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# THE HETEROGENEITY OF RIGHTS

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## INTRODUCTION

If there is a constitutional right to *R*, and a law *L* by its terms prohibits *R*, *L* cannot be validly applied to some person *P*'s exercise of *R*. For at least two reasons, however, most cases involving claims of constitutional right are substantially more difficult than this schematic example. First, lawmakers rarely act so rashly as to proscribe rights in so many words.<sup>1</sup> Second, even facially invalid laws typically include within their sweep much unprotected activity.<sup>2</sup>

These two complications give rise to two familiar doctrinal questions. The first is the problem of *incidental burdens*.<sup>3</sup> When, if ever, does the Constitution bar the application of a generally valid law because in the particular circumstances the law infringes an individual right? The second complication gives rise to the doctrinal issue of *facial challenges*.<sup>4</sup> If *P*'s conduct *C* violates some rights-violating law *L*, but *C* is not constitutionally privileged (and therefore could be proscribed under a different, valid law), does *P* have a valid defense to a prosecution under *L*, or would that be an impermissible effort by *P* to raise the rights of third parties?

The incidental burdens problem and the facial challenges problem are mirror images. In an incidental burden case, the validity of *L* is largely irrelevant; what matters is whether the conduct *C* is an exercise of some protected

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1. *But see* Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (invalidating a ban on all "First Amendment activities" at the main terminal of the Los Angeles International Airport).

2. For example, a law forbidding "prayers or offerings to any god but the Christian God" prohibits, inter alia, involuntary human sacrifice to the Aztec god Huehuetotl, *see* Johanna Broda et al., THE GREAT TEMPLE OF TENOCHTITLAN 68–70 (1988), which ought to be unprotected even under the broadest reading of the Free Exercise Clause.

3. *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

4. *See generally* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 236 (1994).

right  $R$ .<sup>5</sup> Conversely, in a facial challenge case, the protected or unprotected character of  $C$  is irrelevant; what matters is whether  $L$  is a valid rule of law.

Should a system of constitutional rights require that courts sometimes focus on conduct but not laws and other times focus on laws but not conduct? In general, would it not be better if we had one consistent approach to these questions? This sort of unifying impulse underlies Matthew Adler's argument that "[c]onstitutional rights in our own legal world are structured, not as shields *around* particular actions, but as shields *against* particular rules."<sup>6</sup> Even in a typical as-applied challenge, he contends, all that is at issue is whether  $L$  impermissibly picks out certain features of  $P$ 's conduct  $C$ ; courts do not inquire whether  $C$  is privileged, simpliciter.

In contrast with Adler's unifying approach, this article argues that our constitutional rights are heterogeneous, and properly so. Part I addresses incidental burdens. Even if some rights are rights against rules, others are rights, simpliciter. The aim of Part I is not so much to convince the reader that any particular right should be understood as more than a right against rules. Instead, Part I contends that whether to conceive of a given right as more than a right against rules depends on often difficult, substantive questions that vary depending on the right in question. The argument aims to dislodge the view that, as Adler claims in his contribution to this conference, constitutional doctrine is "pervasively rule-dependent,"<sup>7</sup> or as the United States Supreme Court opined in *Employment Div., Dept. of Human Resources v. Smith*<sup>8</sup> (the peyote case), "a private right to ignore generally applicable laws" would be "a constitutional anomaly."<sup>9</sup>

Part II addresses the question of when a litigant may bring a facial challenge. I argue that the key to answering this question is ascertaining whether and when it is proper to sever a challenged rule into the sum of its parts or applications. When  $P$ , whose own conduct  $C$  could be proscribed by a valid law, challenges  $L$  on the ground that  $L$  infringes constitutional right  $R$ , the courts might presume or conclude that  $L$  consists of two severable parts:  $L_U$ , the law in its unconstitutional applications; and  $L_V$ , the law in its valid applications.<sup>10</sup> If they do so, then the case does not involve the

5.  $L$  is not entirely irrelevant, however. Under the typical approach used by courts that do entertain incidental burden claims, even if  $P$  succeeds in showing that  $L$  burdens  $R$ , the government may justifiably override  $R$  by showing that  $L$  advances sufficiently important government interests. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 227 (1972) (finding that the state had not made a sufficiently "particularized showing . . . to justify the severe interference with religious freedom [that] additional compulsory attendance would entail").

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

7. Matthew Adler, *Personal Rights and Rule-Dependence: Can the Two Coexist?* 6 LEGAL THEORY (forthcoming 2000) (October 1999 draft at 60).

8. 494 U.S. 872 (1990).

9. *Id.* at 885.

10. I am assuming that  $L_U$  and  $L_V$  are mutually exclusive and that  $L = L_U + L_V$ . I do not assume, however, that the line between  $L_U$  and  $L_V$  is always easy to draw. See *infra* at 284–85. (discussing vagueness).

application of the invalid rule  $L$  but the valid one  $L_V$ . Knowing when facial challenges will be allowed is therefore a matter of knowing whether severance can cure the constitutional harm, and if it can, whether there is nonetheless some special reason, such as a chilling effect, not to sever.

Part III briefly explores connections between the incidental burden and facial challenge questions. I show that there is considerable tension between the narrow view of incidental burdens and the narrow view of facial challenges, even though Justice Scalia (among others) has championed both. I then consider, but ultimately reject, the objection that my own approach to both of these questions conflicts with the rule of law.

## I. RIGHTS AS PRIVILEGES

I have elsewhere observed that “[a] law imposing a direct burden will be permitted to override a fundamental right only if the law is narrowly drawn to serve a compelling interest, [while i]n contrast, laws imposing incidental burdens trigger more deferential judicial scrutiny.”<sup>11</sup> Thus, as a descriptive matter, I agree that Adler’s basic view of all rights as rights against rules is a plausible first-order approximation of much Supreme Court doctrine. However, there are a number of important ways in which constitutional doctrine departs from this first-order approximation, and in some cases in which the approximation is descriptively accurate I would argue that the doctrine should be modified.

### A. Diversity in Rights

When someone says that  $P$  has a right to  $R$ , she might mean that  $R$  shields  $P$ ’s conduct  $C$  only to the extent that some rule of law  $L$  picks out the  $R$ -ness of  $C$ .<sup>12</sup> If so,  $R$  is only a right against rules. On the other hand, our linguistic practices certainly allow that, in some contexts, to say that  $P$  has a right to  $R$  means that  $R$  provides a shield against all interferences with any conduct  $C$  that constitutes an exercise of  $R$ . If so,  $R$  is what I have been calling a right, simpliciter.<sup>13</sup>

11. Dorf, *supra* note 3, at 1177–78.

12. I say “shields” rather than “trumps” in recognition of the possibility that a right may sometimes be justifiably overridden. See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 430 (1993).

13. I acknowledge that even a right against incidental burdens is itself a kind of right against rules rather than a pure right, simpliciter. Suppose Smith were to steal peyote in order to use it as part of a religious ritual. A sensible regime—indeed the one I favor—would give Smith a meritorious defense against a prosecution for peyote use but not against a prosecution for theft. Thus, Smith’s putative right not to be subject to incidental burdens on his religion is not a right against all rules. Nonetheless, purely for expository reasons, I want to resist treating rights against incidental burdens as a species of rights against rules, because to do so might suggest that in an incidental burden case the putative right-holder alleges that there is something defective in the rule applied. In the example above we might be tempted to think

Is there any reason to suppose that notwithstanding the fact that the term “right” can be used in either of these two ways, *constitutional rights* should be rights against rules? My rather timid answer is: It depends. The constitutional rights recognized by the Supreme Court serve distinct purposes, are grounded in distinct texts, and have distinct histories. It would be remarkable indeed, therefore, if they all had the same structure.

Rights against executive or private, rather than legislative, action will typically take the form of rights not to have certain states of the world exist, rather than of rights not to be judged by certain kinds of rules. A right against unreasonable use of force by the police is one example. Rights against various kinds of punishment provide another. If *P* has a right not to be executed (because, say, *P* did not commit murder), then *P*'s execution violates that right, regardless of the content of the rule that formally authorizes it.<sup>14</sup> The constitutional right against slavery, which applies against private actors, is similarly unconnected to any rule.

But even if we focus only on constitutional rights against legislative action, there is no general reason to rule out the possibility that some rights are rights, simpliciter, especially given the fact that laws that do not target rights can, nevertheless, place stringent burdens on the exercise of rights. The remaining sections of this part argue that the judgment whether a right should be conceptualized as a right against rules or as a right, simpliciter, turns principally on substantive considerations about the particular right, rather than any deep fact about the structure of rights.

