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PERSONAL RIGHTS AND RULE-DEPENDENCE:

Can the Two Coexist?

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INTRODUCTION

Can constitutional rights be both *personal* and *rule-dependent*? Can it be true of constitutional adjudication (1) that a constitutional litigant must assert "her own" rights, and yet also (2) that the viability of a constitutional challenge depends (or sometimes depends) on whether a particular type of legal rule, for example, a discriminatory or poorly tailored rule, is in force?

In a previous article, *Rights Against Rules: The Moral Structure of American Constitutional Law,* I (in effect) answered these questions in the negative.[1] My focus was a specific kind of constitutional challenge[2] and a specific conception of what it meant for a constitutional right to be "personal."[3] The current article is an attempt to generalize the arguments developed in *Rights Against Rules.* Insofar as constitutional doctrine makes reference to rules, constitutional litigants are not personal rights-holders and reviewing courts are not, in the strict sense, courts.[4] Rather, they are mini-legislatures, engaged in the repeal or amendment of rules that fail to meet constitutional norms (such as antidiscrimination norms or narrow-tailoring norms), and litigants are the "private attorneys-general" who initiate the enforcement of these norms. This is true, I will claim, on any plausible understanding of the "personal" cast of constitutional rights.

*Professor, University of Pennsylvania Law School. Many thanks to the participants in the Columbia University Law School symposium on "Rights and Rules" for their incisive comments. All errors are my own.

1. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law,* 97 MICH. L. REV. 1 (1998). *See also* Matthew D. Adler, *Rights, Rules and the Structure of Constitutional Adjudication: A Response to Professor Fallon,* 113 HARV L. REV. 1371 (2000) (responding to criticisms of *Rights Against Rules* put forward by Professor Richard Fallon in *As-Applied and Facial Challenges and Third-Party Standing,* 113 HARV. L. REV. 1321 (2000)).

2. *See* Adler, *Rights Against Rules, supra* note 1, at 13–18 (explicating focus on sanctions and duties).

3. *See id.* at 39–91 (analyzing and criticizing "Direct Account" of constitutional adjudication).

4. For a contrary view, *see* Fallon, *supra* note 1 (presenting a model of constitutional adjudication that is both rule-dependent and yet also, purportedly, vindicates personal rights).

Part I sets the stage: I show that constitutional doctrine is (regularly) rule-dependent, yet that constitutional litigants are officially characterized, by the Supreme Court, as holding "personal rights." Part II shows how the tension between the rule-dependent elements of constitutional doctrine and the supposed tenure of personal rights by constitutional litigants is intimately connected to a problem that, recently, has much engaged the Court: the problem of "facial" and "as-applied" challenges. Parts III and IV argue that personal rights and rule-dependent doctrine cannot in fact be reconciled. Part III develops the argument with respect to one conception of what constitutes a "personal right": the Interest Theory of rights. Part IV develops the argument with respect to alternative conceptions: the Choice Theory of rights, a Hohfeldian view of rights as claim-rights, and a Dworkinian view of rights as "trumps." Finally, in the Conclusion, I very briefly present my alternative view of constitutional adjudication, which preserves the rule-dependent cast of doctrine but denies that litigants need hold personal rights.

There is a well-developed tradition within legal scholarship of viewing constitutional litigants as "private attorneys-general" rather than the holders of personal rights.[5] That idea hardly originates here. What *is* new, I think, is my claim—in *Rights Against Rules* and, more abstractly, in the current article—that the failure of the personal-rights model of constitutional adjudication is necessitated by a pervasive and familiar feature of constitutional doctrine, namely, rule-dependence.

I. THE STATE OF CONSTITUTIONAL DOCTRINE: PERSONAL RIGHTS PLUS RULE-DEPENDENCE

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court. . . .[6]

5. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1978); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

6. Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973) (citations omitted).

This quotation from *Broadrick v. Oklahoma* constitutes a particularly full and eloquent statement of the proposition, frequently and consistently articulated by the Court, that constitutional adjudication involves "personal rights": that governmental action challenged by a claimant on constitutional grounds must invade some "personal right" of hers if she is to secure a remedy against that action from a constitutional reviewing court.[7] As *Broadrick* and other decisions explain, the proposition needs to be qualified for certain (allegedly) exceptional kinds of constitutional cases[8]—in particular, for First Amendment "overbreadth" cases[9] and for other cases where litigants who lack personal constitutional rights are granted "third-party" standing[10] to secure a judicial remedy against unconstitutional governmental action—but, with these exceptions, the tenure of personal rights by constitutional claimants is seen by the Court to be a basic feature of constitutional adjudication.

What does it mean for a litigant to hold a "personal" constitutional right? The term "right" is an ambiguous one.[11] Sometimes, "right" is used in a catholic sense to mean *any* advantageous jural position (a liberty, claim-right, power, or immunity).[12] On this usage, anyone—even the "private attorney-general"—who has the legal power to secure a judicial remedy against unconstitutional governmental action is a "rights-holder." Sometimes, however, "right" is used more restrictedly, to describe the special

7. For other clear articulations by the Court of the "personal rights" model of constitutional adjudication, *see, e.g.*, Los Angeles Police Dep't v. United Reporting Publ'g Corp., 120 S. Ct. 483, 488 (1999); Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (plurality opinion); Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984); New York v. Ferber, 458 U.S. 747, 767 (1982); United States v. Raines, 362 U.S. 17, 20–22 (1960).

8. *See, e.g., Broadrick*, 413 U.S. at 611–15 (discussing exceptions to personal rights model); *Raines*, 362 U.S. at 22–23 (same).

9. *See* Adler, *Rights Against Rules*, *supra* note 1, at 142–45 (discussing overbreadth case law). For scholarly treatments of the overbreadth case law, *see* Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. (1985); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Martin Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

10. *See* Adler, *Rights Against Rules*, *supra* note 1, at 162–64 (discussing third-party standing case law). For scholarly treatments of this case law, *see* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

11. *See* L.W. Sumner, THE MORAL FOUNDATION OF RIGHTS 14–18 (1987) (noting ambiguity in, and potentially expansive scope of, the concept of a "right").

12. *See, e.g.*, Adler, *Rights Against Rules*, *supra* note 1, at 24–25 (stipulating a broad definition of "constitutional right"); Sumner, *supra* note 11, at 32–45 (discussing views that equate rights with advantageous Hohfeldian positions).

properties of *certain* persons who hold advantageous jural positions. For example, one might say that the litigant whose interests are infringed by unconstitutional governmental action is a rights-holder in this restricted sense;[13] or that her interests must not only be infringed, but in addition must be the kind of interests protected by the constitutional provision upon which she relies;[14] or that she must have a suitably individualized interest in the controversy (an interest that would justify a judicial remedy for her alone);[15] or that she must have a "trumping" interest, one sufficiently strong to override considerations of overall welfare.[16] Thus the long-running debate within analytic jurisprudence about the nature of "rights." The question under debate here is what more must be true of a person, beyond simply holding a legal liberty, claim-right, power, or immunity, to make her a genuine rights-holder.[17] And sometimes, so as to clarify that the term "right" is being used in this more restricted sense, the adjective "personal" is appended to that term.

This is what the Court does in *Broadrick*, and what I will do in this article. To say that the constitutional litigant (leaving aside exceptional cases) cannot secure a judicial remedy against unconstitutional governmental action without showing the violation of her "personal rights" is just to say that something more is true of the proper constitutional litigant than her mere possession of an advantageous jural position—that position constituted by the power to secure a judicial remedy against unconstitutional governmental action. Let us call this the Personal Rights Thesis.

The Personal Rights Thesis

It is a necessary condition for a person P to have the legal power to secure judicial relief against a governmental action, on constitutional grounds, that

13. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (stating that "personal injury" is an element of Article III standing); *infra* text accompanying notes 53–60 (distinguishing between the minimal interest-based conception of rights, which makes a setback to the claimant's interests both necessary and sufficient for an unconstitutional government action to implicate his "rights," and more robust conceptions that make a setback to the claimant's interests necessary but not sufficient).

14. *See generally* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237 (1999) (analyzing "zone of interests" requirement within standing doctrine).

15. This is how the "Direct Account," as I call it, understands constitutional rights. *See* Adler, *Rights Against Rules*, *supra* note 1, at 39–44 (formulating Direct Account). *See also* Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 119, 128–31 (Marshall Cohen ed., 1983) (analyzing view of rights as "individuated claims").

16. *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (1977); *infra* Part IV.C. (discussing Dworkin's views).

17. Illuminating overviews of (and entries in) this jurisprudential debate include: Matthew H. Kramer, *Rights Without Trimmings*, in Matthew H. Kramer, N.E. Simmonds & Hillel Steiner, A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES (1998); Sumner, *supra* note 11; and Jeremy Waldron, *Introduction*, in THEORIES OF RIGHTS (Jeremy Waldron ed., 1984). Comprehensive citations to the jurisprudential literature on rights, as it currently stands, are to be found in the Kramer article.

> the action invade her "personal rights."[18] An action invades P's "personal rights" only if something is true of P that is not necessarily true of anyone who holds the legal power just described.

What, specifically, must be true of P to make her a "personal" rights-holder is, again, a matter of considerable scholarly controversy. Nor does the Supreme Court have a particularly clear view on that matter.[19] But one can hold the Personal Rights Thesis while being agnostic across plausible conceptions of "personalness." The argument I advance below is that, on virtually any such conception, this thesis is inconsistent with rule-dependence.

By "rule-dependence," I mean this: In delimiting the conditions under which constitutional relief is available, constitutional doctrine sometimes entails the existence of a discrete legal rule, to which the litigant has some nexus, with a particular type of scope, language, history, or some other such property of discrete legal rules.[20] For example, free-speech doctrine looks to whether the litigant has been sanctioned, denied a benefit, or otherwise set back by a rule that discriminates against certain viewpoints or speech-contents. If so, the litigant's challenge is quite likely to succeed; if not, it is quite likely to fail.[21] Similarly, adjudication under the Equal Protection

18. I drop the rider for "exceptional cases" for the sake of simplicity. In conceding that there are some exceptions to the thesis that constitutional litigants must hold personal rights, the Court and constitutional scholars do not propose that these exceptions are large enough to encompass *any* instance where constitutional doctrine is rule-dependent. *See, e.g.*, *Broadrick*, 413 U.S. at 611 (stating that "the Court has recognized some limited exceptions to [the requirement that the constitutional claimant vindicate her own, personal rights] but only because of the most weighty countervailing policies," and adducing the third-party standing and First Amendment overbreadth doctrines as such "limited exceptions") (internal quotation omitted); Fallon, *supra* note 1 (arguing that third-party standing represents a genuine exception to the personal-rights requirement, but that rule-dependence does not, because a person who challenges the application of an invalid rule to himself is asserting personal or first-party rather than third-party rights); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 389 (1998) ("scholars have not seriously undermined [Henry] Monaghan's central claim that litigants have a [personal] right to be judged under a constitutionally valid rule of law"); *infra* note 84 (citing scholarship by Monaghan advancing this claim).

Thus my analysis of the inconsistency between a qualified Personal Rights Thesis (one that allows exceptional cases in which claimants do not vindicate personal rights) and the Rule-Dependence Thesis would be just the same as the analysis I develop of the inconsistency between the unqualified Personal Rights Thesis stated in the text and the Rule-Dependence Thesis, namely, that the scenario in which doctrine is rule-dependent yet personal rights are also supposed to be at stake is incoherent.

19. The Court's doctrines do rule out the unadorned interest view of "personal rights"—that simply having an interest, of any kind, in judicial invalidation of the challenged action makes the litigant suitably "personal"—but whether the interest needs further to be protected, individualized, or trumping, or whether something else needs to be true of the litigant, is not doctrinally clear. *See infra* text accompanying notes 53–60 (explaining why doctrines rule out the unadorned interest view).

20. *See* Adler, *Rights Against Rules*, *supra* note 1, at 13–39 (describing rule-dependent cast of constitutional doctrine); Alexander, *supra* note 9, at 544–47 (same); Monaghan, *supra* note 9, at 4–14 (same).

21. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); United States v. O'Brien, 391 U.S. 367 (1968). *See generally* Adler, *Rights Against Rules*, *supra* note 1, at 19–26 (summarizing relevant free-speech doctrine).

Clause hinges upon whether the litigant has been subjected to some rule that discriminates against "suspect classes"—whether there exists a rule whose predicate contains a term such as "male," or "female," or "Caucasian," or "black"—and, if so, whether the thus-discriminatory rule can be justified.[22] Establishment Clause doctrine (among other things) concerns whether the litigant has identified a statute or rule whose "purpose" is religious rather than secular.[23] The Supreme Court, in the *Smith* case, announced that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[24] Thus a court hearing a free-exercise challenge does not simply examine individualized facts about the claimant—the religious nature of his motivation, the particular action he has performed or wants to perform, the justifiability of prohibiting that action—but also, and crucially, examines whether the rule that imposes the prohibition is "generally applicable" to nonreligious and religious actors alike.

My claim here is a descriptive one: I do not claim that constitutional doctrine necessarily makes reference to rules, or that it optimally does, but that our actual constitutional doctrines do (and frequently so). Further—and this is a point on which *Rights Against Rules* was not as clear as it might have been—this descriptive claim is *not* a universal one.[25] Certain actions by governmental officials are unconstitutional—and will be invalidated by reviewing courts at the instance of appropriate litigants—quite independent of the language, scope, or history of the legal rules that authorize, or are taken to authorize, these actions. That is to say: The unconstitutional actions can be characterized in terms that do not entail the existence of some legal rule with a particular scope, language, or history. If governmental official G tortures person P, P can get a damages remedy against G regardless of whether the rule that G was following licensed "torture," as opposed to "appropriate measures, as necessary for national security"—indeed, regardless of whether G's action was authorized, or taken to be authorized, by any legal rule.[26]

22. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); Craig v. Boren, 429 U.S. 190 (1976). *See generally* Adler, *Rights Against Rules*, *supra* note 1, at 26–29 (summarizing relevant equal-protection doctrine).

