standing cases, such as the recent *Lujan* case, where again the Court denied standing to (alleged) beneficiaries (this time, to environmentalists who challenged on statutory grounds the government's failure to enforce the Endangered Species Act abroad);⁵⁸² and in the *Akins* case last Term, where the Court (over the dissent of three members) granted standing to voters who challenged the Federal Election Commission's decision not to proceed with an enforcement action against an alleged violator of the election laws.⁵⁸³

578. For a survey, see CHEMERINSKY, *supra* note 290, § 2.3.

579. See generally *Lujan*, 504 U.S. at 561-62 (stating that Article III standing is much more difficult to establish where the target of the challenged government action, or inaction, is not the claimant herself, but some third party).

580. See *Wright*, 468 U.S. at 740-50.

581. See 468 U.S. at 752-61.

582. See *Lujan*, 504 U.S. 555.

583. See *FEC v. Akins*, 118 S. Ct. 1777 (1998). Other important standing cases where this scenario has arisen include: *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (denying standing) (challenge by indigents to favorable tax treatment, by IRS, of hospitals that fail to provide full services to indigents); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (granting standing) (challenge by environmentalists to decision, by ICC, permitting surcharges by railroads); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (denying standing) (equal protection challenge, by mother of illegitimate child seeking support for that child, to Texas child-support statute that covered only the parents of legitimate children); and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (denying standing) (challenge by environmentalists to forest service's approval of plan by an entertainment company to develop portion of national forest). See also *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998) (denying standing) (suit by environmental group against manufacturer pursuant to "citizen suit" provision of Emergency Planning and Community Right-to-Know Act). Technically, *Sierra Club* and *SCRAP* involved standing under the Administrative Procedure Act, but the issues involved in these cases (injury-in-fact and causation) would now be understood as going to Article III standing.

To put the problem in terms of our stylized cases: imagine that, in ALCOHOL, a rule prohibiting the sale of alcohol to men (but not to women) between the ages of eighteen and twenty-one is challenged on equal protection grounds by an association of bicyclists. The bicyclists believe that women under twenty-one, like men, are prone to driving while intoxicated; they seek, optimally, a judicial extension of the rule to women or, failing that, a judicial invalidation which (they hope) will in turn prompt a legislative extension. Do the bicyclists have standing? The proponent of the Direct Account is likely to say no, for two reasons. First, she will demand a threshold showing of some setback to the bicyclists' interests, such that (the bicyclists will then claim) moral reason obtains to reverse that setback. If, for example, the bicyclists cannot show at the threshold that women between eighteen and twenty-one are indeed prone to drive while intoxicated, then the gender-discriminatory scope of the rule does not affect their safety, and the bicyclists lack the feature of a personal setback which — on the Direct Account — is an integral feature of constitutional adjudication. Second — whether this is seen as a problem of Article III or of prudential standing — the question will arise whether the bicyclists are the moral beneficiaries of the Equal Protection Clause.⁵⁸⁴ Imagine, for example, that the Clause is seen to be animated by the morally unwarranted stigma that flows from discrimination, or by the exclusion of outside groups from political participation.⁵⁸⁵ *Bicyclists* are not stigmatized by the rule in ALCOHOL, nor have they been excluded from the political process. Thus, at least on this reading of the Equal Protection Clause, the proponent of the Direct Account will find it anomalous to let the bicyclists challenge the no-alcohol rule: even if the rule does cause them a personal setback, that setback violates no constitutionalized moral right of *theirs*.

By contrast, for the proponent of the Derivative Account, a personal setback on the bicyclists' part is extrinsic to the process of constitutional adjudication. She may, at the threshold, require some non-trivial probability that the scope of the no-alcohol rule affects their interest in safety or some other suitably personal interest — as a means to ensure sufficiently adverse litigants, or perhaps for other reasons — but she will likely eschew the elaborate thresh-

584. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (holding that standing requires, beyond the existence of a case or controversy, that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

585. For a discussion of possible defenses of the Direct Account grounded upon these rationales, see *supra* section II.B.2; *supra* text accompanying notes 254-55.

old inquiry into the litigant's personal setback that the Direct Account requires, and that was evident in *Allen* and *Lujan*.⁵⁸⁶ As for the fact that the bicyclists, themselves, may not be the moral beneficiaries of the Equal Protection Clause: that is simply irrelevant for the Derivative Account. The Equal Protection Clause, on that account, simply identifies certain morally unwarranted rule-types; any (sufficiently adverse) litigant has the legal right to secure the invalidation of such rules. The bicyclist harmed by the discriminatory rule may, himself, not have a moral claim to overturn that treatment grounded in the Equal Protection Clause; but, then again, neither does the young man who breaches the no-alcohol rule by purchasing beer with a stolen credit card.