## B. Religion and Equality

Since the peyote case, a great many legal scholars have addressed the question whether the Free Exercise Clause should be interpreted to require some exemptions from generally applicable laws.<sup>15</sup> This is partly a historical

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that the peyote use prohibition is, from the standpoint of free exercise of religion, worse than the theft prohibition. But if that is so, it is purely an artifact of the case I have put. In my example, Smith engaged in the compound act of (1) stealing peyote + (2) using peyote. We have been assuming that only part (2) is a religious ritual. If Smith's religion also required that the peyote be stolen, then, under a regime that takes incidental burdens seriously, he should have a valid objection to the theft prohibition as well, where a valid objection means that the prohibition would be subject to some form of heightened scrutiny. Thus, I shall use the term right, simpliciter, synonymously with a right to be protected against incidental as well as targeted burdens.

14. Adler himself, in recognizing the limits of his descriptive claim, gives torture as yet another example. See Adler, *supra* note 7, at 7.

15. See Dorf, *supra* note 3, at 1210–19; Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Ira C. Lupu, *To Control Faction And Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). See also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV.

question about the intentions and understandings of those who adopted the First Amendment,<sup>16</sup> but given the ambiguity of the historical material it is also very much a normative question. The normative argument in favor of (some) religious exemptions is straightforward: A law forbidding a religiously mandated practice or requiring a religiously prohibited one burdens the practice of religion whether the law targets religion or applies to everyone; thus, a right to freedom of religion ought to shield religious practices against infringements by generally applicable laws, at least in the absence of a very good justification for overriding the religious practice.

Although many arguments have been offered against any religious exemptions from laws of general applicability, the most powerful one concerns equality: Why should religious obligations be privileged over equally or more demanding nonreligious obligations that may conflict with generally applicable laws? Under the approach of the Religious Freedom Restoration Act ("RFRA") of 1993,<sup>17</sup> Sherbert's religious objection to working on Saturdays would entitle her to circumvent a state's ordinary rules governing eligibility for unemployment benefits,<sup>18</sup> while Atheist's moral obligation to visit her ailing father on Saturdays (the only day the ferry runs to the remote island where he is hospitalized), would receive no protection. Similarly, Smith would be entitled to a religious exemption from a prohibition on peyote use, but cancer victim Rutherford would not be entitled to an exemption from a marijuana prohibition to overcome the nausea associated with chemotherapy.<sup>19</sup> At best, the disparate treatment of religious and other claims seems unfair, and at worst it will strike some as a violation of the Establishment Clause.<sup>20</sup>

On the strength of such comparisons, one might reasonably conclude that religious claims should not be privileged over nonreligious claims that a law is especially burdensome. That conclusion is hardly inevitable, however. The text of the First Amendment itself—protecting the "free exercise"

1465 (1999) (proposing that state courts grant common-law exemptions from generally applicable laws, subject to legislative override).

16. Compare *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172–75 (1997) (Scalia, J., concurring in part) (arguing that *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), reflects the original understanding) and Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (same) with *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 575–76 (1993) (Souter, J., concurring in part and concurring in the judgment) (arguing that *Smith* does not reflect the original understanding) and Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (same).

17. 107 Stat. 1488, 42 U.S.C. § 2000bb et seq. (1994).

18. See *Sherbert v. Verner*, 374 U.S. 398 (1968); 42 U.S.C. § 2000bb-(b)(1) (1994).

19. Cf. *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (holding, as a matter of statutory interpretation, that drugs for the treatment of terminally ill patients are subject to the same approval process as other drugs).

20. See *City of Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring). See also, Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 98; Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997) (arguing that RFRA was unconstitutional because it dictated state-religion relations).

of “religion,” rather than “conscience” or “strongly felt obligations”—suggests one basis for distinguishing religious from nonreligious needs. In addition, there is a plausible argument to be made that religious obligations are felt more strongly than nonreligious ones.<sup>21</sup>

Further, one might draw the line at religious obligations on a floodgates rationale: Although in principle any law can run counter to some idiosyncratic religion’s tenets, in practice there is a sensible line to be drawn between genuine and sham religious claims;<sup>22</sup> considerably greater and more subjective judgments about the burdensomeness of particular laws to particular persons would be required under a regime that permitted exemptions for nonreligious grounds.

Moreover, because “[r]eligious obligations are obligations to submit to the norms of what Robert Cover called a *nomie* community—a community that is a source of norms for its members,” we might conclude that granting religious exemptions recognizes a “dimension of plural sovereignty [that] is absent in the case of claims based on an individual’s moral or other nonreligious grounds for objecting to a generally applicable law.”<sup>23</sup> Thus, recognizing religious, but not nonreligious, obligations as the basis for exemptions from generally applicable laws does not necessarily deny equal treatment because religious and nonreligious claimants are dissimilarly situated in relevant respects.

Finally, to the extent that the equality critique challenges the unequal treatment of persons of different faiths—Christians must obey laws prohibiting peyote use while members of the Native American Church claim an exemption—it rests on questionable premises. Why is this necessarily unequal treatment? Under an RFRA-like regime, persons of all faiths would be entitled to exemptions from laws that substantially burden their religion without a compelling justification. The advantages such a regime confers on minority religious groups can be understood as compensating for the built-in bias towards mainstream faiths reflected in the supposedly neutral laws. On this view, it is no coincidence that even during Prohibition the sacramental use of wine was permitted,<sup>24</sup> but that peyote is classified as an illegal drug.

In any event, even if one finds the equality-based argument against religious exemptions persuasive, it is only an argument about whether to recognize *religious* exemptions; it is not an argument that constitutional

21. See John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996). See also Michael J. Sandel, DEMOCRACY’S DISCONTENT 61–71 (1996).

22. See, e.g., *United States v. Kuch*, 288 F. Supp. 439, 444 (D.D.C. 1968) (rejecting defendant’s claim that she was a member of the Neo-American Church—headed by “Chief Boo Hoo” and having the motto, “Victory over Horseshit”—and thus required by her faith to ingest as well as distribute marijuana and LSD).

23. Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 YALE L.J. 843, 852 (1998) (citing Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5, 24–33 (1983)).

24. See *Smith*, 494 U.S. at 913 n.6 (Blackmun, J., dissenting).

rights *in general* are or ought to protect only against rules targeting rights. To be sure, by calling the regime it rejects constitutionally anomalous,<sup>25</sup> the *Smith* Court seems to say that its argument for formal equality in religion cases is the same, and of the same strength, as the argument for formal equality in constitutional law generally. But is this correct? As a descriptive matter, perhaps it is: Conceptions of formal equality tend to dominate the Supreme Court's current views, as is most obvious in cases involving racial classifications.<sup>26</sup> However, and this is the point I wish to emphasize, there is nothing in the structure of constitutional rights that leads to a formal conception of equality across the board. Academics and others have long criticized the Court's seeming commitment to formal equality as opposed to more substantive conceptions of equality,<sup>27</sup> and the Court has begun to take some of this criticism to heart, especially in sex discrimination cases.<sup>28</sup>

Indeed, consider the range of issues implicated by the choice between formal and other conceptions of equality. Should affirmative action programs that benefit traditionally disadvantaged racial minorities be subject to a lower level of judicial scrutiny than other government programs that facially discriminate on the basis of race? Should a disparate impact on a racial group ever be sufficient, by itself, to establish unconstitutional race discrimination? Should a generally applicable law that conflicts with a religious obligation be subject to heightened judicial scrutiny? These are important and controversial questions of constitutional law, and because they turn on quite different sorts of judgments, one can envision a reasonable argument for any combination of answers. That current doctrine answers no to each of these questions does not reflect any deep fact about constitutional rights, nor does the *Smith* Court nor any of *Smith's* academic defenders offer any reason to think it does.<sup>29</sup>

25. See *id.* at 885 (opinion of the Court).

26. See *Washington v. Davis*, 426 U.S. 229 (1976); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

27. See, e.g., Martha Albertson Fineman, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 175 (1991); Catherine A. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 35 (1987) (critiquing, but also expressing fondness for the accomplishments of, formal equality); Martha Minow, *MAKING ALL THE DIFFERENCE* 76–77 (1990). For a subtle account of the doubts about formal equality feminists themselves harbored, see Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument For Pragmatism and Politics*, 40 *WM. & MARY L. REV.* 209 (1998).

28. See Amy H. Nemko, *Single-sex Public Education After VMI: The Case For Women's Schools*, 21 *HARV. WOMEN'S L.J.* 19 (1998) (arguing that *United States v. Virginia*, 518 U.S. 515 (1996), should not be read to prohibit all-female public secondary schools). The Pregnancy Discrimination Act's amendment to Title VII, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1994), which deems pregnancy discrimination a form of sex discrimination, could be seen as a rejection of formal equality in favor of a more substantive vision of equality. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (applying the Act).

29. Indeed, at the time *Smith* was decided, the answer to the first question was not no but sometimes. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (applying intermediate scrutiny to a federal affirmative action program).