23. *See* Lemon v. Kurtzman, 403 U.S. 602 (1970). In recent years, the *Lemon* test for Establishment Clause challenges has been criticized by various justices and, although not formally overruled, has "ceased to operate as a general Establishment Clause test." Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359. It seems clear, however, that some kind of purpose inquiry will remain part of Establishment Clause doctrine. *See id.* at 364–68.

24. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (internal quotations omitted). *See generally* Adler, *Rights Against Rules*, *supra* note 1, at 29–30, 37 n.144 (summarizing rule-dependent cast of free exercise doctrine post-*Smith* and even pre-*Smith*).

25. *See* Fallon, *supra* note 1, at 1325, 1365 ("[I accept] Adler's important insight that *many* constitutional rights are rights against rules," but "not all rights fit the [rule-dependence] framework"); Adler, *A Response to Professor Fallon*, *supra* note 1, at 1373–77 (agreeing with Fallon that rule-dependence is not universal, and clarifying that *Rights Against Rules* did not claim otherwise).

26. Given the Court's doctrine, "torture" here will need to be defined so as to include a sufficiently culpable mental state on the part of the governmental actor, as well as a certain

The torture example and others like it demonstrate that the rule-dependence claim needs to be an *existential* (descriptive) claim rather than a *universal* (descriptive) one. Think of the claim this way. Constitutional doctrine specifies a variety of scenarios that count as "unconstitutional," in which reviewing courts are empowered to enter appropriate remedies. Some of the scenarios are rule-independent. The doctrinal criteria for the existence of these scenarios make no essential reference to legal rules; it is not the case that if the scenario obtains, a particular type of legal rule is necessarily in force. Thus the "torture scenario." However, and by contrast, some of the scenarios are rule-dependent. The criteria for the existence of these scenarios *do* make essential reference to legal rules; it *is* the case that if the scenario obtains, a particular type of legal rule is necessarily in force. Thus the scenarios specified by the free-speech, free-exercise, Establishment Clause, and equal protection doctrines mentioned above. The claim I am making here is existential rather than universal because it asserts that *some* unconstitutional scenarios are rule-dependent, not that *all* are.

Let us call this the Rule-Dependence Thesis.

The Rule-Dependence Thesis

An unconstitutional "scenario" is a state-of-affairs described by judicial doctrine such that if that state obtains, a constitutional reviewing court is authorized to enter an appropriate remedy.[27] An unconstitutional scenario is "rule-dependent" if a necessary condition for that scenario to obtain is that a discrete legal rule of some type (e.g., a rule with a particular scope, language, or history) be in force. Some scenarios set forth by actual constitutional doctrine are indeed "rule-dependent."

There is a way in which this thesis is too weak. Not just some, but many—maybe most—unconstitutional scenarios described by actual doctrine are rule-dependent. In *Rights Against Rules*, I advanced the descriptive claim

kind of injury to the claimant. *See* County of Sacramento v. Lewis, 118 S. Ct. 1708, 1718 (1998) ("It is . . . behavior at the other end of the culpability spectrum [from negligence] that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). Note, however, that mental states and rules are different things. A government official O can intentionally perform, say, the action A of applying a cattleprod to a victim's body, without there existing any rule that authorizes or arguably authorizes that action. To be sure, for A to violate constitutional rights, some background set of legal rules must be in place, such that O is characterized as a "governmental" official and A as a "governmental" action; but this is not the same as saying that a particular rule authorizing A, or any other particular rule, must be in force.

27. Specifically, an unconstitutional "scenario" is a state of affairs of the following kind: It consists in the performance of some type of unconstitutional governmental action, plus the satisfaction of further prerequisites for judicial relief, such as the presentation of a constitutional claim by suitable litigants. This specification of the concept of an unconstitutional "scenario" follows from the "state action" doctrine, discussed *infra* text accompanying note 53. That doctrine means that any unconstitutional scenario must involve some kind of unconstitutional *governmental action*, rather than merely governmental inaction or private action.

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that unconstitutional scenarios involving the imposition of certain types of setbacks upon claimants—sanctions or duties—were generally rule-dependent,[28] and I still believe that claim to be true. But for purposes of this Article, it is not important to decide (descriptively) whether a very large fraction, or only a nontrivial fraction, of unconstitutional scenarios are rule-dependent. The strategy I pursue here is rather the following: It is to show that in a rule-dependent scenario, that feature of the scenario cannot be squared (in any way that makes normative sense) with the supposed tenure of personal rights by constitutional litigants.

In short: *Insofar* as constitutional rights are rule-dependent, constitutional litigants are not personal rights-holders. The Personal Rights Thesis (understood as the thesis that *all* constitutional litigants hold personal rights) and the Rule-Dependence Thesis (understood as the thesis that *some* constitutional scenarios are rule-dependent) are inconsistent. That will be the thrust of this article.

Why are the Personal Rights Thesis and the Rule-Dependence Thesis in tension? To see why, in an intuitive way, consider the Court's decision in the first flag-burning case, *Texas v. Johnson*.[29] The Court there overturned Mr. Johnson's sanction, imposed pursuant to a Texas statute prohibiting the "desecrat[ion] [of a] . . . state or national flag," while at the same time leaving the State of Texas free to sanction Johnson pursuant to a rule against arson, assault, the destruction of government property, pollution, or some other such rule that was not targeted at speech.[30] Johnson's successful claim in *Johnson* was premised upon the speech-targeted cast of the flag-desecration rule, not upon the innocence of his particular speech-act.[31] Contrast *Johnson* with the case of the rule-independent litigant who has been tortured by police, demonstrates that to the satisfaction of a constitutional reviewing court, and secures a damages judgment under the Due Process Clause. In the torture case, it is easy to see how the litigant's rights can be "personal," on various plausible conceptions of what constitutes a "personal right." Not only is she interested in the litigation—she has been harmed by the police action and will be benefited by the remedy—but the harm is to an aspect of her well-being that falls within the "zone of interests" protected by the Due Process Clause, namely, the interest in not being

28. *See* Adler, *Rights Against Rules*, *supra* note 1, at 13–39. More precisely, I claimed and still believe that *substantive* challenges to sanctions and duties are generally rule-dependent. *Rights Against Rules* did not examine the structure of procedural challenges to sanctions and duties. *See id.* at 18.

29. 491 U.S. 397 (1989).

30. *See* 491 U.S. at 413 n.8 ("We . . . emphasize that Johnson was prosecuted *only* for flag-desecration—not for trespass, disorderly conduct, or arson.").

31. For other cases like this, *see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (successful free-speech challenge, predicated on discriminatory cast of rule, where speech-act was also action of trespass); United States v. Eichman, 496 U.S. 310 (1990) (successful free-speech challenge, predicated on speech-targeted cast of rule, where speech-act may also have been action of injuring federal property).

tortured. Further, this interest trumps considerations of general welfare, and it is also suitably individualized; the court is justified in entering a remedy that benefits just the litigant (the damages remedy). By contrast, because Mr. Johnson could be an arsonist, polluter, assaulter, and so on—nothing in *Johnson* entails otherwise—it seemingly remains open to question whether an individualized remedy for him is justified[32] and whether his interest in speaking does indeed trump the general welfare.[33] And is arsonous, polluting, or assaultive speech the kind of speech that falls within the "zone of interests" of the Free Speech Clause?

To be sure, Mr. Johnson does have a bare interest in having the flag-desecration statute invalidated—he benefits from that remedy—but the same would be true of, say, a manufacturer of fire-starting fluids who prospers as a result of *Johnson* because she can now sell her product to flag burners. If it is not the case that the "personal" rights of the fluid manufacturer are violated by Texas's flag-desecration statute, then why are Mr. Johnson's?

Perhaps the intuitive tension between the Rule-Dependence Thesis and the Personal Rights Thesis can be explained away. I will argue to the contrary. First, however, let me show how that tension is intimately connected to a problem of considerable doctrinal currency: the problem of "facial" and "as-applied" challenges.

II. FACIAL AND AS-APPLIED CHALLENGES

In *United States v. Salerno*, the Supreme Court articulated the following doctrine for "facial" challenges to statutes and other rules.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act at stake in this case] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[34]

32. Assume Johnson turns out to be an arsonist, polluter, or assaulter. Then, intuitively, the Court would be unjustified in issuing an individualized remedial order that benefits only Johnson. I argued in *Rights Against Rules* that this intuition is correct; if Johnson is a wrongdoer under some description other than "flag desecrator," a reviewing court ought to overturn Johnson's sanction only as part of a *general* invalidation of the flag-desecration statute. *See* Adler, *Rights Against Rules*, *supra* note 1, at 39–91.

33. It is at least arguable that, where a speech-act has harmful nonexpressive characteristics, the justification for restricting that act need not be as strong as the justification for restricting a speech-act that is only harmful in virtue of what it expresses. *See* United States v. O'Brien, 391 U.S. 367 (1968) (articulating an intermediate-scrutiny test for rules that are targeted at nonexpressive act-properties but include some speech-acts within their scope); Adler, *Rights Against Rules*, *supra* note 1, at 109 n.357 (noting that, in recent years, the Court has not sustained *O'Brien*-type challenges).

34. 481 U.S. 739, 745 (1987).

Salerno has ignited a continuing and wide-ranging debate among the Justices about the appropriateness of facial challenges.[35] The controversy has considerable practical import: Facial invalidations constitute a large component of the Court's constitutional caselaw,[36] and the *Salerno* doctrine implies that many of these cases are incorrect. Further, this is a controversy with deep jurisprudential roots. *Salerno*, I suggest, is a direct upshot of the Personal Rights Thesis. The cases that cannot be squared with *Salerno* are cases in which the Court has (sub rosa) ignored the Personal Rights Thesis—cases in which the Court has entered constitutional remedies invalidating rules, notwithstanding the absence of any "personal right" on the part of the claimant. It is these cases, not *Salerno*, that are correctly decided, because (as I shall argue) personal rights and rule-dependence are inconsistent. Yet the Court cannot coherently disavow *Salerno* (and justify the cases at odds with *Salerno*) without disavowing the Personal Rights Thesis—something it is loath to do, given its frequent and long-standing endorsement of this Thesis.

Let us step back. What is a facial challenge? And what is an "as-applied" challenge—the kind of challenge to which "facial" challenges are frequently contrasted?[37] Here, as everywhere, ambiguity threatens. The term "as-applied challenge" can be used to mean (at least!) three different things.

(1) *A personal challenge.* An "as-applied" challenge, on one usage, is *any* constitutional challenge that seeks to vindicate the personal rights of the claimants.

35. This debate has been particularly intense in the area of abortion rights. *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (denying certiorari) (memorandum of Stevens, J.); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (denying stay) (O'Connor, J., concurring); Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011 (1992) (denying certiorari) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 972–73 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). But it has also occurred in other areas of constitutional law, including free speech, the Establishment Clause, equal protection, the Takings Clause, and in the assisted suicide cases. *See* Adler, *Rights Against Rules*, *supra* note 1, at 11 n.39 (citing cases). The propriety of facial challenges was prominently at issue in the recent Supreme Court decision sustaining a vagueness challenge to Chicago's gang loitering ordinance. *See* City of Chicago v. Morales, 119 S. Ct. 1849 (1999).

36. *See* Adler, *Rights Against Rules*, *supra* note 1, at 128 n.425 (citing recent facial invalidations); *id.* at 156 n.539 (citing facial invalidations in area of abortion rights).

37. These issues are finally beginning to receive academic attention. The three general treatments (besides *Rights Against Rules* and the contributions to this and the preceding issue of LEGAL THEORY) are Michael Dorf's seminal article, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Mark Isserles' *Overcoming Overbreadth*, *see supra* note 18; and Richard Fallon's *Facial and As-Applied Challenges*, *see supra* note 1. A number of student notes have discussed the facial-challenge problem in the abortion rights context. *See* Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered and the Split over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825 (1996); John Christopher Ford, Note, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443 (1997); Skye Gabel, Note, Casey *"Versus"* Salerno: *Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes*, 19 CARDOZO L. REV. 1825 (1998); Kevin

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In this sense, the tortured person has an "as-applied" challenge to being tortured. So does the black person who is sanctioned pursuant to a law that unjustifiably discriminates against blacks (if indeed, as is commonly thought, the application of such a rule violates personal rights).[38] And—if it is true that free-speech doctrine vindicates personal rights—so does the flag burner who challenges the application of a "no flag burning" law to him, by showing (a) that the law is targeted at speech and unsupported by sufficiently compelling interests[39] and (b) that his own flag burning is expressive, rather than (say) the nonexpressive disposal of an old flag.[40]

(2) *A personal challenge that makes reference to rules.* On this usage, the tortured person is not advancing an as-applied challenge (because his challenge is rule-independent), but the black discriminatee and the flag burner are advancing as-applied challenges (because these challenges assert the existence of one or another kind of improper rule). The discriminatee claims a violation of his personal rights that results from the application of a discriminatory rule to him; the flag burner claims a violation of his personal rights that results from the application of an unjustified, speech-targeted rule to his own speech-act.

(3) *A challenge that makes reference both to rules and to the litigant's own situation*. On this usage, the tortured person lacks an as-applied challenge. So does the black discriminatee—because he needs to show nothing beyond the fact that the rule is unjustifiably discriminatory to prevail on his constitutional claim. Only the flag burner has an as-applied claim, in this sense, because his challenge makes reference both to the "no flag burning" rule (to the fact that the rule is speech-targeted and unsupported by sufficiently compelling interests) and to his own situation (to the fact that his own flag burning is expressive). Note further that on this definition of "as-applied," the flag burner's challenge is as-applied whether or not it turns out to be "personal." Why would a reviewing court ever make reference to features of the litigant's own situation, if the court were not vindicating "personal" rights? One possibility is this: By specifying features of the litigant's own

Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173 (1999).

38. *See, e.g.*, Dorf, *supra* note 37, at 257–61 (suggesting that the application of a law discriminating against a suspect class to a member of that class does violate her personal rights).