A similar point can be made about a constitutional and prudential doctrine closely related to standing: the doctrine of ripeness. This doctrine concerns the *timing* of judicial review. It looks both to the "hardship to the parties of withholding court consideration" and to the "fitness of the issues for judicial decision."⁵⁸⁷ For the proponent of the Direct Account, the ripeness doctrine — like standing — is (at least in part) intrinsic to the very practice of constitutional adjudication. If the litigant has not, yet, suffered "hardship," then there is not yet, for her, a personal setback to which her claim of constitutional right can attach.

Preenforcement challenges to rules pose one major category of ripeness problems.⁵⁸⁸ Can a claimant whose freedom is allegedly restricted by a rule adjudicate her constitutional or statutory challenges to the rule immediately upon its enactment, or must she wait until the rule is enforced against her? The proponent of the Direct Account may well make the claimant wait, at least absent specific evidence that the rule has a coercive effect on the claimant. On the Direct Account, the paradigmatic constitutional suit is a retrospective challenge to some sanction the claimant has received for an action she has already performed. In such a temporal posture, there can no question about the existence of a concrete setback to the claimant. By contrast, in a preenforcement challenge the question remains open whether the rule's duty constitutes a true hardship for claimant: whether she really wants to perform an action covered by the rule and, if so, whether the chance of her being sanc-

586. See *Lujan*, 504 U.S. at 562-71; *Wright*, 468 U.S. at 752-61.

587. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). See generally Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (surveying and discussing ripeness jurisprudence).

588. See CHEMERINSKY, *supra* note 290, § 2.4, at 115.

tioned for that is significant. As the Court explained in *United Public Workers v. Mitchell*,⁵⁸⁹ the high-water mark of a stringent ripeness doctrine, where the Court declined to hear a preenforcement free speech challenge to the Hatch Act (prohibiting political activity by government employees):⁵⁹⁰

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality . . . except when definite rights appear upon the one side and definite prejudicial interferences upon the other.⁵⁹¹

Strains of the Direct Account are clearly audible here.

In the years following *Mitchell*, the Court considerably relaxed the ripeness barrier to preenforcement challenges to rules — most visibly in *Abbott Laboratories v. Gardner*,⁵⁹² which permitted a preenforcement statutory challenge to an FDA regulation, and thereby opened the door to routine preenforcement review within federal administrative law.⁵⁹³ A similar relaxation occurred for constitutional suits. As one commentator has noted: “The Court . . . routinely entertain[s] suits to declare statutes unconstitutional, invoking the ripeness requirement only occasionally.”⁵⁹⁴ But it is, now, far from clear whether this relaxed ripeness regime will continue. The Court took a sharp turn toward renewed stringency in *Reno v. Catholic Social Services, Inc.*,⁵⁹⁵ where it *sua sponte* rejected as unripe a preenforcement class-action challenge to a benefit-conferring rule.

“[I]njunctive and declaratory judgment remedies . . . are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy ‘ripe’ for judicial resolution,” that is to say, unless the

589. 330 U.S. 75 (1947).

590. See *Mitchell*, 330 U.S. at 86-91 (declining to hear preenforcement challenge); 330 U.S. at 91-94 (agreeing to hear challenge by employee who had already been charged by Civil Service Commission with political activity, and where the Commission had entered a proposed order for his removal).

591. 330 U.S. at 89-90.

592. 387 U.S. 136 (1967).

593. See MASHAW, *supra* note 423, at 179 (noting that “[p]reenforcement review has become the norm” within administrative law).

594. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 498 (2d ed. 1994).

595. 509 U.S. 43 (1993).

effects of the administrative action challenged have been “felt in a concrete way by the challenging parties.” . . .