## C. Freedom of Speech

Because of “the pervasiveness of government regulation in the modern state”<sup>30</sup> no functional constitutional system could subject all laws that burden free speech to heightened judicial scrutiny. For example, “newspapers can properly be made to comply with the antitrust laws, to obey generally applicable labor laws, and to pay taxes imposed under a generally applicable tax scheme.”<sup>31</sup> Moreover, although American constitutional doctrine nominally applies a least-restrictive-means test to content-neutral laws that burden speech,<sup>32</sup> in practice this test amounts to a quite deferential approach to incidental restrictions.<sup>33</sup> To be sure, there are exceptions: For example, under the “public forum doctrine,” the application of a law prohibiting blocking sidewalks to someone distributing political pamphlets or speaking on a soapbox would be subject to more exacting scrutiny than the application of the same law to someone engaging in nonexpressive activity such as selling lemonade.<sup>34</sup> But given the government’s ability to designate most public property for particular noncommunicative uses,<sup>35</sup> public forum doctrine is itself at best a limited exception to the principle of deferential review of incidental burdens on speech,<sup>36</sup> and arguably an unjustified exception at that.<sup>37</sup>

Nonetheless, the Supreme Court’s general reluctance to subject laws imposing incidental burdens on free speech to heightened scrutiny does not reflect a deep principle about the right of free speech,<sup>38</sup> much less a deep principle about constitutional rights. Consider the question whether

30. Dorf, *supra* note 3, at 1201.

31. Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 779–80 (1985). Accord Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105 (1987).

32. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (stating a requirement that “the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest”). To the extent that incidental burdens on speech trigger more scrutiny than do incidental burdens on religion, the doctrine appears to be backwards. In general, a person whose speech rights are burdened by a neutral law can find alternative, if not quite as effective, means to express his opinion, but it is often in the nature of religious obligations that they do not admit of substitutes.

33. See Larry Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 925–26 (1993). Alan Brownstein observes that the lower courts have applied the test less deferentially, see Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 115–16 n.45 (1999), but with one exception, see *Gaudiya Vaishnava Society v. City of S.F.*, 952 F.2d 1059 (9th Cir. 1990), all of the cases he cites involve (content-neutral) laws that target expressive activity, rather than the application of general laws to expressive activity.

34. See Schauer, *supra* note 31, at 787–89.

35. See *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (holding that an airport is not a public forum).

36. See Schauer, *supra* note 31, at 789.

37. See Alexander, *supra* note 33, at 931–48.

38. See Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1819 (1999) (“There is no general right of free speech.”). Accord Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1271 (1995).



the First Amendment should be interpreted to afford newspaper reporters a qualified privilege not to be compelled to reveal their sources in judicial proceedings. The Court rejected such a privilege in *Branzburg v. Hayes*<sup>39</sup> in terms that may appear to have foreshadowed its analysis in the peyote case. The Court explained that under the challenged rule of evidence, news gathering is not subject to any special burdens, and, citing cases applying labor and antitrust laws to the press, as well as the fact that reporters have no special right of access to crime or accident scenes, rejected the claim to an exemption.<sup>40</sup> Yet the cited precedents hardly should have been dispositive. Application of the general principle that the law is entitled to every person's evidence imposes a much more serious burden on newspapers than on other enterprises, in a way that application of the labor or antitrust laws does not. Whether the *Branzburg* majority or the four dissenting Justices had the better of the argument is not my concern here. The main point is that the question should be answered by considering the particulars of the exemption claimed, as all of the Justices in *Branzburg* sought to do. In short, there would be nothing anomalous about a constitutional regime that interpreted its free speech/free press norm to encompass a reporter-source privilege.<sup>41</sup>

In denying that the Supreme Court's rejection of heightened scrutiny for incidental burdens in most religion and speech cases reflects a deep principle about constitutional rights, I do not mean to deny that the cases present related issues. For example, it counts against the claim that the press is entitled to reserved seats in a courtroom or special access to crime scenes, accident sites, and battlefields that granting such seats or access would require courts to draw lines distinguishing the institutional press from self-appointed freelancers, and that such lines are themselves at odds with principles of free speech. This argument has the same structure as a standard argument against granting religious exemptions from generally applicable laws: To do so requires courts to decide what counts as a religious belief, and that determination may itself be at odds with the anti-Establishment principle. But the structural similarity hardly implies that the respective arguments are equally persuasive or unpersuasive. Just as arguments based on concerns about slippery slopes, group action, or moral hazard vary in their persuasiveness depending on context, so too, claims

39. 408 U.S. 665 (1972).

40. *See id.* at 682–84.

41. Most states have recognized such a privilege by statute. *See, e.g.*, CAL. EVID. CODE § 1070 (West 1995); MICH. COMP. LAWS § 767.5a (West Supp. 1999); N.J. STAT. ANN. § 2A:84A-21 (West 1994). In a related context, the House of Lords found that a prison regulation completely barring reporters from interviewing prisoners was ultra vires as applied to the case of a prisoner hoping to reveal a miscarriage of justice. *See Regina v. Secretary of State for the Home Dep't Ex Parte Simms* (1999) (visited Sept. 7, 1999) <<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm>>. This may be as close as a court may come to granting exemptions from generally applicable laws in a system with parliamentary supremacy.

about the dangers of granting right-holders exemptions from generally applicable rules vary depending on the right (and other circumstances).

#### D. Rights of the Poor

The premise that constitutional rights are typically negative rights has rendered most claims to government resources unsuccessful.<sup>42</sup> Nonetheless, in cases involving access to the courts, established doctrine recognizes an indigent's right to, inter alia, free counsel for a criminal trial<sup>43</sup> and appeal,<sup>44</sup> a free trial transcript when necessary for appeal,<sup>45</sup> and the waiver of a filing fee for a divorce.<sup>46</sup> Significantly, the result in each of these cases was to grant special exemptions from the general norm, leaving the challenged procedure in place in cases not involving indigents. For example, the well-known *Miranda* warnings inform suspects in custody that they have the right to free counsel, but only if they cannot afford to hire counsel.<sup>47</sup> The court access cases refute the descriptive claim that constitutional rights are invariably rights against rules.

One might, of course, think that the indigents' court access cases are simply wrong, that if it is permissible for the government to charge anyone a user fee for some service (such as filing for divorce) or to fail to provide someone financial assistance in some matter (such as hiring a criminal defense attorney), then it is permissible to charge the fee or fail to provide the service in all cases. On this view, discrimination against the poor would only be found where a law expressly distinguishes between rich and poor.<sup>48</sup> A thoroughgoing formalist might well argue in favor of such a regime based on analogies to *Smith* and *Washington v. Davis*.<sup>49</sup>

For me, however, and I suspect for most readers, this argument is a *reductio ad absurdum*, suggestive of Anatole France's aphorism that "the majestic equality of the law . . . forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."<sup>50</sup> More pertinently, the indigents' court access cases illustrate the two principal points of this Part. First, as a descriptive matter, some constitutional rights are rights, simpliciter, rather than rights against rules. Second, unless one is committed to a deep formalism for formalism's sake, the decision whether to

42. See, e.g., *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

43. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

44. See *Douglas v. California*, 372 U.S. 353 (1963).

45. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

46. See *Boddie v. Connecticut*, 401 U.S. 371 (1971).

47. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

48. See *Edwards v. California*, 314 U.S. 160 (1941) (invalidating a California law that prohibited knowingly bringing a nonresident indigent into the state).

49. 426 U.S. 229 (1976).

50. Anatole France, *LE LYS ROUGE* 111–23 (1894), quoted in *THE OXFORD DICTIONARY OF QUOTATIONS* 292 (Angela Partington ed., 4th ed. 1992).

conceptualize any particular right as a right against rules or as a right, simpliciter, will depend on a great many factors that vary depending on the right in question.

## II. FACIAL CHALLENGES AND THE UTILITY OF SEVERABILITY DOCTRINE

In a facial challenge, a litigant claims that some rule is invalid, regardless of whether she had a right, simpliciter, to engage in some particular course of conduct. When should the courts entertain such a challenge? That question has inspired a surprising degree of rancor. In part this may reflect the fact that the issue has often arisen in the emotionally fraught context of abortion,<sup>51</sup> although the Justices' unusually strong views have spilled over into other substantive domains as well.<sup>52</sup> The resulting doctrine and much of the commentary on it are rather confused. I argue in this Part that severability analysis can eliminate much of the confusion.<sup>53</sup> I do not offer a complete prescription for all facial challenges questions here because, as with the question of rights against rules versus rights, simpliciter, I contend that ascertaining when a facial challenge should be permitted turns on often-difficult substantive questions of constitutional law. I argue only that understanding the facial challenges debate as a debate about when courts may sever portions and applications of statutes would clarify the real stakes.

### A. Severability Preliminaries

Recall the basic outline of the facial challenges problem. When  $P$ , whose own conduct  $C$  could be proscribed by a variety of valid laws, challenges  $L$  as unconstitutional, the courts sometimes presume that  $L$  consists of two severable parts:  $L_U$ , the law in its unconstitutional applications; and  $L_V$ , the law in its valid applications. When the courts do entertain this presump-

51. See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (opinion of Stevens, J., respecting the denial of certiorari); *id.* at 1176–81 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., joined by Souter, J., concurring); *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from the denial of certiorari).