39. *Cf.* Texas v. Johnson, 491 U.S. 397, 406–421, 406, 412 (1989) (holding that Texas's flag-desecration law was "directed at the communicative nature of conduct" and therefore triggered "the most exacting scrutiny," which it failed) (internal quotations omitted).

40. *Cf. Johnson*, 491 U.S. at 404 n.3 ("Although Johnson has raised a facial challenge to Texas's flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. . . . A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case . . . we address only Johnson's claim that [the statute] as applied to political expression like his violates the First Amendment.").

situation that are necessary for a successful challenge against the rule, the court is partially invalidating (amending) the rule, rather than wholly invalidating (repealing) it.[41] The features of the litigant picked out by the court are (on this analysis) meant to identify the types of cases in which future prosecutors and courts ought not enforce the rule. Whether or not this particular (partial-invalidation) view is correct, the broader point to see here is that judicial reference to features of the litigant's own situation is conceptually distinct from the vindication of personal rights.

Thus the three meanings of "as-applied." Which is the most perspicuous? I think the third. Assuming it is impossible for a challenge to be both facial and as-applied, the first usage implies that "facial" challenges are, by definition, impersonal. (But what about the discriminatee?) The second implies that the discriminatee has an as-applied, not a facial challenge. (But is that not counterintuitive, since all he relies upon is the discriminatory cast of the rule?) So my definition of "facial" and "as-applied" challenge will be as follows:

Facial and As-Applied Challenges

A "facial" unconstitutional scenario is a rule-dependent scenario that makes no reference to features of the litigant's own situation (beyond her having some minimum nexus to the rule identified by the scenario, e.g., being subject to it). An "as-applied" unconstitutional scenario is a rule-dependent scenario that, further, makes reference to features of the litigant's own situation. A "facial" challenge claims the existence of a facial scenario, while an "as-applied" challenge claims the existence of an as-applied scenario.

Now back to *Salerno*. I have said that the *Salerno* doctrine for facial challenges follows directly from the Personal Rights Thesis. It should now be pretty easy to see why. If the Personal Rights Thesis is correct, then all challenges—in particular, all rule-dependent challenges, facial or as-applied—must vindicate personal rights. A facial challenge is a rule-dependent challenge that makes no reference to features of the litigant's own situation. Given the Personal Rights Thesis, a facial challenge should succeed only if—regardless of the particular situation of the litigant—the application of the rule to her infringes her personal rights. That is, a facial challenge should succeed only if the sheer fact of the rule's fitting a particular description (its being discriminatory, or overbroad, or poorly tailored, or whatever) *guarantees* that every person falling under the rule will have his personal rights violated by its application. Conversely, if this is not true—if there is some litigant to whom the rule might be applied without violating her personal rights—then a facial challenge is inappropriate. But this is just what *Salerno* says: "A facial challenge to a legislative Act is, of

41. *See* Adler, *Rights Against Rules*, *supra* note 1, at 36–38, 106, 125–27, 157–58 (suggesting that as-applied challenges are best understood as partial invalidations).

course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[42]

This has unsettling implications in various areas of constitutional doctrine. Consider, as one example, the abortion-rights cases. The Court, in this line of case law, has frequently sustained facial challenges to statutes and other rules.[43] *Roe v. Wade*,[44] for example, facially invalidated a statute that prohibited all abortions (with very limited exceptions). But *Roe*'s holding runs afoul of *Salerno*: A law prohibiting all abortion, as applied to the abortion of a viable fetus, would not seem to violate the mother's personal rights, given the viability–nonviability line set out in *Roe* and reaffirmed in *Casey*. Perhaps a yet more perverse statute would meet *Salerno*'s strictures? It is hard to see how. Imagine a statute prohibiting all *previability* abortions. Again, there would seem to be instances of that statute that violate no one's personal rights—say, its application to a mother who procures a previability abortion by means of a coercive threat against the doctor.[45]

But how to vindicate *Roe* and its ilk in the face of *Salerno*? *Salerno* represents the straightforward application of the Personal Rights Thesis to the case of facial challenges. The specific holding of *Salerno*, again, is a consequence of the more encompassing (and more profound) claim that all rule-dependent challenges, facial or as-applied, vindicate personal rights. It is this claim, most deeply, that the debate about *Salerno* concerns—that its defenders need to defend, and its critics need to reject. Let us now consider whether the claim is, in fact, a defensible one.

42. 481 U.S. at 745. One objection to my line of argument here is that *Salerno* follows from the Personal Rights Thesis only if that thesis requires judicial *certainty* that the claimant's rights have been violated, as a prerequisite for judicial relief. Imagine instead that (1) the Thesis requires only that the court be 51% sure that the claimant's rights have been violated; (2) the court is 100% sure that, for a given rule R1, 51% of R1's applications violate the rights of those to whom R1 is applied; (3) claimant C raises a facial challenge to R1, asserting only that R1 applies to him but adducing no further facts about the particulars of his situation. Then the court is justified in giving C a remedy, even though the *Salerno* test has not been satisfied.

I think this line of argument is correct, and so my blanket claim in the text needs to be refined. *Salerno* follows from the Personal Rights Thesis together with a premise that the level of proof (degree of justified judicial belief) achieved with respect to the elements of the Thesis is a high one.

43. I count all of the following as facial invalidations: Planned Parenthood v. Casey, 505 U.S. 833 (1992); Hodgson v. Minnesota, 497 U.S. 417 (1990); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Belloti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

44. 410 U.S. 113 (1973).

45. *See Rights Against Rules*, *supra* note 1, at 42, 39–91 (describing hypothetical case of a sanction imposed pursuant to an antiabortion statute upon a woman who procures an abortion through a coercive threat, and arguing inter alia that such a sanction would not violate the woman's personal rights).

III. CAN THE RULE-DEPENDENCE THESIS AND THE PERSONAL RIGHTS THESIS BE RECONCILED? INTEREST THEORIES OF RIGHTS

The Personal Rights Thesis says that P properly holds the power to secure a remedy from a constitutional reviewing court only if P's "personal rights" are at stake. The Rule-Dependence Thesis says that, sometimes, P properly holds the power to secure a remedy from a constitutional reviewing court only if a particular kind of legal rule is in force. Can the two theses be reconciled? The concept of "personal right" is a vague and contested concept—as evidenced by the long-running debate within analytic jurisprudence about the nature of "rights." One prominent position within this debate is that occupied by Interest Theories of rights.[46] Joseph Raz[47] and Neal MacCormick[48] are the best-known contemporary proponents of Interest Theories, as against H.L.A. Hart, who has argued for a Choice Theory.[49] Jeremy Bentham, whose work initiated this debate,[50] held a theory of rights different from that of Raz and McCormick but still properly characterized as an Interest Theory.

This Part considers whether the Rule-Dependence Thesis and the Personal Rights Thesis can be reconciled on (some variant of) an Interest Theory of rights. Later on, I will proceed to consider different theories of rights, such as Hart's Choice Theory and yet others. But it makes sense to start with the Interest Theories—both because of the importance of such theories within modern jurisprudence and because the Supreme Court's own understanding of "personal rights" seems to involve an interest theory.[51]

Let us say that a theory of rights is an Interest Theory of rights if P's holding a right (in our terminology, a "personal right") entails P's having a particular kind of interest. This definition covers a lot of ground—enough to encompass Raz, MacCormick, Bentham, and the various other scholars who are characterized as holding interest views—but it still delineates a distinct and nontrivial position. The Interest Theorist links a jural advantage held by P—a liberty, claim, power, or immunity—to some

46. For an extended and recent summary of the debate between Interest Theorists and Will Theorists, see Kramer, *supra* note 17, at 60–101.

47. *See, e.g.*, Joseph Raz, THE MORALITY OF FREEDOM 165–92 (1986).

48. *See, e.g.*, D.N. MacCormick, *Rights in Legislation*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 189 (P.M.S. Hacker & J. Raz eds., 1977).

49. *See, e.g.*, H.L.A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171 (2d series; A.W.B. Simpson ed., 1973).

50. *See id.* (discussing Bentham's theory of rights).

51. This is true insofar as current Article III doctrine maps onto a weak variant of an Interest Theory of rights, by requiring "injury in fact." *See infra* Part III.D. A fortiori, the person whose "personal rights" are violated by unconstitutional governmental action will be able to show injury. For an illuminating discussion of standing doctrine, and its evolution from a stronger interest-based view that equated standing with the tenure of personal rights, see Monaghan, *supra* note 10.

aspect of P's *well-being*.[52] Only if such a link can be drawn, the Theorist claims, can that advantage be said to constitute, protect, or realize P's "personal rights."

What, specifically, would the Interest Theorist say about constitutional rights? I take it she would say at least the following: P legitimately has the power to secure relief from a constitutional reviewing court only if governmental actors have performed, or threatened to perform, some action that (1) infringes some constitutionally distinctive interest of P's (at the limit, any interest of P's) and (2) is unjustified. Note a couple of assumptions here, which I take to be uncontroversial. The first is that the interest of a person, P, that makes her a *constitutional* rights-holder is an interest in the actions of governmental officials. This is not a consequence of the Interest Theory of rights, or of the Personal Rights Thesis (as I have framed it), but rather of the "state action" doctrine—a basic feature of American constitutional law.[53] The second assumption is that justified actions by governmental officials cannot be unconstitutional actions; being unjustified, in some way, whether legally or morally, is a necessary condition for being unconstitutional. A view of constitutional rights that empowered P to secure judicial relief against justified infringements of her interests would be, strictly, consistent with an Interest Theory of rights and with the Personal Rights Thesis (as I have framed it), but it would involve an unfamiliar understanding of how the Constitution grounds rights.[54]

I am also going to assume, at least for now, that the Interest Theorist will want to strengthen her definition of constitutional rights a bit more. The strengthened version of constitutional rights that I will focus on in this Part runs as follows: P legitimately has the power to secure relief from a constitutional reviewing court only if governmental actors have performed, or threatened to perform, some action such that (1) that action infringes some constitutionally distinctive interest of P's and (2) not only is the action unjustified, but *the harm to P (the infringement of her interest) is unjustified*. The concept of "unjustified harm," which I have invoked here, is surely an important part of our framework of normative

52. *See* Sumner, *supra* note 11, at 47 ("The interest conception treats rights as devices for promoting individual welfare."). As Raz puts it, "To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e., that an aspect of his well-being is a ground for a duty on another person." Raz, *supra* note 47, at 180.

53. *See*, *e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989).

54. The one apparent counterexample is the Takings Clause, since a property owner is constitutionally entitled to compensation even when government, for very good reasons, takes his property for public use. But what constitutes a rights violation, in the Takings Clause context, is the (unjustified) taking-and-then-not-paying-compensation, not the (justified) taking. Relatedly, the property owner has no power to secure constitutional relief, from a federal reviewing court, until the government has both taken his property and declined to compensate him. *See*, *e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation").

concepts[55]—at least insofar as we discuss the existence and scope of moral and legal rights—but it is a difficult concept to make precise. To say that P has suffered unjustified harm from governmental action entails *more* than saying that the government has acted unjustifiably and thereby caused harm to P. For example: If the government (unjustifiably) passes a rule prohibiting the display of pictures of naked or partly clothed children, then it is true both of P1 (the child pornographer, coerced not to display kiddy porn by the rule) *and* of P2 (the innocent parent, coerced not to display a picture of her infant to relatives) that the government has acted unjustifiably causing them harm.[56] The unjustifiable governmental action is the enactment of the overbroad rule; the harm to P1 and to P2 is the setback to the liberty of each.

Still, intuitively, there is a sense in which P2 has suffered *unjustified harm* while P1 has not. After all, P1's liberty to display kiddy porn ought to be restricted;[57] it is only by virtue of the fact that the rule covers P2 and other innocents, and not by virtue of the fact that it covers P1, that the governmental action of enacting the rule is unjustified. Relatedly, in this kind of case P2 will be described by constitutional scholars and the Court as asserting her "personal rights," while P1 will be seen as lacking any "personal rights" against the enactment of the rule.[58] P2 has suffered a wrong *to her*—an unjustified harm—while the harm that P1 suffers is, taken alone, an appropriate one.

How, then, should the concept of "unjustified harm" be made precise, such that P2, but not P1, will count as suffering that? It is tempting to say that P's harm is unjustified relative to an action A if the action is unjustified and the harm counts as a reason not to perform the action. I am not sure this works: After all, harm to anyone is (arguably) always one reason not to perform an action, although the harm might be outweighed by countervailing considerations. Alternatively, "unjustified harm" might be defined with

55. *See generally* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (arguing that a plaintiff has a right to sue a defendant in tort only if the defendant has breached a duty to the plaintiff—if the defendant has committed a relational wrong, relative to the plaintiff—and not merely because the defendant has committed a wrongful act that forseeably injured the plaintiff).

56. I assume that such a rule would be sufficiently overinclusive to count as unconstitutionally "overbroad" under the Court's doctrine. *Cf.* Massachusetts v. Oakes, 491 U.S. 576, 590 (1989) (Brennan, J., dissenting) (arguing that statute prohibiting nude or sexual photographs, etc., of children, with nudity defined only to include genitals, pubic areas, and postpubertal female breasts, was overbroad).

57. At least under current free-speech doctrine; the Court has more than once upheld statutes regulating child pornography. *See* Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).

58. P1's challenge to the rule would be seen by the Court (and by constitutional scholars who accept the Court's formulation of the overbreadth doctrine) as a paradigmatic First Amendment "overbreadth" challenge: a challenge that is asserted by a person whose own speech is unprotected, and who, therefore, cannot raise a claim of "personal rights," but is permitted to invoke judicial relief given a special, First Amendment exception to the personal rights requirement. *See* sources cited *supra* note 9.

reference to considerations of desert:[59] Harm is unjustified if and only if it is undeserved. The problem here is that this ties the seemingly generic concept of "unjustified harm" to a fairly specific (and contestable) part of the moral landscape. In our example, the fact that P1, but not P2, is justifiably coerced can be explained in forward-looking terms—kiddy porn hurts kids, but the display of infant photos does not—rather than on the grounds that P1 deserves a setback more than P2.