. . . [T]he promulgation of the challenged regulations did not itself give each . . . class member a ripe claim; a class member’s claim would ripen only once he took the affirmative steps [of applying individually for the benefit and being rejected].⁵⁹⁶

The Court has not, yet, extended *Reno*’s renewed stringency to conduct-regulating rules — but there are some hints that it may do just that.⁵⁹⁷

The proponent of the Direct Account will be cheered by *Reno*; the proponent of the Derivative Account will be alarmed. Ripeness, like standing, is extrinsic to the Derivative Account. There is no preference, within that account, for retrospective rather than anticipatory challenges. Just the opposite: if a rule is morally and constitutionally invalid, then, *ceteris paribus*, the rule ought to be repealed or amended as soon as possible. I say “*ceteris paribus*” because there may well be countervailing considerations, acceptable to the Derivative Account, that weigh in favor of postenforcement rather than preenforcement review. For example, as Jerry Mashaw has noted, “review at the application stage . . . provid[es] a better information base.”⁵⁹⁸ Further, by invoking the threat of preenforcement review against an administrative agency, organized litigants may be able to force changes, benefiting themselves, in the terms of perfectly valid rules. These kind of considerations may, perhaps, lead the proponent of the Derivative Account to concur in a tightening of the ripeness requirements for anticipatory challenges. What is the optimal timing for constitutional challenges, such that invalid rules are maximally repaired, yet with minimal judicial interference against the enforcement of valid rules? It is upon *that* question, and not upon some further preference for a

596. *Catholic Social Servs.*, 509 U.S. at 57, 59 (footnote and citations omitted) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); cf. 509 U.S. at 67-70 (O’Connor J. concurring in the judgment) (criticizing majority’s ripeness holding); 509 U.S. at 77-83 (Stevens, J., dissenting) (same).

597. See 509 U.S. at 58 (suggesting that “a controversy concerning a regulation is not ordinarily ripe for review . . . until the regulation has been applied to the claimant’s situation by some concrete action”); *Renne v. Geary*, 501 U.S. 312, 320-23 (1991) (finding unripe anticipatory, free-speech challenge to provision of California Constitution — albeit enforceable only by injunction — that prohibited political parties from endorsing candidates for nonpartisan offices); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (holding that statute precluded preenforcement challenge, by mine operator, to sanction-backed agency order requiring operator to designate union members as representatives for safety inspections at mine). For recent evidence, in other contexts, of the Court’s seriousness about ripeness doctrine, see *Texas v. United States*, 118 S. Ct. 1257 (1998), and *Ohio Forestry Association v. Sierra Club*, 118 S. Ct. 1665 (1998).

598. MASHAW, *supra* note 423, at 179.

maximally concrete harm to the litigant that, within the Derivative Account, the viability of preenforcement review should hinge.

The points I am making here could be multiplied, and applied to other procedural doctrines besides ripeness, standing, and the others I have discussed. Virtually any procedural doctrine will be viewed one way within the Direct Account, and another way within the Derivative Account. Consider, for example, abstention doctrine. The Court's announcement, in *Younger v. Harris*,⁵⁹⁹ that a federal court must abstain from issuing an injunction against a state criminal statute where a prosecution of the claimant pursuant to that statute has already begun, was clearly shaped by the view that the sweeping relief effected by an injunction was not the kind of relief inherent to constitutional rights: "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision."⁶⁰⁰ Or consider nonacquiescence doctrine, which I discussed above in section III.B.2. Here, it is the Derivative Account, not the Direct Account, that makes an intrinsic demand upon this procedural doctrine: intrinsic to the Derivative Account is the proposition that (most or all) nonjudicial actors should acquiesce in judicial decisions declaring statutes to be invalid, at least where the relevant courts are unanimous. By contrast, the proponent of the Direct Account can be agnostic about nonacquiescence.⁶⁰¹

But it bears emphasis that the deepest implications of the Derivative Account are substantive, not procedural. The Direct Account makes stringent demands on the content of substantive constitutional doctrines. How can moral reason obtain to overturn *X*'s own treatment, independent of further invalidating the rule under which that treatment falls? Someone who stipulates the existence of such reason, as an entailment of *X*'s constitutional right, must choose one of two options. Either she abandons the Basic Structure entirely, and therewith the judicial focus on the predicate and history of rules. In that event, constitutional adjudication changes radi-

599. 401 U.S. 37 (1971).