52. See *City of Chicago v. Morales*, 119 S. Ct. 1849, 1871 (1999) (Scalia, J., dissenting) (asserting that "in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the 'unconstitutional in every conceivable application' rule, when the statutes at issue concerned hot-button social issues on which 'informed opinion' was zealously united," such as "homosexual rights" and "abortion rights").

53. Richard Fallon deserves credit for focusing attention on severability in this context. See Richard Fallon, *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 871–74 (1991). Another useful effort to clarify matters is Alfred Hill, *The Puzzling Overbreadth Doctrine*, 25 *HOFSTRA L. REV.* 1063 (1997) (explaining how the Court and commentators have paid inadequate attention to the remedial consequences that follow from an overbreadth ruling).

tion, then, so long as  $L_U$  is not coextensive with  $L$ ,  $P$ 's facial challenge to  $L$  will fail because, by definition, the application of valid rule of law  $L_V$  to unprotected conduct  $C$  is constitutionally unobjectionable. Even if  $L$  violates some right against rule  $R$ ,  $L_V$  does not. Although I have criticized the Supreme Court's willingness to employ the severability presumption in some contexts, where it holds, the case of *United States v. Salerno*<sup>54</sup> states the proper test: A facial challenge will only succeed if "no set of circumstances exists under which the Act would be valid,"<sup>55</sup> i.e., if  $L_U$  and  $L$  are co-extensive.

Subparts B–E of this Part map the domain to which the severability presumption and, more generally, the remedy of severance, legitimately apply. Before coming to the details of my mapping, however, I need to address a threshold objection to the very enterprise of judicial severance. If the legislature has enacted a law  $L_1$ , the objection goes, the courts should either enforce  $L_1$  or, if it is invalid, so declare and leave to the legislature the task of enacting its valid cousin,  $L_2$ ; the courts have no business replacing  $L_1$  with  $L_2$ .

At the limit, the objection is clearly correct. Suppose, for example, that the city council enacts an ordinance  $L_1$ , which provides: "It shall be an offense to give a public address in the town square even if the speech in question is not incitement as that term has been defined by the United States Supreme Court." If this law is challenged as invalid under the First Amendment, it would go well beyond the standard conception of judicial role for a court to "cure" the defect by replacing  $L_1$  with  $L_2$ , which provides: "It shall be an offense to ~~give a public address~~ litter in the town square even if the ~~speech~~ littering in question is not incitement as that term has been defined by the United States Supreme Court."  $L_1$  addressed speech in the town square, while  $L_2$  addresses a wholly separate matter, littering. Even though  $L_2$  preserves most of the words of  $L_1$ , its content is almost wholly unrelated to the law actually enacted by the city council.<sup>56</sup> It is, to employ a much-abused term, judicial legislation.

Suppose, however, that a court were to substitute  $L_3$  for  $L_1$ , where  $L_3$  provides: "It shall be an offense to give a public address in the town square ~~even~~ if the speech in question is ~~not~~ incitement as that term has been defined by the United States Supreme Court." At first blush, this rewriting seems no more legitimate than the first. Where the city council sought to prohibit speech regardless of whether it constitutes incitement, the court has brazenly focused the new ordinance only on incitement. And yet, this rewriting is not nearly so problematic as the substitution of littering for speech in  $L_2$ . After all, the city council did not mean to exempt incitement

54. 481 U.S. 739 (1987).

55. *Id.* at 745.

56. In addition, the portion of the ordinance following the "even if" is now largely surplusage because it is difficult to conceive of circumstances in which littering *would* constitute incitement.

from its prohibition. Far from it, the original ordinance prohibited incitement plus other speech. The First Amendment prevents the court from giving full effect to  $L_1$ , but the court judges that it is better to address some of the evils at which  $L_1$  aimed than to address none of them.

It might be thought that rewritings like  $L_3$ —which by striking particular words from the law enables the attainment of a subset of the law's aims—are rarely available. However, if we view a law as its semantic content rather than its canonical formulation, this sort of rewriting will be possible in a wide range of circumstances. And, at least in the present circumstances, it does appear sensible to regard the law as its semantic content. Why should anything turn on whether a court generates  $L_3$  by striking individual words as opposed to accomplishing the identical result through some other formulation? The key difference between  $L_2$  and  $L_3$  is not that the former both added and subtracted words, whereas the latter merely subtracted; the difference is that the former completely changed the meaning of  $L_1$  and the latter preserved some of it. A court might still conclude that even  $L_3$  departs too far from the original  $L_1$  to warrant calling the process of turning  $L_1$  into  $L_3$  *severance*. That conclusion, however, would have to be based not on the difference in wording between  $L_1$  and  $L_3$  but on the distance between their coverage.

Finally, note that the objection under consideration here—that severance is an improper judicial function—rests upon a respect for the jurisdictional boundaries between legislatures and courts. Yet that same consideration may be enlisted in reply to the objection. For it hardly shows respect for the legislature to strike down entire statutes, rather than to attempt to preserve as much of the legislative work as possible. In short, in the current context, judicial respect for the legislature is a double-edge sword,<sup>57</sup> and thus the decisions whether to entertain the severability presumption and whether to sever invalid portions or applications of statutes will typically turn on other factors.

## B. Overbreadth

In asking whether *Salerno* states the proper test for overbreadth cases, I do not begin with the *Salerno* principle itself, but with the free speech exception that typically accompanies it. I hope that exploring the basis for the exception will shed light on the general principle.

There is a longstanding academic debate over the basis for the Supreme Court's willingness to allow overbreadth challenges in free speech cases, and that debate has sometimes spilled into the Court's cases. On one view,

57. Cf. Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY (present issue) (arguing that in severing and performing similar functions, courts should consider how the resulting rule operates, and whether they are properly situated to make such determinations).

most closely associated with Henry Monaghan, free speech doctrine itself requires overbreadth as a substantive matter, because of the requirement that a law infringing speech be the least restrictive means of accomplishing its objective.<sup>58</sup> An overly restrictive law is overbroad.

The competing view, which the Supreme Court has itself endorsed and with which I generally agree, asserts that to some extent free speech really does mark an exception to a prohibition on most overbreadth challenges, and justifies this exception on the ground that overly broad laws will lead to a chilling effect on free speech.<sup>59</sup> Overbreadth, on this view, is a form of third-party standing: Persons whose own free speech rights are not infringed are permitted to stand in for those engaging in self-censorship and therefore not likely to bring cases on their own.<sup>60</sup>

Related to the debate over the basis for the free speech exception to *Salerno* is a debate over whether the exception extends beyond free speech cases. There is no question that the Court has applied something like overbreadth in abortion and other cases,<sup>61</sup> but the Court has also stated that the doctrine does not apply except in free speech cases.<sup>62</sup> I have argued elsewhere that whether one accepts Monaghan's account of overbreadth or the third-party account, free speech cases are not unique. On Monaghan's view, overbreadth doctrine should apply in any context in which the government must satisfy a least restrictive means test, and this means all fundamental rights, including, arguably, abortion.<sup>63</sup> On the third-party view, overbreadth ought to apply wherever the exercise of a right is subject to a chilling effect or some other circumstance that warrants third-party standing (such as the temporary nature of pregnancy).<sup>64</sup>

In my earlier work on overbreadth I assumed *arguendo* that Monaghan was correct that there is a constitutional right to be judged by a valid rule of law, but went on to show that the severability presumption (where it applies) renders that right largely irrelevant.<sup>65</sup> The reason by now should

58. See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 24.

59. See *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973).

60. In his paper for this conference (published separately), Richard Fallon argues for a third way. Fallon suggests that some substantive constitutional tests "require that a statute be relatively fully specified." Richard Fallon, *As Applied, Facial, and Overbreadth Challenges*, 113 HARV. L. REV. 1321, 1342 (2000). This view has three principal difficulties: First, if this requirement is drawn from substantive doctrine, it is at least a bit odd that no case refers to it; second, the requirement seems to contradict the well-accepted practice under which state courts can provide narrowing constructions that, absent notice issues typically associated with the vagueness doctrine, avoid overbreadth problems, see Fallon, *supra* note 53, at 854–55; and third, Fallon offers little in the way of normative justification for a requirement of relatively full specification. Because such a requirement is, in any event, the practical equivalent of a prohibition on a severability presumption, in my view we do better to ask directly whether and when there should be such a prohibition.