In my article *Rights Against Rules*, I (implicitly) took a different approach to defining "unjustified harm." I thought of that as a harm such that suitably individualized actions to repair the harm were justified: P was "unjustifiably harmed," I suggested, if remedying or preventing P's harm alone was justified. Note how this distinguishes between P1 and P2 in the above example: A judicial order freeing P2 alone from the overbroad rule is justified, but a judicial order freeing P1 alone is not. Note, further, how this definition links closely with the role of courts in enforcing rights: If and only if P has suffered "unjustified harm," as I defined it, is a personal remedy—the kind of remedy that courts are unproblematically empowered to provide P—justified.

This definition of "unjustified harm" is, however, not a perfect one, and it may not be the only good one. There may be a variety of conceptualizations that acceptably specify what makes P1 different from P2. For purposes of this article, I will not insist on a particular such conceptualization—except to say, once more, that P does not suffer unjustifiable harm merely because the government has acted unjustifiably, causing harm to P.

The strengthened version of rights that I will be focusing on in this Part—that P holds a constitutional right only if a governmental infringement of his interests constitutes unjustified harm to him—is not entailed by the Interest Theory of rights, or by the state action doctrine, or by the proposition that justified governmental action is not rights-violating. But the Interest Theorist will adopt the strengthened version if she wants to make sense of the further platitude of American constitutional law (exemplified by the case of P1 and P2) that governmental action can be unjustified and harmful to a claimant's important (indeed, constitutionally distinctive)[60] interests without violating her constitutional rights. "Unjustified harm" is simply my placeholder for the additional feature, variously specified by different kinds of strengthened Interest Theories, that (on

59. *See generally* George Sher, DESERT (1987) (analyzing such considerations, and partly defending their moral significance).

60. Why not use the first prong of the rights schema—the requirement that the rights-holder's *constitutionally distinctive* interest be infringed—to do the work of sorting between P1 and P2, and more generally between rights-holders and those merely harmed by governmental wrongdoing? The claim would have to be that P1 suffers a different kind of setback to his well-being than P2. That is what I mean by "constitutionally distinctive," as I explain at greater length below; the first prong of the schema is meant to capture the effect of the unconstitutional governmental action on the rights-holder herself. *See infra* Part III.A. But it's hardly clear that P1 does suffer a different kind of welfare setback than P2; and even if that were true

these theories) is possessed by the constitutional rights-holder but not necessarily by anyone whose interests are adversely affected by governmental wrongdoing.

A. Rules and Distinctive Interests

The Interest Theorist says that P has the power to secure constitutional relief only if (1) governmental actors have infringed some constitutionally distinctive interest of P's and (2) that harm to P is unjustified. If this is the correct framework for understanding constitutional rights, why should the Rule-Dependence Thesis hold true? One general line of response is the following: Rules are relevant to the *first* prong of the rights framework, i.e., to the infringement of constitutionally distinctive interests.[61] For at least some of the setbacks to interest that count as "constitutionally distinctive," the existence of a certain type of rule (plus some nexus to that rule on the part of P, the claimant) is wholly or partly constitutive of the existence of that setback.

Here is an example to make the idea more concrete. P's interest in not being stigmatized as an inferior lies within the zone of interests protected by the Constitution (specifically, by the Equal Protection Clause).[62] That interest is "constitutionally distinctive," as I have put it. Further, P is stigmatized as an inferior just in case a legal rule possessing a stigmatic message about some class of persons within which P falls is in force and is applied to P. Therefore, an infringement of P's interest in not being stigmatized as an inferior is (partly) constituted by the existence of a certain type of rule—one possessing a stigmatic meaning. Constitutional doctrine, insofar as it protects that interest, makes essential reference to the types of legal rules in force. Or so a plausible account of the Rule-Dependence Thesis goes.[63]

The account is plausible, but does it really succeed? Is it truly the case that, for at least some constitutionally distinctive interest, governmental

in this example, it would not be generally true of overbreadth cases or other cases where persons harmed by unconstitutional government action are seen as lacking personal rights.

Consider, for example, the harm constituted by a sanction that flows from an overbroad rule; both the overbreadth claimant who challenges his sanction, and the "personal rights" claimant who challenges his sanction, would seem to be suffering exactly the same type of harm. Moreover, in both cases the harm flows from an unjustified governmental action, namely the action of enacting the rule. So some further feature—"unjustified harm"—is needed to sort between the two claimants.

61. To put this prong of the framework in terms more familiar to constitutional lawyers: She might insist that P's interest lie within the "zone of interests" protected by the Constitution. *See* Anthony, *supra* note 14 (discussing zone-of-interest doctrine).

62. This is a familiar view, defended (among others) by Andrew Koppelman, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

63. *See* Adler, *Rights Against Rules*, *supra* note 1, at 71–74 (further articulating this account).

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infringement of that interest is constituted (even partly constituted) by the existence of a particular type of legal rule? At the threshold, note an ambiguity in the meaning of "constitutionally distinctive." An aspect of P's well-being could, it seems, be "constitutionally distinctive" in two different ways. First, constitutional distinctiveness might involve *moral distinctiveness.* Assume that on our best theory for individuating the constituents or prerequisites for well-being, a person's well-being depends on how fully she realizes (A1, . . . An). An aspect A* of well-being is morally distinctive if A* equals some Ai. Second, constitutional distinctiveness might involve *mere legal distinctiveness.* An aspect A* of well-being is merely legally distinctive if constitutional law specifies A* as distinctive, without it being the case that A* is morally distinct. For example, a specific provision in the Constitution's text might clearly demarcate infringements of A* as giving rise to constitutional rights—even though, on our best theory of well-being, A* is simply a fragment of some more basic Ai.

For now, I will simply take for granted the premise that "constitutionally distinctive" interests are morally distinctive, and not merely legally distinctive. I will eventually defend that premise below, in Section C, in the course of a broader analysis as to whether constitutional criteria are moral or merely legal.

Consider, now, whether the existence of a legal rule (plus some nexus to that rule on P's part), is partly or wholly constitutive of an infringement of a distinctive—morally distinctive—aspect of P's well-being. Why would it be? What are the characteristic features of legal rules, such that rules might be thought to have a constitutive connection to certain elements of human welfare? First, there is a clear connection between legal rules and legal positions (rights, liberties, duties, powers, immunities, disabilities, and so on). One function of legal rules is to create the legal positions that citizens hold and, perhaps, challenge as unconstitutional. A bit more robustly, one might with some plausibility say this: For certain types of legal positions, P holds the position only if a discrete legal rule, vesting the position in P, exists. For example, it is arguably the case that P has a legal duty not to perform some range of actions only if a discrete legal rule enjoining persons not to perform such actions and including P within its scope is in force.[64] Further, a reasonable suggestion would be that legal positions (or some of them) are morally distinctive constituents of well-being. P's tenure

64. But what about individualized orders? *Some* duties (for example, the duty to go to prison, or the duty to pay money as a fine, or the duty not to perform actions forbidden by judicial injunction) are imposed by a person-specific order rather than by a general rule. Nor is it clearly true, of those duties that are imposed by general rule, that a discrete legal duty entails a discrete legal rule; networks of rules could give rise to discrete duties. I will, however, ignore these points and assume, for the sake of argument, that—for some constitutionally distinctive types of legal positions, e.g., some types of duties—the scenario in which a claimant holds a particular position of that type just is a scenario in which a particular type of legal rule is in force. Even on this assumption, the rule-dependent cast of constitutional doctrine is not explained, as I discuss below.

of a legal liberty is good for him in a different way than P's being in good health, or P's possessing money; similarly, P's tenure of a legal duty is distinct, qua welfare, than the physical pains that P suffers, even though both are bad for him.[65] Putting these ideas together, the defender of the Personal Rights Thesis might propose that whether P's constitutionally and morally distinctive interest in possessing (or not possessing) certain legal positions has been infringed depends on what legal rules are in force. Insofar as constitutional doctrine protects that interest of P's, it makes essential reference to legal rules.

Note however that the reconciliation between the Personal Rights Thesis and the Rule-Dependence Thesis achieved by this line of argument is a very limited one. It does not explain, for example, why if a particular legal position is imposed upon P1, and the very same legal position is imposed upon P2, P1 but not P2 should have a valid constitutional claim in virtue of the legal rule that governmental officials followed in P1's case. P1 is sentenced to a year in jail pursuant to a rule that prohibits "criticizing the government"; P2 is sentenced to a year in jail pursuant to a rule that prohibits "trespass." Or, P1 is denied a grant of $1000 from the welfare agency pursuant to a rule that confers benefits only upon "white persons"; P2 is denied a grant of $1000 from the welfare agency pursuant to a rule that confers benefits only upon "impoverished persons." Many of the setbacks to interest that constitutional claimants challenge, such as sanctions or the denial of benefits, jobs, or licenses, are created not by the enactment of a legal rule, but by the issuance of a particularized order directed at the claimant. In such a context, the language, scope, or history of the general rule that the issuing official took to authorize her particularized order are not constitutive of the legal position challenged by the claimant—that is constituted by the terms of the order. And yet these features of the authorizing rule have much significance for the viability of the claimant's challenge as doctrine currently stands.[66]

To put the point a bit more generally and abstractly: Constitutional doctrine as it currently stands is *broadly* rule-dependent. The rules in claimant P's environment can bear on his constitutional claim, not just in defining his legal liberties, duties, and other legal positions, but also in authorizing or causing the setbacks (legal or other) that he suffers. What the defender of the Personal Rights Thesis needs to explain is broad

65. *Cf.* John Rawls, A THEORY OF JUSTICE 92 (1971) (specifying "rights" and "liberties" as separate types of primary goods).

66. Texas v. Johnson, 491 U.S. 397 (1989), is paradigmatic. In *Johnson*, a state-court directive ordering Johnson to spend one year in prison and pay $2000 was overturned by the Supreme Court because Johnson had been prosecuted pursuant to a speech-targeted law, one prohibiting the "desecrat[ion] [of a] . . . state or national flag." Numerous other cases involving the Court's reversal of a sanction by virtue (in part) of the rule that the government had relied upon to obtain the sanction, and not merely by virtue of the change in legal position that the sanction constituted, are cited in *Rights Against Rules*, *supra* note 1, at 13–39.

rule-dependence, but the conceptual connection between rules and legal positions, such as it may be, will not help him do it.[67]

Legal rules do not merely function to create the legal positions held by persons. A legal rule can also function to *characterize* citizens as falling under the description announced by the terms of the rule. The distinction between these two functions maps, very roughly, onto the familiar distinction between conduct rules and decision rules.[68] A conduct rule (call it R) creates a duty not to perform certain actions. A decision rule (call it R*) authorizes governmental officials to issue directives, or take other actions, with respect to persons who have breached the duty created by the accompanying conduct rule R or who satisfy some other such description contained in R*. Thus, insofar as governmental officials take (or purport to take) R* as authorizing action against P, they (at least implicitly) characterize P as falling under the description contained in or referenced by R*. For example, if a conduct rule states that "no blacks shall purchase land," and an associated decision-rule authorizes government officials to levy fines against those who breach this conduct rule, then—insofar as government officials levy a fine on P in virtue of that decision rule—they have (implicitly) characterized him as "black" and as having "purchased land." The entry of the fine against P entails, not just the creation of a new legal position for P (a duty to pay money), but also the creation of an official description, one that flows from the legal rules that authorize governmental officials to act against P.

This is (I take it) the insight behind the "expressivist" view of constitutional law that has proved popular as an account of the Equal Protection Clause, the Establishment Clause, the Free Exercise Clause, and other provisions.[69] The expressivist sees that legal rules can function to characterize persons as falling under various, official descriptions—insofar as rules are *applied* to persons (i.e., serve as decision rules that state officials take to authorize action against those persons), or perhaps in other ways as well. The expressivist argues, further, that the Constitution prohibits the government from uttering certain descriptions. In particular, and paradigmatically, the Constitution prohibits the government from describing persons as inferiors—as second-class citizens, as persons not worthy of full concern

67. The temptation to explain cases of broad rule-dependence as cases where the claimant holds yet another legal position—a liability—should be avoided. For example, if rule R1 says that "All black persons are subject to a $1000 fine if they drive faster than 80 miles per hour," and rule R2 says that "All persons whose income was greater than $1 million in 1998 are subject to a $1000 fine if they drive faster than 80 miles per hour," then P (a black millionaire) has exactly the same liability under R1 and R2—the liability to have a large fine imposed if he speeds—but only his sanction under R1 will be unconstitutional.

68. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,* 97 HARV. L. REV. 625 (1984).

69. *See generally* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview,* 148 U. PA. L. REV. 1363 (2000) (describing and criticizing expressive theories of law, including expressive theories of constitutional law).

and respect.[70] One might ask how the language contained in legal rules could possibly do *that*. For example, a rule that authorizes sanctions against certain "black" persons literally describes them as "black," not as "racially inferior." In response to this observation, the expressivist can point out that the semantic and, in particular, descriptive content of language is not limited to its literal content.[71]

What does all of this have to do with rights and rule-dependence? As I tried to suggest earlier with my example of the stigmatic rule, expressivism turns out to be a natural strategy for showing how rules can be constitutive of morally and constitutionally distinctive setbacks to claimants' well-being. Consider the following schema:

(1) P has a constitutionally protected, and morally distinctive, interest in the government's refraining from characterizing him as falling under certain descriptions. (Call these "prohibited descriptions.")
(2) For at least some prohibited descriptions, P is characterized as falling under such a description only if a particular legal rule is in force (and P has some nexus to that rule, for example, its being applied to him). Therefore,
(3) Constitutional doctrine, in protecting P's interest in not being characterized as falling under certain prohibited descriptions, makes essential reference to legal rules.

Again, this is a natural schema for reconciling rule-dependence and an interest theory of rights because one of the central functions of rules is to describe; the idea here is to use descriptions as an intermediating factor between interests, on the one hand, and rules, on the other.