600. *Younger*, 401 U.S. at 52. Relatedly, and even more fundamentally, the proponents of the Direct and Derivative Accounts may well disagree about the proper scope of the fiction established by *Ex parte Young*, 209 U.S. 123 (1908), permitting federal suits for prospective relief against state officers despite the Eleventh Amendment. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2038-40 (1997) (opinion of Kennedy, J.) (arguing that *Ex parte Young* should be applied on a case-by-case basis to suits for prospective relief, rather than automatically).

601. See *supra* notes 499-513 and accompanying text (discussing nonacquiescence).

cally, and becomes a moral inspection of *X*'s action or actions rather than of some rule that *X* challenges. Or, less radically, she identifies some feature of rules such that sanctioning actors pursuant to rules with that feature violates their moral rights independent of the proscribability of their actions under different descriptions. But what would such a feature be? If anything, it would be the *discriminatory* cast of a rule. Sanctioning *X* pursuant to a discriminatory rule can violate her nonepistemic moral rights, as in the case of racial stigma. Failing that, it can arguably violate her epistemic moral rights, insofar as discrimination evidences false beliefs, among legislators, about the moral relevance of the rule-predicate.⁶⁰²

So, if the Direct Account obtains, constitutional law should become a series of antidiscrimination norms: norms that constrain rules not to discriminate on the basis of gender, race, speech, or religion. At a minimum, a right against discrimination should become the central and animating paradigm of a constitutional right. And indeed, in recent years, the Court has become increasingly concerned with the discriminatory cast of rules, to the exclusion of other moral failings that the Derivative Account might recognize. In *Smith*,⁶⁰³ the Court reworked its free exercise doctrine so as to eliminate any right of religious actors to be exempt from nondiscriminatory rules;⁶⁰⁴ in the area of free speech, too, "content discrimination" has become the major if not quite exclusive trigger for judicial intervention.⁶⁰⁵ Has this trend, in fact, been caused by the Justices' adherence to the Direct Account? Who knows. Should it be reversed, if the Derivative Account is instead correct? Not necessarily — for there may be independent reasons why the Discrimination Schema should be the sole or main rule-validity schema within that account.

I tend to doubt that such reasons exist. The Liberty Schema, not just the Discrimination Schema, is integral to constitutional law — or so I have already argued.⁶⁰⁶ But the point I want to make here is a more basic one. Assume, for example, that the constitutional criterion of "free speech" picks out some liberty (some type

602. See *supra* section II.B.2; *supra* text accompanying notes 218-19 (discussing possible nonepistemic and epistemic defenses of Direct Account, linked to concept of discrimination).

603. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

604. See *supra* text accompanying notes 109-13 (discussing change in free exercise doctrine worked by *Smith*).

605. See *supra* note 357 and accompanying text (noting increasing focus, in free speech doctrine, on rules that discriminate against speech or speech-types).

606. See *supra* text accompanying notes 358-69.

of action it is morally important for persons to be free to perform, absent overriding reason); that judicial invalidation of rules abridging the liberty of speech is not self-defeating; and that courts are epistemically, democratically, and otherwise well placed to identify some such rules.⁶⁰⁷ If so, courts should invalidate (some) rules that violate the liberty of speech, whether or not those rules are discriminatory. There is no bias, within the Derivative Account, toward rule-validity schema that preserve the "personal" cast of constitutional rights, since constitutional rights do not have such a cast. Discrimination may or may not be definitive of constitutional rights; but on the Derivative Account, there is nothing about the moral content of constitutional rights that requires it to be. The Direct Account — if its implications were truly drawn — would tightly constrain the ways in which rules can be constitutionally invalid. In this sense, the Direct Account encapsulates an argument for judicial restraint, within the very concept of a constitutional right. The Derivative Account, the correct account, does not.

607. These are, within the Derivative Account, the individually necessary and jointly sufficient conditions for rules violating the liberty of speech (in the sense set forth by the Liberty Schema) to be properly invalidated by constitutional reviewing courts. On the problem of self-defeating review, see *supra* text accompanying notes 361-64; on the problem of the epistemic and remedial capacities of courts, see Adler, *supra* note 4, at 771-80.