61. See Fallon, *supra* note 53, at 859 n.29; Dorf, *supra* note 4, at 272 & n.158.

62. See *Salerno*, 481 U.S. at 745.

63. See Dorf, *supra* note 4, at 262.

64. See *id.* at 265, 270; Fallon, *supra* note 53, at 873–75.

65. See Dorf, *supra* note 4, at 249–50.

be familiar: If all invalid applications can be severed, a litigant whose own conduct is not protected will be judged by the valid rule  $L_v$ .<sup>66</sup>

However, one might argue that there is no right to be judged by a valid rule. On such a view, nothing in the American practice of judicial review prevents courts from enforcing invalid rules, so long as they are not invalid as applied to the particular circumstances before the court.<sup>67</sup> This contention is plainly implausible if it asserts that, with the exception of free speech and perhaps some other small category of rights,  $P$  can only challenge a law  $L$  if  $L$  proscribes  $P$ 's constitutionally protected conduct  $C$ . Many constitutional doctrines have nothing whatsoever to do with the protected or unprotected status of a litigant's conduct. Consider the foundational structural principles of federalism and separation of powers. The rulings that Lopez and Chadha respectively could not be punished for gun possession near a school,<sup>68</sup> nor be deported by a simple majority vote of one house of Congress,<sup>69</sup> in no way implied Lopez's right to gun possession near a school nor Chadha's right not to be deported. In short, in many circumstances there is at least a legal right, if not a moral right, to be judged by a valid rule.<sup>70</sup>

66. I sometimes encounter the following objection: What does it matter that  $P$  could be judged by valid rule  $L_v$ ? How does that change the fact that he is being judged by invalid rule  $L$ ? Is it not like saying that a killer's conviction can be sustained even though he was denied a fair trial because he could have been convicted had he been granted one? I would respond by asking how, if one believes there is a right to be judged by a valid rule of law, one ascertains what "rule" applies to a particular case. Criminal indictments specify the statutory language they invoke, but government actions frequently depend upon multiple sources of authority. Suppose the provision under attack was passed as part of an omnibus bill. Are seemingly unrelated portions invalid? This is exactly the kind of question about severability that the objection under consideration here assumes is improper if there is a right to be judged by a valid rule. Upon examination, saying that someone states a meritorious claim to be judged by a valid rule turns out to be equivalent to saying that severability cannot cure the claimed violation. We are still left with the question why that should be.

67. See Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 187–91 (1999). I cannot resist responding to just one of the overheated attacks on my work contained in Martin's Note. A typical section of the latter is devoted to showing that my article, *Facial Challenges*, *supra* note 4, misleadingly claims that *Salerno* was not rooted in prior law. See Martin, *supra*, at 181 ("Dorf argues that the *Salerno* standard was born of an immaculate conception."). The smoking gun in Martin's detective story is *Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912), which he correctly identifies as an important antecedent of *Salerno*. See Martin, *supra* at 182–87. In his zeal, Martin neglects to mention that far from ignoring *Yazoo*, my article repeatedly invoked *Yazoo* as providing the best doctrinal and logical support for *Salerno*. See Dorf, *supra* note 4, at 242–43, at 249–50; *id.* at 251 (referring to the "*Yazoo/Salerno* Presumption of Severability"). Similar misstatements and exaggerations pervade the Note.

68. See *United States v. Lopez*, 514 U.S. 549 (1995).

69. See *INS v. Chadha*, 462 U.S. 919 (1983).

70. I find convincing Adler's claim that such a right is a legal rather than a moral right. See Adler, *supra* note 6, at 12. There is no direct entitlement to be judged by a valid rule, see Dorf, *supra* note 4, at 242–46, but the Constitution "forbids a court from enforcing an unconstitutional law," *id.* at 248, and thus courts "will treat litigants exactly as though they have a right to be judged only by constitutional rule[s] of law[]." *Id.* at 249.

## C. Vagueness

The vagueness doctrine, closely related to overbreadth, further illustrates that discerning when a facial challenge should succeed depends upon discerning whether severability should be employed. In its most recent pronouncement on the subject, the Supreme Court stated that a vague statute may be challenged either on overbreadth grounds or “because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.”<sup>71</sup> The latter ground in turn encompasses two concerns: providing persons subject to the law with fair notice and avoiding arbitrary enforcement,<sup>72</sup> although I shall only address notice here.

Let us suppose that a state statute prohibits “all sexual activity not protected by the Constitution.” By its terms the statute prohibits no constitutionally protected activity, and thus, whatever else its defects, it certainly is not *overbroad* in the conventional sense. Nonetheless, determining whether a facial attack should be permitted is largely a question of determining whether to permit (either presumptive or actual) severance.

To begin, just as in conventional overbreadth cases, we may worry about a chilling effect. Current law is less than perfectly clear about what sexual conduct is constitutionally protected. Is there a right of married couples to use sexual aids?<sup>73</sup> Is heterosexual oral sex protected? Is heterosexual adultery protected?<sup>74</sup> Many persons whose own sexual conduct is constitutionally protected do not know, in advance of an indictment, that the courts will ultimately so hold, and thus will not risk the prohibited behavior. Moreover, such persons may not seek declaratory or injunctive relief in an as-applied anticipatory challenge because of the risk of embarrassment, and even if some do, such relief may be limited in each case to a small subset of the arguably protected conduct the statute chills. Thus, the chilling effect rationale applies, and the courts might, on this basis, permit a facial challenge to the statute in the context of a prosecution of someone whose own conduct is not protected.

What has all this to do with severability? Suppose that the person challenging the statute engaged in conduct that is not even arguably protected—for example, a forced sexual act that is not prohibited by any other

71. *City of Chicago v. Morales*, 119 S. Ct. 1849, 1857 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

72. See *Kolender*, 461 U.S. at 357 (“the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

73. See *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Alab. 1999) (finding no such right but invalidating sexual device prohibition as irrational).

74. See *Roe v. Butterworth*, 958 F. Supp. 1569, 1579 (S.D. Fla. 1997), *aff’d* 129 F.3d 1221 (11th Cir. 1997) (“Whether the right of privacy includes the right to engage in extra-marital sexual relations between consenting, heterosexual adults is a . . . difficult question, and one which the Supreme Court has refused to resolve.”).



state statute. A court might legitimately worry that facial invalidation would create a gap in the law: Very harmful conduct would be legally permitted prior to new legislative action. The appropriate remedy would be a narrowing construction of the statute that severs its invalid applications. Perhaps the court specifies particular unprotected acts—including the one in which the person before the court engaged—to which the statute applies. The judicially truncated law does not infringe the right to be judged by a valid rule because the applicable law is the newly limited one.

Now consider the case of someone whose own conduct was, at the time it occurred, arguably protected, but ultimately held to be unprotected. For him or her, the narrowing construction that disposed of the first case (clearly unprotected conduct) does nothing to address the second concern of the vagueness doctrine, fair notice of what conduct the law prohibits—at least for conduct occurring prior to any narrowing construction provided. By contrast, as to the person who forced himself on another, a court could plausibly hold that his conduct fell within a sufficiently clear core of prohibited conduct.<sup>75</sup> Thus, our severability analysis leads to the conclusion that a person whose own conduct is unprotected, but just barely so, should be able to secure a judicial ruling barring the application of the unqualified statute to his conduct, whereas a person whose own conduct is obviously unprotected should not be able to challenge the statute on its face (or for that matter, as applied).

In this last example and throughout this Part my main point is not to argue for any precise resolution to the question of when a facial challenge should be permissible. Instead, I have tried to show that this question should be addressed by asking when severability cures a constitutional infirmity and at what cost.

#### D. Beyond Overbreadth and Vagueness: The Example of Illicit Purpose

A recent article by Marc Isserles divides the universe of possible facial challenges into two categories: overbreadth challenges and valid-rule challenges.<sup>76</sup> As to the former category, he argues that *Salerno* states the correct standard. *Salerno* does not apply, however, to cases in which a litigant claims that a law is invalid, not because it reaches protected conduct, but because “the terms of the statute itself, . . . measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety.”<sup>77</sup> Because such a challenge points to an “inherent constitu-

75. See *Haig v. Agee*, 453 U.S. 280, 309 n.61 (1981).

76. See Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998).

77. *Id.* at 387.

tional defect invalidating all conceivable applications,” Isserles contends, “they are largely unaffected by matters of statutory severability, whether presumptive or actual.”<sup>78</sup>

The difficulty with Isserles’ analysis is his failure to recognize how severability can blur the distinction between, on the one hand, overbreadth and related doctrines, and, on the other, valid-rule facial challenges. He is surely correct that there are some valid-rule challenges to which severability does not apply.<sup>79</sup> For example, in some separation-of-powers cases, the very existence of a rule- or policy-making body will be deemed unconstitutional, thus rendering all of its actions invalid.<sup>80</sup> But the conclusion that severability does not apply to a given claim does not automatically follow from the mere characterization of a claim as a valid-rule facial challenge. A court properly reaches that conclusion only because, after careful analysis, it decides that severability does not cure an alleged defect. In this sub-Part, I further illustrate this thesis by asking what severability analysis can tell us about the claim that a law was enacted for an invalid purpose.