The problem with the schema just delineated is the first premise—that persons have a constitutionally (morally) distinctive interest in being free of certain, official descriptions. Why is *that* an important and separable aspect of welfare? Standardly, expressivists draw a link between the content of the government's descriptions and the social status (and concomitant self-respect) of the persons thus described.[72] If, for example, the government describes P as an inferior, this tends to confer upon him the social status *of* an inferior, and thereby to diminish the self-respect that he possesses—or so the story goes. I will assume that self-respect is indeed a morally distinctive aspect of welfare. I doubt whether social status and self-respect are really so tightly linked, but let me place this issue to one side. Even if there *is* a constitutive connection between P's social status and P's tenure of the morally distinctive good of self-respect (or any other morally

70. Stigmatic utterances—utterances that characterize the target as inferior—have been a central concern of "expressivist" scholars, not just in the area of the Equal Protection Clause, *see* sources cited *supra* note 62, but in other areas as well. *See* Adler, *supra* note 69, at 1422–25,1428–38, 1446.

71. *See* Adler, *supra* note 69, at 1384–88, 1400–01 (noting that an utterance with a particular literal meaning may also have a non-literal conventional meaning, or a non-literal speaker's meaning).

72. *See id.* at 1432–33.

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distinctive good), there is no such connection between the government's description of P and P's social status.

Social status is, roughly, a matter of what is generally believed about P. But the link between (a) the government's characterization of P as falling under a particular description and (b) the existence of a general belief that P falls under that description (or any other general belief about P) is purely contingent. The government's characterization of P is not *sufficient* to trigger a general belief about P, because governmental officials might be widely despised or ignored by the population. Nor is the government's characterization of P *necessary* to trigger a general belief about P, because the general beliefs constitutive of social status have lots of sources other than the characterizations contained in legal rules.[73]

In short, the connection between social status and governmental description is simply too weak to explain why constitutional doctrine—insofar as it protects a distinctive interest in status and concomitant self-respect—should make reference to legal rules. An (epistemically and remedially perfect) reviewing court concerned to remedy or prevent status-setbacks to P would not require P to identify some legal rule containing a prohibited description of him; rather, the court would require P to identify a governmental action of any kind causing an unfavorable change in collective beliefs about P.[74] This creates a dilemma for the defender of the Personal Rights Thesis. Either she argues that the distinctive interest protected by the Constitution is status (and concomitant self-respect), in which case the Rule-Dependence Thesis remains unexplained. Or she argues that the distinctive interest protected by the Constitution is an interest in being free from certain official descriptions—regardless of the effect of such descriptions on status or self-respect—in which case the claim that persons have a distinctive interest in *this* becomes implausible.[75]

73. This encapsulates an argument presented at much greater length in *id.* at 1424–25, 1434–36, 1447–48; and also in Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Response to Professors Anderson and Piildes*, 148 U. PA. L. REV. 1577, 1590–94 (2000).

74. To be sure, actual courts are not epistemically or remedially perfect. My invocation here of the ideal of an epistemically and remedially perfect court is meant to delineate what P's constitutionally distinctive interest in status and self-respect consists in—not as a recommendation for actual constitutional doctrine. Given judicial imperfections, the best way to achieve status goals (minimizing the number of persons with inferior status) might be to craft a judicial doctrine that focuses on the content of governmental descriptions rather than on status impacts. The first kind of doctrine might be easier and cheaper to implement than the second. But adopting the first kind of doctrine means giving up the Personal Rights Thesis. Description-focused rather than status-focused doctrine fails to vindicate the personal rights of constitutional claimants, because a claimant who is the subject of a doctrinally prohibited description need not thereby suffer a harm to his constitutionally distinctive interest in status.

75. A further difficulty with the expressivist line of argument for defending rule-dependence is that descriptions do not really entail rules. Rules may be a central source of descriptions, but it is easy to imagine cases in which a governmental actor utters a prohibited description of some claimant without that description being embodied in some rule. For example, if an administrative agency, operating under a broad grant of statutory authority, issues an individualized order against a claimant and accompanies the order with an opinion

Thus far we have considered two central functions of legal rules—in creating legal positions, and in producing official descriptions—and two matching accounts of the Rule-Dependence Thesis. Neither account is successful, or so I have claimed. A third central function (or at least feature) of legal rules is this: Rules issue from a particular rule-formulation process, either a legislative process (in the case of a statute) or an administrative process (in the case of a regulation). Two rules identical in the positions they create, and the descriptions they produce, might differ in the processes by which they were enacted. Indeed, a substantial segment of rule-dependent constitutional doctrine appears to focus on the rule-enactment process—thus, for example, Equal Protection and Establishment Clause doctrines that trigger a constitutional claim if the legislative or administrative "purpose" behind a rule was discriminatory or non-secular[76]—and there is a significant body of academic literature in defense of a "process" approach to constitutional law.[77] Perhaps, then, the defender of the Personal Rights Thesis might try to explain the Rule-Dependence Thesis as follows: Insofar as a rule exists that issued from a flawed process (and P has the right sort of nexus to that rule), a constitutionally distinctive interest of P's is infringed.

This line of argument raises large issues, which I cannot hope to fully address here.[78] At a minimum, it is clear that—if the instrumentalist view of rule-formulation processes is correct—the line of argument fails. The instrumentalist view of rule-formulation processes is this: There is no intrinsic value, and in particular no intrinsic benefit for human welfare, in the process by which a rule is enacted (or, more generally, the process by which any legal directive is formulated). On this view, if there are two rules, R1 and R2, that have the very same semantic content, are issued in the same social context, and are taken by governmental officials to authorize the very same set of directives and actions, then the effect of the two rules on welfare is just the same. The sheer fact that R1 was formulated through a different process than R2 can make no difference to anyone's well-being. Rule-formulation processes are more or less "flawed" just insofar as they produce

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that purports to justify the order on the grounds that the claimant is "black," this would seem to be no less troubling an utterance than the case where the underlying statute or an administrative rule authorizes agency orders only against "blacks." Prohibited descriptions, like legal positions, are typically connected to particular rules but do not strictly necessitate them. *See supra* note 64.

76. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 271–80 (1979) (explaining relevance of "discriminatory purpose" within equal protection doctrine); *supra* note 23 (discussing relevance of religious purpose within Establishment Clause doctrine).

77. *See, e.g.*, John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For specific discussion of the doctrinal role that the purpose of a rule, or other features of the process that produced it, should have in constitutional challenges to the rule or to actions flowing from it, *see* Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

78. An acute and much fuller treatment is provided by Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19 (1998).

different outcomes—paradigmatically, rules that differ in semantic content—and not because process as such has importance for welfare. Clearly, if the instrumentalist view is correct, the flaw in the process by which a rule affecting P was enacted—whether this flaw is a participational flaw, an epistemic flaw, or a flaw of some other kind—will not constitute an infringement of P's interests. A fortiori, it will not constitute an infringement of his "constitutionally distinctive" interests.

Many constitutional scholars have denied the instrumentalist view. For example, many scholars think that participation in rule-formulation and other processes has intrinsic value for welfare.[79] It is also plausible to think that persons can have intrinsic epistemic interests in rule-formulation processes—an intrinsic interest that the rule-formulator deliberate about the moral justifiability of the rules it eventually issues[80]—or intrinsic interests in the mental states held by legislators or administrators.[81] I think the instrumentalist view can survive all of these challenges, for reasons I will briefly sketch. Imagine that M* is the instrumentally best-justified rule-formulation process.[82] That is: M* is the process that rule-formulators would be rational to follow were they simply concerned with producing substantively justified rules. Then if intrinsic processual criteria obtain, nothing guarantees that M* complies with such criteria, or that a complying process will produce a substantively optimal rule R*. (If M* is guaranteed to comply with the processual criteria, they are instrumental, not intrinsic.)[83] This means, in particular, that the legislature might have followed M* and produced a rule R* that is morally optimal with respect to substantive criteria, and still have committed a moral wrong. Relatedly, the legislature would be morally

79. This view has been most fully articulated in the literature on procedural due process. *See, e.g.*, Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126 (J. Roland Pennock & John W. Chapman eds., 1977); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

80. *See* Adler, *Rights Against Rules*, *supra* note 1, at 55–66 (elaborating notion of epistemic interest). *Cf.* Richard J. Hall & Charles R. Johnson, *The Epistemic Duty to Seek More Evidence*, 35 AM. PHIL. Q. 129 (1998).

81. *See* sources cited *supra* note 77. More generally, "motivational deontologies" or other moral theories that make rightness or wrongness a partial function of actors' mental states have been long propounded within the philosophical literature. *See* Heidi M. Hurd, *What in the World is Wrong?*, 1994 J. CONTEMP. LEGAL ISSUES 157 (1994) (analyzing motivational and other deontologies). My argument for the instrumentalist view of rule-formulation processes does not constitute, nor depend upon, the view that mental states are irrelevant in all moral contexts.

82. More precisely, M* in the current example is ex ante instrumentally justified. An ex ante instrumentally justified procedure is one that persons rationally follow, insofar as they aim at justified outcomes; an ex post instrumentally justified procedure is one that actually produces the justified outcome.

83. Strictly, this is not right. We could imagine a view that posited an intrinsic benefit only in the following of an instrumentally justified rule. But no theorist I am aware of says this; for example, participationists (as I read them) suggest that participation of the right sort is a (prima facie) benefit even if a more accurate, participation-free procedure is available. *See* sources cited *supra* note 79.

justified in repealing R* and instead following procedure M′, which (predictably) leads to rule R′ that is not substantively optimal. But legal rules are simply too significant, morally speaking—too important in their effects on the persons whose legal positions they change and whose welfare they otherwise influence—for legislatures and agencies to have an obligation to aim at the production of suboptimal rules and to repeal morally optimal ones. Whatever the place of intrinsic processual criteria in other contexts, these have no place here.

B. Rules and Justification

Can the Rule-Dependence Thesis and the Personal Rights Thesis be reconciled within the framework of an Interest Theory of rights? One approach, which I have considered at some length, is to construe the language, scope, or history of rules as bearing upon the individuation of harms. To have a particular kind of rule applied to you is to have your interests injured in a distinctive and constitutionally problematic way. I have argued that this approach is unsuccessful. But there remain other possible links between rights, rules, and interests that need to be examined. In particular, rule-properties might matter, not because they wholly or partly constitute distinctive types of harms, but because such properties are relevant to the *justifiability* of harm. Remember our canonical statement of the Interest Theory of constitutional rights: P has the power to secure relief from a constitutional reviewing court only if governmental actors have performed, or threatened to perform, some action such that (1) the action infringes some constitutionally distinctive interest of P's (at the limit, any interest of P's) and (2) that harm to P is unjustified. The existence of rules could be relevant to the second prong of this schema rather than to the first.

Consider, for example, the case of the flag burner P whose act of flag burning also falls under some nonexpressive category of wrong (for example, because it is an act of destroying governmental property, or pollution, or battery), such that the First Amendment permits P to be sanctioned pursuant to a law prohibiting "the destruction of government property" or "pollution" or "battery" but precludes a sanction pursuant to a law prohibiting "flag desecration." It seems implausible that the choice of rule changes the harm to P himself. If, for example, P is fined $1000 for the action of destructive, etc., flag burning, it is hard to see how a $1000 fine flowing from a rule that makes no reference to speech leaves P better off than a $1000 fine flowing from the "flag desecration" rule. More plausibly, the choice of rule matters here because it matters to whether P's setback is justified. Intuitively, imposing S1 on P for "flag desecration" is normatively problematic while imposing the very same setback S1 on him for "destroying government property" is not.

Indeed, the view that the language, scope, and history of rules are relevant to the justifiability of the setbacks challenged by constitutional

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claimants is a familiar one in the scholarly literature on overbreadth. This is, in effect, the view that Henry Monaghan has repeatedly and vigorously articulated—the so-called "valid rule" view of overbreadth and, more generally, of rule-dependence.

> [W]hatever the limits on judicial power to reshape statutes affecting expression, overbreadth challenges are best understood as invoking the conventional principle that a litigant's conduct may be regulated only in accordance with a valid rule. Where the substantive constitutional standard is more stringent than the rational basis test, this demand translates into a requirement of significant congruence between the boundaries of the rule and constitutionally acceptable governmental ends. A rule that proscribes significantly more conduct than is justified by the permissible governmental end may not be applied to the litigant, even though the litigant's own conduct could be prohibited. This is so not only in the first amendment area, but whenever significant means-end congruence is required by the applicable substantive constitutional law. . . . [O]verbreadth dispositions are simply determinations *on the merits* of the litigant's substantive constitutional claim.[84]

Where a P whose conduct is proscribable under some description challenges the application of an overbroad or otherwise invalid rule, this is not a special exception to the Personal Rights Thesis. P does not need to rely upon the "overbreadth" doctrine or some other special and limited doctrine conferring "third-party standing" upon constitutional claimants who lack "personal rights." Rather, P's *own rights* are violated via the application of a constitutionally "invalid rule"— or so Monaghan has repeatedly claimed.

Is Monaghan correct? To begin, note once more the threshold question whether the concepts that comprise the Interest Theory of constitutional rights should be understood as *moral* concepts or rather as *legal* concepts. "Unjustified harm" might mean morally unjustified harm, or it might mean legally unjustified harm. I will now argue that *if* "unjustified harm" is taken in the first sense—the moral sense—rules do not bear upon the justifiability of claimants' harms and, consequently, the Rule-Dependence Thesis remains unexplained. Why justification should be thus construed is an issue I take up below in Section C.

Lon Fuller's work *The Morality of Law* paints a well-known picture of the moral advantages of law and legal rules. Fuller argues that any well-functioning legal system will regulate conduct through enactments that are general, public, prospective, clear, logically consistent, practically possible, relatively constant, and predictably applied.[85] Fuller's account, if correct, shows why

84. Monaghan, *supra* note 10, at 285 (citations omitted). For other statements by Monaghan of this view, *see* Monaghan, *supra* note 9, at 4–14; Henry Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 196–97.