Although the Supreme Court sometimes announces that illicit purpose, standing alone, is insufficient to invalidate a law,<sup>81</sup> there are at least two clear examples of illicit purpose tests in current doctrine. First, under the Court’s equal protection doctrine, a law that is on its face neutral with respect to race will nonetheless be subject to strict scrutiny if it was adopted for the purpose of imposing burdens or distributing benefits on the basis of race.<sup>82</sup> Second, under the First Amendment’s Establishment Clause, an otherwise valid law will be held invalid if it lacks a secular purpose.<sup>83</sup>

Under the most fully developed justification for illicit purpose tests, the constitutional objection to a law with an invalid purpose is that it is the product of a legislative breakdown.<sup>84</sup> It is as if the body that enacted the law lacked the formal authority to do so. If one accepts this account of illicit purpose tests (as I shall here), then an invalid purpose is much like the sort of separation-of-powers defect discussed above. Just as the improper composition of a lawmaking body renders all of its actions invalid, so too

78. *Id.* at 408.

79. Isserles boldly (and quite erroneously) claims that Fallon, Monaghan, and I all somehow managed to overlook the fact that some facial challenges are not structured as overbreadth challenges. *Compare id.* at 378 with, e.g., Dorf, *supra* note 4, at 251–61 (discussing differences between overbreadth and underinclusiveness claims); 279–81 (discussing differences between overbreadth and illicit purpose claims).

80. *See, e.g.,* Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. 501 U.S. 252 (1991).

81. *See* United States v. O’Brien, 391 U.S. 367, 383 (1968); Palmer v. Thompson, 403 U.S. 217, 224 (1971).

82. *See, e.g.,* Miller v. Johnson, 515 U.S. 900, 913 (1995). For simplicity, I substitute “race” for “race or some other suspect classification.”

83. *See* Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

84. *See* Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115–18; John Hart Ely, DEMOCRACY AND DISTRUST 136 (1980).

severability generally cannot save a law that was adopted for an invalid purpose, because “[t]he invalid legislative purpose pervades all of the provision’s applications.”<sup>85</sup>

This general picture needs to be qualified, however. We can imagine a court finding that one clause of a statute was adopted for an illicit purpose but that the remainder—including the portion to be applied in the particular case—was adopted for a permissible purpose. Suppose a state law requires that public high schools teach both creationism and algebra. Suppose further that the former provision was adopted for the illicit purpose of advancing religion, whereas the latter was adopted for the valid purpose of advancing mathematical literacy.<sup>86</sup> A student who wishes to be excused from studying algebra might invoke the public choice theorist’s notion that every law embodies a “deal” to be enforced by courts in toto or not at all, and that courts have no reliable way of ascertaining whether the law would have passed absent the creationism prong. But this argument would not succeed because any judge who finds it convincing will be unlikely to accept the notion of invalidating a law based on illicit purpose in the first place. Public choice theorists, after all, reject the claim that a law can have a single or even a primary purpose.

Are there other constitutional reasons why a court might invalidate the algebra provision along with the creationism provision? Perhaps the statute has a nonseverability clause, or the state has a background presumption that all laws are inseverable, but this is unlikely to be the case, and even if it were, the result would be a conclusion based on principles of statutory construction having nothing to do with any constitutional barrier to severing laws with illicit purposes. Thus, clause severability should be available to reject a facial challenge where an illicit purpose can be demonstrated, even if application severability generally should not be.<sup>87</sup>

The recognition that, unlike clause severability, application severability usually cannot cure a statute with an illicit purpose has important consequences for doctrines that—at least in some accounts—act as proxies for illicit purpose. Consider the constitutional rule that subjects all laws employing racial classifications to strict scrutiny. The Court has sometimes stated that the rule is justified as a means of “smoking out” the illicit

85. Dorf, *supra* note 4, at 279.

86. Cf. Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problem of Hate Speech and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 29 (imagining a religiously motivated law requiring the teaching of trigonometry).

87. In light of my argument that severability should concern itself with a law’s semantic content rather than its canonical formulation, *see supra* Part II.A, what I mean by *clause* severability may be somewhat obscure. If a law is simply its semantic content, perhaps nothing should turn on whether various requirements are grouped in the same or different clauses. However, where a law’s alleged defect is the legislature’s illicit purpose, one cannot simply ignore the canonical formulation, because ascertaining how much of the statute the illicit purpose infects necessarily turns on the mental processes of the legislature, which (with respect to this inquiry at least) may well vary depending upon the wording actually adopted.

purpose of racial discrimination.<sup>88</sup> Viewing strict scrutiny of race classifications as a proxy for an illicit purpose test clarifies an otherwise puzzling feature of facial challenges doctrine.

Suppose that some statute provides: “Littering shall be an offense if committed by African-Americans but not if committed by persons of other races.”<sup>89</sup> In an earlier article, I noted that we may conceptualize the statute as containing two provisions: “(1) Littering shall be an offense (2) if committed by African-Americans but not if committed by persons of other races.” I noted further that—subject to retroactivity constraints imposed by the requirement of fair notice—existing equal protection doctrine would allow a court to hold the statute invalid because it facially discriminates, but go on to cure the defect (prospectively) by “severing” part (2), thereby expanding the scope of the statute to cover littering by anyone, regardless of race.<sup>90</sup> Nonetheless, courts typically do not *presume* that facially discriminatory statutes will be remedied by this sort of severance-by-expansion. In contrast to cases of overinclusive statutes, where the *Salerno* test would preclude the attack altogether, when a facially discriminatory—and thus underinclusive—statute is challenged, the question of whether severance is available is put off until the remedial stage.<sup>91</sup>

If the rule that all racial classifications are subject to strict scrutiny is an indirect means of invalidating laws that serve an illicit purpose, the puzzle is nearly solved. On this understanding, when a court invalidates a law because it employs a racial classification, the court implicitly finds that there is a substantial possibility that the law was adopted for an invalid purpose, and because an invalid purpose infects all the applications, severance cannot cure the evil.

This account goes a substantial way towards justifying the different treatment of overinclusiveness and underinclusiveness, although, I must confess, not the entire distance. For if we accept the account of underinclusiveness cases, then we dispense not only with the *presumption* of severability; we dispense with severability entirely, even at the remedial stage. And yet current doctrine allows, as a matter of remedial discretion, the sort of severance-by-expansion illustrated by my littering hypothetical.

Nonetheless, the current doctrine may be more sensible than my earlier suggestion that laws with invalid purposes must always be invalidated in

88. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). See also *Jed Rubinfeld, Affirmative Action*, 107 *YALE L.J.* 427, 428 (1997).

89. Dorf, *supra* note 4, at 251.

90. See *id.* at 253–57 (discussing *Orr v. Orr*, 440 U.S. 268 (1979) and *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), *cert. denied*, 471 U.S. 1020 (1985)).

91. In my earlier article on this issue, I observed that the Court had not articulated any coherent rationale for treating overinclusiveness and underinclusiveness differently. I proposed a rationale for disallowing the severability presumption in those underinclusiveness challenges in which the defect alleged violates the challenger’s personal right not to suffer discrimination, although I acknowledged that this proposal was somewhat inconsistent with the Court’s increasingly formalist conception of discrimination. See Dorf, *supra* note 4, at 257–61.

toto. For example, a murder law that exempts lynchings should not be completely invalidated, thereby legalizing all murders committed during the period between invalidation and legislative reenactment without the offending exemption, even if that period is quite short. A pragmatic reviewing court would have to find some way to strike the exemption but not the prohibition on murder.

The *best* solution to this sort of problem, in my view, is to follow a practice like that of European constitutional courts such as the Constitutional Court of Hungary: When it finds a law invalid, instead of invalidating the law immediately, it sometimes orders the legislature to modify the law by a certain date.<sup>92</sup> That practice, however, may be better suited to a centralized constitutional court with the express power of abstract review<sup>93</sup> than to the American system of decentralized judicial review in concrete cases only. Although in practice federal courts in the United States routinely enjoin the enforcement of legislation, they lack the formal power to declare statutes void in the abstract<sup>94</sup> or—except in truly extraordinary circumstances—to order legislative acts.<sup>95</sup> It thus seems quite unlikely that the United States Supreme Court, much less a single federal or state judge, would pursue such a course.

Hence, our courts must make do with an imperfect solution to the problem of facially underinclusive statutes: Permit the challenge and invali-

92. See Symposium, *Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, 12 AM. U. J. INT'L L. & POLY 45, 96 (1996) (comments of Kim Lane Scheppele).

93. Article 32A of the Hungarian Constitution provides in part:

(1) The Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law.

(2) The Constitutional Court shall annul any laws and other statutes that it finds to be unconstitutional.

(3) Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.

An English translation of the Constitution of Hungary can be found at <[http://www.uni-wuerzburg.de/law/hu00000\\_.html](http://www.uni-wuerzburg.de/law/hu00000_.html)> (visited Aug. 25, 1999). For an illustration of the breadth of judicial review in Hungary, see Vicki C. Jackson & Mark Tushnet, *COMPARATIVE CONSTITUTIONAL LAW* 1452–76 (1999) (excerpting *Hungarian Benefits Case*, 43.1995 (VI.30) AB Decision (Constitutional Court of Hungary), 4 E. Eur. Case Rep. Const. L. 64 (1997) (English transl.); Andras Sajo, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 E. EUR. CONST. REV. 31 (1996)). The German Constitutional Court's 1975 and 1993 rulings invalidating abortion laws as insufficiently protective of fetal life are the best-known examples of a constitutional court affirmatively requiring legislation. See Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43, AM. J. COMP. L. 273, 274–87 (1995).