85. *See* Lon L. Fuller, THE MORALITY OF LAW (rev. ed. 1969). *See also* Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2236–55 (1992) (summarizing Fuller's view, and analyzing "rule of law" values he articulates).

constitutional doctrine is rule-dependent in a certain limited way. For example, it implies that a setback imposed by state officials upon P for some conduct of hers is morally justified only if there exists a clear and public rule which is contradicted by no other, with which compliance is at least physically possible, and which proscribes and predates that conduct (or at least some conduct) of P's. But there is nothing in *The Morality of Law* to suggest that the clear and public rule authorizing P's setback must also be a *nondiscriminatory* rule, or a properly *tailored* rule (one that is neither overinclusive nor underinclusive relative to sufficiently important governmental purposes), or a properly *motivated* rule. The varieties of rule-dependent doctrines so pervasive in Equal Protection, Free Speech, Free Exercise, Establishment Clause, and substantive due process jurisprudence[86] are wholly unexplained by the Fullerian account—because the rule-properties Fuller focuses upon (clarity, publicity, etc.) are properties that are necessary conditions, or nearly so, for a given text to be a legal rule in the first place, whereas the constitutional doctrines just mentioned are constraints upon full-fledged legal rules.[87]

"Process theory" might be thought to bridge these doctrines (or at least some of them) with the Personal Rights Thesis via the link of "justified harm." It might be thought that (a) where a setback (or at least a certain type of setback) to P flows from a rule that was formulated through the wrong type of process—for example, a process in which P was not permitted to participate, or a process where rule-formulators did not engage in sufficient moral deliberation concerning P's interest, or a process where the formulators were callous, or corrupt, or bigoted—this setback constitutes "unjustified harm"; and that (b) at least some of the constitutional doctrines constraining full-fledged legal rules—doctrines such as antidiscrimination doctrines, tailoring doctrines, and motivational doctrines—are direct or indirect tests for the existence of a flawed rule-formulation process (one that vitiates justifiability in the way just described). But rule-formulation processes have no relevance to the justifiability of the harms that flow from rules, just as they are not constitutive of harm in the first place.

What would be a feature, F, of a rule-formulation process such that harms flowing from a rule characterized by F turn out to be unjustified? Consider two possibilities. First, F might be an *instrumental* flaw in the formulation of

86. This includes the abortion case law mentioned above, *see supra* text accompanying notes 43–45, as well as other parts of substantive due process jurisprudence, *see* Adler, *Rights Against Rules*, *supra* note 1, at 30–33.

87. Note further that the Fullerian account mainly leads to *negative* rather than *positive* rule-dependence. It mainly explains why there are unconstitutional scenarios defined as those in which no rule exists (e.g., a scenario in which the claimant has been imprisoned without any prior rule restricting his actions), and not why there are unconstitutional scenarios defined as those in which a particular rule of a given problematic type (e.g., a discriminatory rule) exists. But constitutional doctrine is, to a significant extent, positively rule-dependent. That's what the Rule-Dependence Thesis asserts; and that's what needs to be reconciled with the Personal Rights Thesis.

rules—a flaw that tends to produce substantively unjustified rules. Then the purported account of rule-dependence runs as follows: If a setback to P1 flows from a rule R1 formulated in a way that tends to lead to substantively unjustified rules, P1's harm is unjustified as such, that is, even if a rule R2 with the same semantic content as R1 could be justifiably applied to a person P2 with exactly the same history as P1. This is implausible. Imagine a case where legislators use a random-number generator to determine the criteria for granting or denying welfare benefits; the legislature ends up producing a rule R1 that denies benefits to many who morally deserve them, and also to a few (including P1) who do not deserve the benefits and could be justifiably denied them under a different rule. There are here two different senses in which the rule-formulation process behind R1 "tends" to produce unjustified rules: First, R1 itself is seriously underinclusive in granting benefits; second, even if that were not true of this particular rule, it is generally true of benefit-conferring rules enacted by random-number generators that they are unjustified. Do we therefore want to say that the denial of benefits to P1 is unjustified?

Do not be tempted by the thought that P1's claim to the benefits might depend (for example, as a matter of equality) upon what benefits others receive, and not simply upon P1's own needs, prior actions, and so on. The process theorist here claims something else, and more robust: that even if the substantive justifiability of granting or denying each person the benefit is wholly independent of the benefits, income, wealth, well-being, resources, or what have you possessed by others, and even if the denial of P1's benefit is substantively justified by these solipsistic standards, the fact that P1 was denied that benefit by a process that produces errors in many other cases renders his own setback unjustified. This seems confused. For example, if the legislature is comparing the error-producing process to a different process that produces different kinds of errors, it should count P1's particular case as one of the few that weighs in favor of keeping the first process (because P1 himself has been accurately treated) and not as one that weighs against it.

The second possible construal of F is that it is *noninstrumental*—namely, a rule-formulation process can be characterized by F even if that process tends to produce substantively justified rules and even if R1, which results from the process, is justified. But this version of "process theory" leads to the unpalatable result noted in Section A: that a legislature could be obliged to repeal a substantively justified rule issuing from an instrumentally appropriate process and to follow instead a process that would tend to produce substantively unjustified rules. And whatever modest plausibility might attach to the view that rule-formulators are obliged to aim at the production of unjustified rules, insofar as the rule-formulation process has intrinsic benefits for welfare, there is no plausibility whatsoever (as far as I can see) in the view that they are obliged to do so simply because certain processes can somehow "taint" otherwise-justified outcomes. If R1 and R2 have the

same semantic content and are issued in the same social contexts, and if P1 and P2 suffer the *same harm* from the rules and have the same histories, then surely P1's harm is justified if and only if P2's is.

So much for process theory. Process theory is one possible way for the Interest Theorist of constitutional rights to link the properties of (full-fledged) legal rules with "unjustified harm," but it is not the only way. The Theorist might concede that where R1 and R2 have identical semantic content, are issued in the same context, and produce the same harm for P1 and P2, who have the same histories, either both harms are justified or neither is; but she might still argue that rule-properties are *substantively* relevant to justified harm. For example, R1 and R2 might have different semantic contents—R1 might use the word "black" or be too broad in its scope—such that P1's harm is unjustified in virtue of flowing from R1.

Does this tack work? Consider the features of the world and of persons that are standardly thought to bear upon moral justification and that in particular might be thought to bear upon whether P's setback is justified: well-being and harm; resources for well-being; needs; desert and responsibility; virtues; equality; deontological requirements.[88] None of these moral factors has any conceptual connection to the language or scope of rules, or to other (nonprocessual) rule-properties that might figure in constitutional doctrine—or so I want to claim. Imagine a setback S for P that flows from a particular rule, R. Whether S is justifiable depends on how bad S is for P; but as I have already argued, rule-properties are not constitutive of distinct harms. They do not make S a different kind of harm or a worse one. Whether S is justifiable may further depend upon P's needs, his prior actions, his virtues or vices, and his overall level of welfare or resources for welfare. Clearly, though, these features of P are independent of the language, scope, or history of the rule applied to him; the fact that P is needy in a particular way, has performed a particular kind of action, possesses a particular character trait, or has reached a particular level of welfare or welfare-resources does not entail that a particular kind of rule is in force. For example, if P is a rich, vicious flag-burner whose action of flag burning also pollutes the environment, P will remain a rich, vicious flag-burner whether he is sanctioned for "flag desecration" or instead for "pollution."

I think it is equally clear that deontological requirements are not rule-dependent. Consider the paradigm of a deontological requirement—the prohibition on killing, plausibly specified as a prohibition on purposeful (rather than merely knowing), active (rather than merely inactive), and offensive (as opposed to defensive) killing.[89] Every person and, in particular, every governmental official is plausibly constrained from performing a pur-

88. A wonderful overview of these features is provided by Shelly Kagan, NORMATIVE ETHICS 25–186 (1998).

89. *See id.* at 70–105; Adler, *supra* note 69, at 1481–84.

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poseful, active, offensive killing.[90] A governmental official who kills P in violation of this deontological requirement has wronged P—the official has caused P to suffer unjustified harm—whether or not the rule that the official took to authorize her action was vague, overbroad, discriminatory, underinclusive, poorly motivated, and so forth.

It is a bit more plausible to think that considerations of moral desert *are* linked to rules.[91] The justifiability of setback S for P may depend upon whether P deserves S. (For example, the justifiability of a punitive sanction for P does depend—or so the retributivist argues[92]—on whether P deserves that sanction in virtue of his prior wrongdoing.) In turn, whether P deserves S *might* be thought to depend not simply on rule-independent facts about S and P—how bad S is, what P did in the past, how fortunate or unfortunate his life has been, and so on—but also on whether S flows from a rule or rulelike entity that sufficiently describes *what it is about P* that makes him deserve S. Thus the "expressive" theory of desert, exemplified by the expressive theories of retribution standard within the literature on punishment.[93] To use the flag-burning case once more: Although the polluting flag-burner does deserve a sanction, he deserves it in virtue of his pollution not his flag burning, and thus his sanction for "flag desecration" is undeserved (and unjustified). The anti-"flag-desecration" law, by contrast with the anti-"pollution" law, is not adequately expressive of the elements of P's desert.

I have elsewhere provided an extensive argument against an expressive theory of desert, and do not have space to repeat that argument here.[94] Suffice it to say that the theory is supported neither by strong intuitions nor by systematic considerations. If P and S are linked by considerations of desert, why further do we need a rule that expresses that linkage? Surely not to constitute the linkage: The expressive "failure" of the "flag-desecration" rule is its failure to express a linkage existing apart from that rule, which the "pollution" rule does express, namely, that P was a polluter. Perhaps

90. This statement of the no-killing requirement would need to be modified if the death penalty is morally and constitutionally legitimate. A proviso about "desert" would be one way to handle the instances in which governmental officials purposefully, actively, and nondefensively impose death as a penalty, i.e., one could say that "every person and, in particular, every governmental official is constrained from performing a purposeful, active, offensive killing of a person who does not deserve to die." Would the addition of a "desert" factor into the no-killing requirement give rise to rule-dependence? I think not. I argue immediately below that considerations of desert do not satisfactorily account for rule-dependence.

91. *See* Sher, *supra* note 59 (generally analyzing moral relevance of desert); *see also* G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989) (discussing resurgent role of considerations of desert and responsibility within egalitarian moral theorizing).

92. *See* Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

93. An expressive theory of retribution, of one kind or another, is defended by Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992); Robert Nozick, PHILOSOPHICAL EXPLANATIONS 363–97 (1981); Igor Primoratz, *Punishment as Language*, 64 PHIL. 187 (1989); R.A. Duff, TRIALS AND PUNISHMENTS 233–66 (1986).

94. *See* Adler, *supra* note 69, at 1421–22, 1476–79.

expressiveness ensures that setbacks *track* desert: If one rule more fully describes the preconditions for deserved setbacks than another, then a setback delivered pursuant to the first rule is more likely to be deserved than a setback delivered pursuant to the second one. (It is by reference to considerations of "tracking" that Robert Nozick defends his well-known expressive theory of retribution.[95]) But the tracking claim fails to explain rule-dependence for the same reason that (as we saw above) a process-based theory fails. Although a rule may tend to produce undeserved setbacks—although it may fail to "track"—the moral force of that feature of the rule is exhausted by the scope and extent of those setbacks. It does not mean that a deserved setback fortuitously meted out pursuant to the non-tracking rule is *also* unjustified.

Considerations of equality, too, may seem to support the rule-dependent cast of constitutional doctrine.[96] But a more probing analysis suggests that this will not work. Whether P is treated equally as compared to Q (or a class of Q1, Q2, . . . Q3) depends, to start with, upon whether P and Q are similar in relevant respects—upon whether P and Q are similarly needy, on whether they have performed similar types of action, on whether they are similarly virtuous or vicious. It is hard to see how the existence of a particular kind of rule could be constitutive of the similarity or dissimilarity of the two persons. For example, imagine a theory of equality that says that persons who have the same level of basic needs and are similarly responsible for those needs are entitled to the same amount of resources.[97] Imagine, further, that P and Q are indeed similarly situated in the sense specified by

95. *See* Nozick, *supra* note 93, at 369–70.

96. Equality has been a subject of much current philosophical work, including Temkin's seminal book, *see* Larry S. Temkin, INEQUALITY (1993); Amartya Sen's corpus of work, *see, e.g.*, INEQUALITY REEXAMINED (1992); and the large body of literature, integrating equality and responsibility, that was generated by Ronald Dworkin's articles on equality of welfare versus equality of resources, *see* Peter Vallentyne, *Self-Ownership and Equality: Brute Luck, Gifts, Universal Dominance, and Leximin*, 107 ETHICS 321, 321 n.1 (1997) (citing this literature). The view that equality is parasitic on other moral considerations, *see* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), is (plausibly) denied by all the scholarship just described, and so my argument against an egalitarian defense of rule-dependence concedes that equality is a separable and significant part of morality.

My interest, here, is in the possible connection between rule-dependence and considerations of *equal treatment*. Equality might, of course, mean equal concern and respect rather than equal treatment. I have already, in effect, considered and rejected the possible connection between rule-dependence and considerations of equal concern and respect. *See supra* text accompanying notes 68–75 (rejecting expressivist account of rule-dependence).

97. This particular theory of equal treatment is simply meant to illustrate the point that equality does not generate rule-dependence. That point holds good, I think, on any plausible theory of equal treatment—not merely this one. Theories of equal treatment will differ in their specification of what makes persons "similarly situated" and of what "similarly situated" persons are entitled to. (One theory might say that all persons are entitled to the same level of welfare; another, that all persons with the same needs—and regardless of their responsibility for those needs—are entitled to the same amount of resources; another, that all persons with the same needs are entitled to a certain minimum amount of resources; and so on.) *However* the theory defines "similarity" and "entitlement," the proponent of rule-dependence needs to claim that rules are somehow constitutive of these elements. Such claims will, I think, be unpersuasive; that is what my discussion, in the text, of the need-and-responsibility-based theory is meant to suggest.

this theory—they are similarly needy and similarly responsible. Then this comparative feature of P and Q holds true regardless of whether there exists a rule that *characterizes* P and Q as similar or a rule of some other kind to which they have a nexus. The fact that P and Q are similarly needy and similarly responsible for their needs does not entail the existence of a particular type of rule.