94. This is more than a mere formality. See John C. Reitz, *Political Economy and Abstract Review in Germany, France and the United States*, in *CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE* 62, 68 (Sally J. Kenney, William M. Reisinger, & John C. Reitz eds., 1999) (“[S]uch examples of abstract review as can be found in the USA are fundamentally different from the European versions.”). For an interesting effort to explain why American courts do not engage in the sort of abstract review practiced in France and Germany (as well as other European countries) in terms of differences in the respective political economies, see *id.* at 71–86.

95. See *Missouri v. Jenkins*, 495 U.S. 33, 56 (1990). *But cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982) (plurality opinion) (leaving to Congress the decision how to restructure bankruptcy adjudication in the light of the Court's prospective invalidation of some of the jurisdiction conferred on bankruptcy courts).

date in toto if no grave danger (such as legalized murder) will result; otherwise, sever by expansion, notwithstanding the conflict with the principle that an illicit purpose infects all of a law's applications.

#### E. Federalism

Throughout this Part II, I have been assuming that, absent one of the considerations identified above, the *Salerno* severability presumption properly applies to facial challenges. If I am correct that severability analysis plays a substantial role in determining the standard for judging a facial challenge, that assumption is not quite right. For then the willingness of courts to presume that invalid portions or applications of laws are severable from the valid portions or applications will sometimes contravene principles of judicial federalism.

When a state law  $L_S$  is challenged in either state or federal court, severability is a question of state law. In principle, at least, each state will have its own unique body of severability law, and the proper approach would not be to presume that all laws are severable, but to apply the appropriate body of severability law. In practice, however, there is little cause for concern because under federal law as well as the law of nearly all states, there is a presumption of severability.<sup>96</sup>

What about the cases in which state law dictates a different approach to severability (and thus facial challenges)? In the 1999 decision of *City of Chicago v. Morales*,<sup>97</sup> the Supreme Court opined that state courts need not apply *Salerno* because, as a restriction on third-party standing, it is not applicable to state courts, which are not subject to federal justiciability limits.<sup>98</sup> Although the Court cited my *Facial Challenges* article in support of this conclusion,<sup>99</sup> I must confess partial disagreement. A state or federal court adjudicating a facial challenge to a state law based on a state or federal constitutional claim need not follow federal law governing the scope of facial challenges, because the allowable scope of facial challenges is largely a question of severability; severability is in turn a question of statutory construction, and in a challenge to a state law, state rather than federal principles of statutory construction govern. Thus, the Court was correct that a principle derived from Illinois law should have governed, but it was Illinois statutory construction law rather than Illinois justiciability law. And the same would have been true had the *Morales* case originated in federal court.

We can see what is wrong with the *Morales* Court's view by imagining that a federal law were to be challenged on federal constitutional grounds in a state court. Let us assume that the facial challenge is the sort to which

96. See Dorf, *supra* note 4, at 295–304.

97. 119 S. Ct. 1849 (1999).

98. See *id.* at 1858 n.22.

99. See *id.*

*Salerno* properly applies in federal court—an overbreadth challenge outside the domain of the exception for free speech and perhaps other doctrines. By hypothesis, *Salerno* applies in federal court because of a judgment that the law does not so chill protected conduct as to warrant setting aside all of Congress' work. This is a judgment that balances harms to individuals against harms to the national democratic project. It is difficult to see why that balance should be struck differently if the federal law happens to be challenged in state court. Accordingly, the state court should apply *Salerno*.

Thus, even if (contra Monaghan), overbreadth has a third-party standing component, it is an odd sort of standing doctrine. When a state or federal court adjudicates a facial challenge to a *federal* law based on a federal constitutional claim,<sup>100</sup> severability is a question of federal statutory construction, and thus where *Salerno* provides the applicable standard for such challenges, state courts no less than federal courts are obliged to apply it. In short, the relevant federalism distinction here is not between state and federal *fora* but between challenges to state and federal *laws*.

In summary, courts should (and generally do) allow persons whose own conduct is unprotected to challenge a law on its face under the following circumstances: when severing the law's invalid applications or provisions would not cure the constitutional defect complained of; when there is a chilling effect or similar phenomenon (such as a notice problem) that prevents severance or presumptive severability; and when, for reasons of statutory construction, severance appears to be improper. These criteria are rather vague, and thus different judges and commentators will draw different conclusions about the proper scope of allowable facial challenges, but whatever their conclusions, severability should be one of the principal objects of inquiry.

### III. CODA: RIGHTS OR RULES?

In this last Part, I bring together my analysis of incidental burdens and facial challenges. I begin by identifying a tension in current doctrine between *Smith* and *Salerno*, to the extent that each purports to be a solution to a general problem of constitutional law. After proposing a means for resolving the tension, I critique my own favored approach, proposing but then rejecting the objection that it is inconsistent with the rule of law.

#### A. Justice Scalia's Dilemma

Suppose one believes, contrary to my argument in Part I, that constitutional rights are invariably rights against rules. This position is in tension with the

100. Under the Supremacy Clause, a federal law cannot be challenged on the basis of a state constitution.

view that litigants should only be permitted to challenge laws that are unconstitutional as applied to them. For it is not clear what it could mean to say that a law is invalid “as applied” once one has rejected the notion of an invalid application of a facially valid law. In doctrinal terms, *Smith* and *Salerno* are difficult to reconcile.

The inconsistency just noted appears to be a problem for those like Justice Scalia, who have championed both *Smith* and *Salerno*. To a litigant who claims a right to have his conduct shielded, they respond that constitutional rights only provide protection against invalid rules (*Smith*); when the litigant asserts the invalidity of a rule, they say he is attempting to assert the rights of others (*Salerno*). But how can there even be third parties whose rights are violated in other applications (our exasperated litigant asks)—given that you Justices want to deny that rights shield conduct? Heads you win, tails I lose.

Our hypothetical litigant is wrong to suggest that *Smith* and *Salerno* (taken as general rules) would combine to defeat all constitutional rights claims. Instead, one could think that in order to state a successful constitutional claim a litigant must satisfy two necessary conditions: First, he must point to a defect in some rule of law; and second, he must show that, because of the defect, his own right is violated. The category of challenges that will succeed, in other words, is not the null set. *Smith* would permit the application of a general tax on medical services to abortion, and *Salerno* would permit the application of a complete ban on abortions to a third trimester abortion that is not medically necessary, but successful abortion claims remain possible. For example, a woman seeking a first trimester abortion could successfully challenge a law prohibiting “all abortions,” because the rule targets her protected conduct.

Justice Scalia is not yet off the hook, however (and not just because he would prefer not to enforce any constitutional right to abortion). To defend the concatenation of (generalized) *Smith* and (generalized) *Salerno*, he needs an account of why the combination of a burden to an individual and an invalid rule gives rise to a successful challenge, even though neither does on its own. In my view, the best candidate for the job relies on a floodgates rationale. We might begin with the intuition that constitutional law should concern itself with violations of rights only in particular cases (*Salerno*). Although we would recognize that rights can be infringed by neutral, generally valid rules as well as by targeted, invalid ones, we might still worry that the ubiquity of incidental burdens will lead to a flood of claims. The requirement that a law not only burden but also target the exercise of a right (*Smith*) keeps the number of claims manageable.<sup>101</sup>

Alternatively, one might begin with the view that rules, not applications,

101. I am using “target” here loosely to mean either that the law on its face makes protected activity the predicate of regulation or was passed for the purpose of rendering the exercise of a right more difficult than it otherwise would be. *But cf.* Dorf, *supra* note 3, at 1233–40 (distinguishing, for other purposes, between targeted and purposeful burdens).



pose constitutional problems (*Smith*). However, those problems only create justiciable controversies when they have an unconstitutional impact on somebody. On this understanding, “the requirement that there must be some effect for there to be a constitutional violation is like a ‘standing’ rule; in the absence of any effect on constitutional values, no one would be hurt, and no one would have ‘standing’ to invoke the judicial power to seek a remedy.”<sup>102</sup> For example, a city’s decision to close a swimming pool in furtherance of racial segregation does not give rise to justiciable rights unless it actually results in segregated facilities.<sup>103</sup>

Both of the above-suggested reconciliations of (generalized) *Smith* and (generalized) *Salerno* assume that on the whole, it is worse for the government to target rights, than for neutral laws to impose incidental burdens. Is there a reason to think that this is so? The best reason, in my view, takes note of the fact that most neutral laws serve purposes unrelated to the suppression of rights, whereas laws targeting rights often do not. If subjected to some form of heightened scrutiny, a rights-neutral law stands a legitimate chance of surviving, because it may be found to be sufficiently closely tailored to the rights-neutral justification, which may in turn be deemed sufficiently important. By contrast, preventing harms directly connected with the exercise of a right will less frequently qualify as a sufficient justification under heightened scrutiny. Thus, we can think of the targeting requirement (*Smith*) as a means of reserving heightened judicial scrutiny for the cases most likely to yield a finding that the government is acting unconstitutionally. Additionally, we might think that, other things being equal, some targeted violations of rights pose a greater threat to rights because they violate not only individual entitlements but structural norms—such as a prohibition on the government acting as censor.<sup>104</sup>

The foregoing suggestions show how one might justify (the generalized version of) *Smith* as an approximate means of limiting the opportunity for litigating constitutional rights to the most serious cases. Yet the approximation is extremely rough. Targeted “burdens can be trivial—for example, a one-penny tax on newspapers that publish editorials critical of the government—whereas conversely, incidental burdens can be extremely harsh—for example, applying a prohibition against wearing headgear in the military to an Orthodox Jew.”<sup>105</sup> If we want to capture the most serious cases, we would do better with some other screening mechanism, such as a requirement that incidental burdens be substantial in order to trigger heightened scrutiny.<sup>106</sup>

102. Richard H. Fallon, *The Supreme Court 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 152 n.218 (1997).

103. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

104. See *Dorf*, *supra* note 3, at 1239 (“[C]ontent-based and viewpoint-based regulations of speech are structurally problematic [because] they distort the marketplace of ideas.”).

105. *Id.* at 1177.

106. See *id.* at 1243–46.

Still, a defender of (generalized) *Smith* might object that the reason for limiting rights to protection against targeted burdens need not have anything to do with predicting which cases exact the worst toll on rights. Incidental burdens, according to this objection, simply are not, as a substantive matter, even prima facie infringements of rights. This argument closely tracks Adler's contention that constitutional rights are only rights against rules, and even though I argued in Part I that that argument fails, I began this Part by supposing that it succeeded. If it succeeds, we do not need an additional, instrumental reason for limiting constitutional scrutiny to cases of targeted burdens.

Or do we? The question is not whether a plausible argument can be offered for (the generalized version of) *Smith*. The question is whether such a plausible argument can coexist with a commitment to (the generalized version of) *Salerno*. Someone committed to *Salerno* cannot accept Adler's claim that a constitutional right is no more than a legal right to have an unconstitutional rule invalidated. That, at bottom, is precisely what *Salerno* denies.<sup>107</sup>

Thus, none of the arguments considered here can fully reconcile a commitment to a strong version of *Smith* with a commitment to a strong version of *Salerno*, notwithstanding their failure to eliminate all possible constitutional claims. Perhaps these doctrines can be reconciled, but because I am committed to neither one, I leave that task to others.

## B. The Rule of Law

My approach to the incidental burden and facial challenge questions is less categorical than the one we have just considered. As to the first question, I would allow that in some instances rights should be defined as rights against rules but in others as rights, simpliciter, and that the choice should be based on the substance of the right. As to the second question, I would apply *Salerno* only to the category of constitutional defects that can be remedied by severability, and only when other considerations, such as chilling effects and federalism, do not counsel a different course.

Although I have no difficulty reconciling these positions, I must face a different sort of objection. In each area, I would allow that—at least in some substantial family of cases—a given law *L* should be understood as the sum of the infinitely many possible applications of *L* to particular conduct. Symbolically:

$$L = \sum_{i=1}^{\infty} L_i$$

107. See Adler, *supra* note 6, at 153–60.

I want to conclude by sketching and responding to an objection to this common feature of my approach to incidental burdens and facial challenges: that it is fundamentally incompatible with the rule of law. To put the point starkly, allowing constitutional challenges based on incidental burdens, or allowing the government to defend a rights-infringing law by pointing to a severable application, equates any given law with a collection of bills of attainder. It treats the law not as a general norm, but as a collection of individual, and thus potentially arbitrary, commands.

Hayek most famously associated generality with the rule of law by contrasting legal authority with the giving of orders.<sup>108</sup> An order, in Hayek's view, is inconsistent with liberty because it asserts the authority of the sovereign, the order giver, over a subject. By contrast, when the law is phrased in general terms, "the source of the decision on what particular action is to be taken shifts progressively from the issuer of the command or law to the acting person."<sup>109</sup> Hayek's argument could be invoked against even the narrow application of *Salerno* that I favor, because severability—especially application severability—undermines the generality of law. Moreover, Hayek specifically objected to giving any government authority the power to grant exemptions from general rules,<sup>110</sup> and thus would likely have approved of the *Smith* decision. In short, Hayek's argument tends in the same direction as Adler's—recognizing only rights against rules and conceptualizing all cases as in some important sense presenting facial challenges.

Let us distinguish between, on the one hand, a robust and implausible version of Hayek's position, and, on the other, a weak but defensible version. The robust version, which Hayek himself probably intended, would stand as a bar even to particularization in the text of a law itself, at least where the particularization cannot be understood as an application of some general rule. Thus, although the *Smith* Court (with the possible exception of Justice Stevens) would have certainly upheld a state law that proscribed peyote use but granted religious exemptions, Hayek would have disapproved of such a law.

The robust form of the argument is difficult to defend because it rests on Hayek's somewhat naive faith in the ability of general laws to provide adequate guidance in concrete cases.<sup>111</sup> He believed that lawmakers do not delegate discretion to judges and others by formulating general rules; thus, he proposed such general rules as a means of avoiding either legislative specificity or administrative discretion<sup>112</sup>—each of which he deemed

108. See Friedrich A. Hayek, *THE CONSTITUTION OF LIBERTY* 148–61 (1960). H.L.A. Hart's critique of Austin's conception of law as the command of the sovereign also comes to mind. See H.L.A. Hart, *THE CONCEPT OF LAW* 16–25 (1961).

109. Hayek, *supra* note 108, at 150.

110. See *id.* at 155.

111. Hayek scorned Holmes's aphorism about general propositions and concrete cases, see *id.* at 156, espousing interpretive formalism as the means of promoting predictability. See *id.* at 158.

112. See *id.* at 225 (discussing price controls).

objectionable as a form of order giving. For anyone who does not share Hayek's formalist faith, the robust form of the argument will therefore be unpersuasive.<sup>113</sup>

The weak form of Hayek's argument accepts that legislation often legitimately includes details that can only be understood as arising out of political compromise rather than the specification of some broad principle. The legislature can, contra the pure Hayekian, issue commands. Courts stand on a different footing, however. When they cut the legislative product into smaller pieces, they effect a relative move from law to command, but without the legitimacy that democratic accountability confers. Generality, in other words, is a stronger imperative for courts than for legislatures.

The weak form of the argument is compatible with a wide range of jurisprudential views. On Ronald Dworkin's account, for example, we have reason to worry about judicial departures from generality because courts are meant to be fora of principle,<sup>114</sup> and principles are general. On a quite different account, such as Jeremy Waldron's, a court that slices up the work product of the legislature shows inadequate respect for the text that the latter body produced.<sup>115</sup>

Nonetheless, I want to reject even the weak Hayekian argument against judicial subdivision of legislation, at least insofar as it purports to be a categorical claim. In my view, the force of Hayek's rule-of-law critique is completely absorbed by specific doctrinal limitations of the sort discussed in Parts I and II. In other words, generality and the other values we associate with the rule of law play a substantial role in limiting the scope of the incidental burdens doctrine and of severability, but it would be double counting to invoke these values as additional limits on the doctrines.

When the Hayekian says that courts should not grant religious exemptions from generally applicable laws because granting them would be an improper judicial function, I can reply that I understand the argument, that it has considerable force, but that I have already found that force to be outweighed by the gravity of the burden that would fall on the religious objector were he not to receive an exemption.<sup>116</sup> Moreover, I might respond, at least in some cases, the granting of an exemption actually serves the purpose of ensuring that—viewed at a more general level—the law imposes roughly equal burdens on persons of different faiths. Again, my response may or may not be convincing, but that is a matter of weighing the

113. For a cogent critique, see Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 981–82 (1995).

114. See Ronald Dworkin, *FREEDOM'S LAW* 30–31, 343–47 (1996).

115. See Jeremy Waldron, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *THE DIGNITY OF LEGISLATION* (1999).

116. John Locke's objection to religious exemptions, see John Locke, *A LETTER CONCERNING TOLERATION* (1689), reprinted in 6 *THE WORKS OF JOHN LOCKE* 5, 34 (1963) (1823), might also be thought to rest upon a broader view about the rule of law, but Locke offers no argument for that broader view.

claims in their particular context, not the general principle of the rule of law.<sup>117</sup>

In short, although rule-of-law values constrain incidental burden and facial challenge doctrines, they do not fully determine these doctrines. Constitutional rights are appropriately heterogeneous all the way down.

117. See Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COL. L. REV. 1 (1997).