Further, if P and Q are relevantly similar, then whether they are treated equally depends upon how they fare—on how their welfare levels, or the levels of their welfare-productive resources, compare. Here, too, the morally relevant considerations are not essentially rule-dependent. The fact that P and Q end up faring equally with respect to welfare or welfare-productive resources does not entail the absence of a rule discriminating between them. Imagine that a rule conferring some kind of governmental benefit—welfare benefits, health benefits, housing subsidies—denies the benefit to P but grants it to Q, who is relevantly similar. P and Q could still end up faring equally: P could be wealthier than Q or could end up receiving benefits under some other rule that gives lesser or no benefits to Q.[98] Reciprocally, the fact that P and Q end up faring unequally does not entail the existence of a rule discriminating between them. If P and Q receive the same level of benefits under all benefit-conferring rules yet P has higher wages than Q or receives a larger inheritance, then P will end up with greater resources and, possibly, greater welfare than Q despite the fact that their status under the benefit-conferring rules is just the same.

To put the point a different way: Whether equality obtains depends upon the patterns of well-being (or resources for well-being) across the population—or, more narrowly, across "similarity classes" of similarly situated persons. What pattern exists in a particular similarity class obviously depends upon the totality of rules applied to the various members of this class. But it is the pattern that matters, not whether the class members were treated equally or unequally by a particular rule; and relatedly, the existence of a given pattern cannot be equated with the existence of a discrete rule. A (locally) discriminatory or poorly tailored rule that covers only some of the class may end up being counterbalanced by other (locally) discriminatory or poorly tailored rules, or by background conditions; a (locally) neutral rule that treats the class equally may end up producing a pattern of inequality given other rules and background conditions.[99]

98. There is an issue lurking here about the length of the "time slices" of P's life and Q's life that are appropriately compared to determine whether their treatment is equal, *see* Temkin, *supra* note 96, at 232–44; but even the shortest plausible time-slice will allow that where P is denied a benefit by rule R1 and Q is granted one, that difference might later be erased by a benefit to P under some other rule, or might be compensated for by P's preexisting wealth.

99. By "locally" discriminatory, I mean discriminatory in some sense other than contributing to a pattern of inequality—e.g., in not giving a particular benefit to all members of a similarity class.

Why not define a "globally" discriminatory rule with respect to some similarity class as a rule that exacerbates a pattern of inequality across that class? Could not one then argue that

C. Legal or Moral?

Let us return to an issue left hanging. The strengthened version of an Interest Theory of rights that I have focused upon stipulates that P legitimately possesses the legal power to secure a remedy from a constitutional reviewing court only if (1) governmental actors have infringed some constitutionally distinctive interest of P's (at the limit, any interest) and (2) that harm to P is unjustified. Further, and crucially, I have taken constitutional distinctiveness (within the meaning of the first prong of this schema) to be *moral* distinctiveness, and I have taken justifiability (within the meaning of the second prong of this schema) to be *moral* justifiability. I have then argued that the existence of rules has no constitutive connection to moral distinctiveness or moral justifiability. But why should the constituents of the Interest Theorist's schema be cashed as *moral* concepts rather than as *legal* concepts? Why not say that P legitimately possesses the legal power to secure a remedy from a constitutional reviewing court if some legally distinctive (albeit not necessarily morally distinctive) interest of hers has been infringed, such that this infringement amounts to legally unjustifiable (albeit not necessarily morally unjustifiable) harm?

The basic answer is that construing the constituents of the Interest schema as legal concepts, not moral concepts, threatens to trivialize the ascription of "rights." Imagine that Congress passes a statute that reads as follows:

> *The Constitutional Welfare Act*: Any citizen shall have the power to bring suit, in federal court, to challenge any governmental action that is unconstitutional. Every citizen is hereby declared to have a "legal interest" that is implicated by each and every unconstitutional action of a governmental official.

This statute confers on every citizen the power to secure constitutional relief against every unconstitutional action. But surely the Interest Theorist will resist the proposition that each and every unconstitutional action violates the *rights* of each and every citizen. She will say, I think, that some citizens do not have a genuine interest in some unconstitutional actions—that the welfare of some citizens is not genuinely implicated by those actions—and that such citizens therefore fail to meet the minimum threshold for the ascription of rights within an Interest Theory. She will say this, I think, even though these citizens are legally characterized as having an

inequality *does* entail the existence of "globally" discriminatory rules? This line of argument is seductive but, I think, unconvincing. Constitutional doctrine concerned with protecting personal equality-rights would make reference to the overall pattern of resources or welfare that exists in a given similarity class, not to the existence or absence of a "globally" discriminatory rule. For example, if P fares worse than similar Q by virtue of some governmental action other than the enactment of a rule, a pattern of inequality could arise and P's equality-right could be violated.

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interest.[100] Remember: The point of a theory of rights is to isolate a subset of all those persons holding one or another legal position (in this case, all those persons holding a legal power) and to explain why the persons within the subset are specially situated. An Interest Theory of rights does this through the concept of an interest: Of all those who hold legal powers, rights-holders are those who have an interest in the tenure of their powers. But if "interest" is construed to be "legal interest," it is not clear how the status of "rights-bearer" is to be confined to a proper subset of all those persons who bear legal powers, let alone how that status amounts to anything special.

A similar point can be made about the other elements of a strengthened Interest Theory of rights, namely, distinctiveness and justifiability. This theory purports to further restrict the status of "rights-bearer," and to explain why those persons within the restricted group are particularly special. It purports to isolate an inner core within the subset of persons who have an interest in their legal powers. Both P1 the child pornographer and P2 the innocent parent have a genuine interest in holding the power to invalidate a rule R barring pictures of naked children, but only P2 is a true rights-bearer because only P2 suffers unjustifiable harm through the enactment of R. But if "justifiability" and "distinctiveness" are construed legally rather than morally, it is not clear how the inner core of genuine rights-bearers can remain isolated from the larger subset of interested power-holders nor, specifically, how P1 is to be distinguished from P2. Imagine that Congress passes the following statute.

> *The Constitutional Justifiability Act*: Any citizen shall have power to bring suit, in federal court, to challenge any unconstitutional governmental action that affects her welfare. Any such citizen shall be counted as suffering "unjustifiable harm."

Will the advocate of the strengthened Interest Theory of rights agree that by virtue of the passage of this statute, both P1 and P2 count as genuine rights-bearers? Surely not. A theory that says (1) suffering unjustified harm, or suffering a harm to a constitutionally distinctive interest, or both are required for P to be a constitutional rights-holder but (2) harms are distinctive or unjustified if thus characterized by Congress, is implausible. What is the significant difference—significant enough for the ascription of constitutional "rights" to depend upon it—between the interested person who by statute is given the power to secure constitutional relief and the

100. This point is borne out by the Court's standing doctrine. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Court denied Article III standing even though the claimants had federal, statutory standing created by a "citizen suit" provision that Congress had enacted. *See id.* at 576–78 ("The question presented here is whether the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious. . . . 'Individual rights' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.").

interested person who is given that power and is also officially characterized by Congress in a certain way?

At this juncture, it might fairly be objected that there is an intermediate point between the view I am criticizing—that the attribution of "interest," "unjustified harm," and "distinctiveness," for purposes of a theory of constitutional rights, depends upon Congressional characterization—and the view I have adopted, namely, that these concepts are to be construed as moral concepts. After all, the kinds of rights under discussion here are *constitutional* rights. Why not say that P counts as having an "interest" in judicial relief from governmental action if *constitutional law* counts him as having an interest—regardless of whether his welfare is genuinely affected (but not merely because Congress has thus characterized P)? Similarly, why not say that P's interest counts as distinctive if *constitutional law* counts it as distinctive (regardless of whether the interest is morally distinctive); and that a setback to P's interest counts as "unjustified harm" if *constitutional law* counts it as unjustified (regardless of whether the harm is morally unjustified)?

Is this intermediate position tenable? For the sake of analytic clarity, I will focus on the concept of unjustified harm and on the particular version of that concept that runs as follows: P suffers unjustified harm from action A only if an individualized remedy for P is justified. The intermediate view of "unjustified harm" would then be: P suffers unjustified harm, for purposes of a theory of constitutional rights, only if an individualized remedy for P is constitutionally justified (albeit not necessarily morally justified). Adler's view is: P suffers unjustified harm, for purposes of a theory of constitutional rights, only if an individualized remedy for P is morally justified. I think the intermediate view is tenable, but I also think the following: First, for most (if not all) of the domains of constitutional law where doctrine is rule-dependent, constitutional criteria are at bottom moral criteria; second, where constitutional criteria are at bottom moral criteria, the intermediate view and Adler's view end up saying the same thing.

I cannot here defend the proposition that constitutional criteria are at bottom moral criteria for most (if not all) of the domains of constitutional law where doctrine is rule-dependent. I think the Equal Protection Clause incorporates the moral criterion of equality (and analogously for the Due Process Clause, the Free Speech Clause, and so on); the originalist thinks the Equal Protection Clause incorporates the Framers' beliefs about equality, or the original linguistic meaning of the term "equality," or something like that. There is a huge literature on such issues, which I will not even summarize (let alone contribute to) in this Article.[101] If the reader is

101. The best-known contributions to this literature are cited by Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 781 n.69 (1997). A good summary, with bibliography, is Michael J. Gerhardt & Thomas D. Rowe, Jr., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 1–193 (1993). An important recent contribution is Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO L.J. 1765 (1997).

unpersuaded by the powerful arguments against originalism and other nonmoral construals of constitutional criteria, then she can take this article as having shown not that the Rule-Dependence Thesis and the Personal Rights Thesis are inconsistent but (more weakly) that the consistency of rule-dependence and personal rights presupposes originalism or some other such nonmoral theory of constitutional interpretation.[102]

Assume that within a given constitutional domain, constitutional criteria are at bottom moral criteria. The relevant bit of constitutional text—the Free Speech Clause, the Equal Protection Clause, and so on—incorporates some moral criterion for evaluating actions, states, events, or some other such basic object of moral assessment.[103] Adler's view of unjustified harm is: P suffers unjustified harm only if it is better in light of the incorporated moral criterion to give P an individualized remedy. An individualized remedy must truly advance equality, or free speech, or whatever. Will the intermediate view under discussion here say anything different? I suppose the view could be developed, in a sophisticated way, as follows: If the constitutional domain incorporates moral criterion M, then P suffers unjustified harm if *the legal institution of conferring an individual remedy upon P* is better in light of M. This sophisticated line of thought concedes that constitutional criteria are at bottom moral criteria (within the relevant domain), but still preserves a disjunction between P's harm being morally unjustified and P's harm being constitutionally unjustified. But why should this line of thought be accepted by the Interest Theorist? The Theorist uses the concept of "unjustified harm" to distinguish between the subset of interested power holders, and the core of that subset who have the genuine status of rights-bearers. Contrast P0, who is merely an interested power-holder; P1, who does not morally merit an individualized remedy in light of M, but who falls (or would fall) under a legal institution that confers such a remedy upon her and that as a general institution is itself justified (or would itself be justified) in light of M; and P3, who merits an individualized remedy in light of M but does not fall under the type of institution covering P2. P3 and P2 each claim to be specially situated vis-à-vis the others and thus to count, uniquely, as a rights-holder. I think P3 has the stronger claim.

102. Originalism or some other such nonmoral theory of constitutional interpretation is a *necessary* condition for reconciling personal rights and rule-dependence, but it is hardly a *sufficient* condition. What needs to be shown is that the right theory of constitutional interpretation is a nonmoral theory that, specifically, makes the existence of certain kinds of rules constitutive of rights violations. For example, the originalist who wants to reconcile personal rights and rule-dependence needs to show that the Framers believed rules and rights to be essentially linked, or something like that. *See* Adler, *A Response to Professor Fallon*, *supra* note 1, at 1395 n.90.

103. On the (possible) plurality of the objects of moral evaluation, see Kagan, *supra* note 88, at 194–212. In effect, my argument immediately below denies that legal institutions are basic objects of moral evaluation (although, of course, the action of creating a legal institution, or an action pursuant to an institution, *is* a basic evaluated object insofar as actions generally are). *Cf.* Geoffrey Scarre, UTILITARIANISM 122–32 (1996) (summarizing debate between act utilitarians and rule utilitarians).

Although P2 and P3 both accept M as a criterion for evaluation, P2 shows only that she is picked out indirectly by M, whereas P3 can say that criterion M singles her out directly. So the sophisticated response fails.

A broadly similar line of argument can, I think, be developed to show that P's constitutionally distinctive interest—within the framework of a (strengthened) Interest Theory of rights—is best understood as a morally distinctive interest, with "interest" understood to mean some genuine aspect of P's well-being.[104] I will not belabor matters by spelling out that argument.

D. Other Roles for Rules? Weak-Interest Rights

The language, scope, or history of the rule applied to constitutional claimant P is not constitutive of a distinctive harm to him; nor does it matter to the justifiability of P's harm that he was subjected to a particular kind of rule. Or so I have argued. But might there be some further role that rules could play in constitutional adjudication beyond the two just mooted, which is consistent with the Personal Rights Thesis and with an Interest Theory of rights?

Several possibilities spring to mind. First, constitutional challenges could be patterned upon the following tripartite and conjunctive schema, with the requirement that a particular type of rule exist functioning as an additional restriction upon the set of viable challenges, *beyond* harm and justifiability, rather than as a constituent of harm or justifiability.

> *The Tripartite Schema for Constitutional Challenges*
>
> P has the power to secure relief from a constitutional reviewing court only if governmental actors have performed or threatened to perform some action such that: (1) this action infringes some constitutionally distinctive interest of P's; (2) this harm to P is unjustified; *and* (3) there is in force a specified type of rule (for example, a discriminatory rule or an overbroad rule) to which the governmental action causing unjustified harm to P has an appropriate nexus.

For example, where a religiously motivated actor has been (unjustifiably) sanctioned pursuant to a generally applicable law, the following might be said to explain why (as per the *Smith* case[105]) a reviewing court ought not invalidate the sanction: "Although the actor's constitutional rights are no less violated in this case than in the case where a discriminatory law is applied to him for the kind of action he has here performed, 'general applicability' does not bear upon constitutional rights. It is simply the case that, rights-violating or not, the government's treatment of an actor does not amount to a justiciable Free Exercise Clause violation unless it occurs pursuant to a discriminatory law."

Because of its conjunctive structure, the tripartite schema just set forth

104. And not merely something constitutionally or legally identified as part of P's "interest."
105. Employment Div. v. Smith, 494 U.S. 872 (1990).

is—in one sense—consistent with the Personal Rights Thesis. Because a claimant *is* a rights-holder within an interest theory if he has been unjustifiably harmed, then a fortiori he is a rights-holder if he has been unjustifiably harmed in a particular way, pursuant to a particular type of rule. But, in a different sense, the schema is inconsistent or at least in tension with the Personal Rights Thesis. If the Thesis is understood as setting forth a general rationale for the structure of constitutional adjudication, and not merely necessary conditions for the conferral of the power to secure judicial relief, the third prong of the schema becomes troubling. If the function of constitutional courts is to protect rights, then why deny relief to one who satisfies the basic prerequisites for having a constitutional right—the suffering of unjustified and constitutionally distinctive harm from governmental action—simply because one type of rule, rather than another, was implicated in the violation?

Perhaps there is an argument to be made here about the epistemic limitations of reviewing courts.[106] "Constitutional courts are, in general, subject to significant error in determining whether claimants have suffered unjustifiable harm. They are less subject to error in determining whether claimants have suffered unjustifiable harm pursuant to particular types of rules, for example, discriminatory ones. Making unjustifiable harm both necessary and sufficient for judicial relief would lead to an unacceptable rate of erroneous judgments against the government. Constitutional doctrine therefore focuses judicial resources in the particular areas, defined by reference to rules, where courts are well-placed to adjudicate rights violations." The truth of this kind of claim about the relative competence of courts in identifying rights violations that occur pursuant to different types of rules is an empirical matter, which cannot be definitively resolved here. But I tend to doubt that the claim is true. Plainly, a doctrine that looks solely to the language, scope, and history of the rules applied to the claimant places less of an epistemic burden on constitutional courts than a doctrine that requires courts to evaluate the justifiability of the claimant's harm. For example, deciding whether an insufficiently tailored rule has been used to deny the claimant a benefit is easier than deciding whether he deserves that benefit. But the tripartite schema does not relieve reviewing courts from inquiring into the claimant's desert and into other factors bearing upon the justifiability of his setback. Rather, it demands that those factors be investigated *and* that the rule at stake be placed within the stipulated category. Determining that a discriminatory rule has been applied to the claimant and that this has violated his rights is scarcely less taxing of epistemic resources than determining that the claimant's rights have been violated, period.

A different and simpler role for rules within constitutional adjudication could be this: P has the power to secure relief from a constitutional review-

106. On the role of these and other institutional considerations in limiting judicial review, see Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

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ing court only if (1) the government has performed the action of enacting an unjustified rule, and (2) this action has caused harm to P. So structured, constitutional adjudication would be focused not on the justifiability of harm to the claimant but rather on the justifiability of the action of rule-enactment that the government has performed. Constitutional courts would be (in effect) mini-legislatures, charged with repealing or amending unjustified rules; and discrimination tests, overbreadth tests, narrow-tailoring tests, and the like would figure within constitutional doctrine as tests for the justifiability of the government's actions of rule-enactment. However, claimants would need to suffer harm from the unjustifiable rules that they challenge; they could not merely be concerned citizens.

The simple schema just sketched is clearly consistent with the Rule-Dependence Thesis: P's power to secure judicial relief entails the existence of a particular type of rule, namely, an unjustified one. Further, the simple schema is minimally or weakly consistent with the Personal Rights Thesis on an Interest Theory of rights. As I explained earlier, the minimal account of constitutional rights that an Interest Theorist could give would be the following: P has a constitutional right if governmental actors have performed or threatened to perform some action such that (1) that action infringes some interest of P's, and (2) this action is unjustified. Thus, it is minimally consistent with an Interest Theory of rights and the Personal Rights Thesis to say that P has the power to challenge an unjustifiable governmental action of rule-enactment that harms him. P is harmed by the action, and helped by the judicial remedy against it.

But it bears emphasis that the kind of constitutional right tracked by the simple schema is indeed a weak and minimal one. For example, if P1 is our displayer of kiddy porn and P2 is our displayer of innocent infant photos, then each is harmed by the unjustifiable enactment of an overbroad rule prohibiting pictures of naked children; and each would be empowered by the simple schema to secure relief from a constitutional reviewing court. Although the Court and constitutional scholars persistently describe P1 as lacking a "personal right," such a description presupposes a more robust sense of rights holding than the sheer fact of harm flowing from an unjustified governmental action. That more robust sense of rights holding is what I have tried to capture through the concept of "unjustified harm"—and it is precisely "unjustified harm" that the simple schema now under consideration fails to secure.[107] More generally, any Interest Theory of rights

107. Why not strengthen the simple schema to introduce a requirement that the claimant's interest be "constitutionally distinctive," without requiring that she suffer "unjustified harm"? That is: Why not say that P has the power to secure relief from a constitutional reviewing court only if (1) the government has performed the action of enacting an unjustified rule, and (2) this action has caused *constitutionally distinctive* harm to P? As I have already suggested, this sort of schema—like the simple schema—attributes "personal rights" to claimants traditionally seen by the Court and commentators as lacking such rights. In particular, it counts the imposition of a sanction on P1, the displayer of kiddy porn, pursuant to an overbroad rule prohibiting pictures of naked children, as a violation of P1's personal rights. *See supra* note 60.

strong enough to sort between P2 and P1 will be too strong to count the simple schema as consistent with the Personal Rights Thesis.

Let us call a "Weak-Interest" right the kind of right that the claimant possesses just because the government has unjustifiably acted to cause him harm, such that he would benefit by a remedy—the kind of right secured by the simple, rule-dependent schema. Notably, the elements of a Weak-Interest right map precisely onto the elements of so-called Article III standing. Federal courts are permitted, under Article III of the Constitution, to hear a case against the government if the claimant shows "injury in fact" (harm), causation, and redressability.[108] It is standard to subdivide the category of Weak-Interest rights holders and distinguish between those who lack constitutional rights in a stronger sense—such as overbreadth claimants like P1, or other persons with merely "third-party" standing—and those who possess such rights.[109] If my arguments in this Part have been cogent, such a distinction is illusory insofar as constitutional doctrine is rule-dependent. The Rule-Dependence Thesis and the Personal Rights Thesis *are* consistent if the elements of rights holding are no more than the elements of Article III standing—if rights are taken to be nothing more than Weak-Interest Rights—but, as I have tried to show, these two theses are inconsistent on any tighter view of the connection between interests, rights, and justification.

IV. OTHER THEORIES OF RIGHTS: CHOICES, HOHFELDIAN CLAIMS, AND TRUMPS

Can the Personal Rights Thesis be reconciled with the Rule-Dependence Thesis on some theory of rights other than an Interest Theory? This section briefly considers that question. I examine two other theories of rights that have proved important within analytic jurisprudence (Hart's choice theory of rights and Hohfeld's equation of rights with a particular jural position, the claim-right) and one theory that has had less significance in the general jurisprudential literature on rights but has dominated constitutional scholarship on that topic (Dworkin's theory of rights as "trumps"). My discussion is much briefer than in Part III because the analysis developed there, in many ways, carries over to demonstrate the inconsistency of constitutional rights—now understood as protected choices, as claim-rights, or as trumps—with the invocation of rule-properties characteristic of constitutional doctrine.

108. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The Weak-Interest right, by contrast with standing doctrine, requires that the challenged action be unjustified; but this is just what would be shown "on the merits" by a claimant with standing. The Weak-Interest rights-holder is a person with standing to make a claim that a particular governmental action is unconstitutional and whose claim is, in fact, meritorious.

109. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 610–15 (1973); United States v. Raines, 362 U.S. 17, 20–23 (1960).

A. Hart: Rights as Protected Choices

Hart famously analyzes a "right" as entailing a protected *choice* on the part of the right-holder, rather than a protected interest. His analysis is, in effect, Kantian rather than Millian: According to Hart, rights are conceptually linked to autonomy and liberty, not to well-being. The case of duties provides a standard example illustrating the difference between Choice Theorists and Interest Theorists. What must be true of Q's duty to refrain from action A, such that P has a right (a "personal right") to Q's refraining? Interest Theorists like Bentham, Raz, and MacCormick link action A to P's welfare. Action A must harm P; or it must be the kind of action that "typically" harms persons like P; or, more restrictedly, it must be the kind of harm or typical harm that the legislature intended to alleviate when it obliged Q not to perform A; or it must be the case that there is some harm that P suffers by A such that if A is performed, it is entailed (and not merely contingently true) that P will suffer that harm.[110] By contrast, Hart argues, P has a right to Q's refraining from A if and only if P has a certain kind of choice in that matter—in particular, he suggests, a choice whether to waive Q's duty and, if unwaived, to pursue enforcement of the duty (plus the additional choice for P whether to waive any remedy that the enforcement authority issues).

> Instead of utilitarian notions of benefit or intended benefit we need, if we are to reproduce this distinctive concern for the individual, a different idea. The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it "unenforced" or may "enforce" it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.[111]

Hart goes on to observe that "not all who benefit or are intended to benefit by another's legal obligation are in this unique sovereign position in relation to the duty"[112]—consider the persons who benefit from criminal-law duties—and it is reciprocally true (although a bit less obvious) that P could possess the set of choices just delineated without benefitting from those options or their exercise.

110. *See* Kramer, *supra* note 17, at 78–101 (discussing the problem of distinguishing within an Interest Theory between duty-breaching actions that merely harm a person and duty-breaching actions that violate his rights).

111. Hart, *supra* note 49, at 191–92 (footnote omitted).

112. *Id.* at 192. Overviews of the Choice Theory are provided by Kramer, *supra* note 17, at 66–78; and Hillel Steiner, *Working Rights*, in A DEBATE OVER RIGHTS, *supra* note 17, at 239–83.

It should be noted that choices related to waiver and enforcement are not the only kind of choices that, according to Hart, can ground rights. Consider a very different example from the standard one just elaborated—the one where duties on the part of Q give rise to rights on the part of P. Consider the case where P herself is at liberty to perform or not perform some action X, and this choice is "protected" in the sense that other persons are restrained (for example, by enforceable legal duties) from interfering in a variety of ways with P's choice (for example, from physically compelling P to choose one option, or from coercing her to choose one). Even if P herself lacks the power to waive or enforce these duties of noninterference—they might instead be nonwaivable criminal-law duties, enforced by the state—it seems plausible for the Choice Theorist to say that P has a *right* to choose X or not-X, and indeed Hart himself would say that.[113]

Nonetheless, I think, it is the particular choices of waiver and/or enforcement, identified by Hart in the duty example, that are best suited to provide general support for the Personal Rights Thesis. After all, the Thesis is not limited in scope to infringements of liberty. Constitutional claimants challenge a wide array of governmental actions as unconstitutional—not merely coercive interference with liberty, but also the denial of money, resources, jobs, or other benefits, and the imposition of sanctions (including sanctions that do not, in any direct way, infringe liberty, such as criminal or civil fines). The Interest Theory offers an account of personal rights suitably broad to accommodate this diverse practice of constitutional adjudication: Any kind of governmental action can invade P's constitutional rights provided that it sufficiently affects P's interests. The Choice Theorist will need to say something similarly broad if she is to bear out the Personal Rights Thesis (let alone reconcile that thesis with the Rule-Dependence Thesis).

In particular, I suggest, the Choice Theorist can say this: Any kind of governmental action can invade P's constitutional rights provided that P has sufficient power to waive the government's duty not to perform the action and, if the duty is unwaived, to pursue enforcement of the government's duty. A bit less ambitiously, the Choice Theorist might drop the proviso about waiver and focus exclusively on claimants' powers to *enforce* governmental breaches of constitutional duty. It may not be true that as a matter of existing constitutional doctrine rights-holders normally possess waiver powers; but it is abundantly clear that rights-holders normally (indeed necessarily) possess enforcement powers, because the concept of "rights-holder" is used by the Court just to describe the category of persons who can appropriately bring suit against the government in a constitutional reviewing court.

The Choice Theory (Via Enforcement) of Constitutional Rights: Preliminary Version

P's "personal right" is violated if the government has performed a constitution-

113. *See* Hart, *supra* note 49, at 179–83.

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ally unjustified action and P has sufficient power to enforce the government's duty not to perform this action.

Observe how this account seems suitable to explain the rights-bearing status not just of those who challenge the denial of liberties, but also of disappointed beneficiaries, the targets of sanctions, and the host of other constitutional claimants whose liberties may not have been restricted—because for any kind of governmental action that might violate constitutional norms, the claimant's power to complain *in court* about the action makes him (on this version of the Choice Theory) an eligible candidate for the description "rights-holder."

But the account, as just articulated, is still rough and preliminary. Imagine the following case. State legislatures have a constitutional duty not to enact laws that unjustifiably discriminate against speech. To enforce that duty, the federal Congress passes a remedial statute providing that "any citizen" may bring suit, in federal court, to invalidate a state law that unjustifiably discriminates against speech. Is this remedial statute consistent with the Personal Rights Thesis? Surely not. The sheer fact that each citizen has a *statutory* power of enforcement does not make each citizen a rights-holder within the meaning of the Personal Rights Thesis. The thesis purports to identify a nontrivial condition for holding a legal power of enforcement, and the mere holding of such a power cannot itself satisfy the thesis. This suggests that within the Choice Theory, "rights-holders" should be understood as persons whose legal powers of enforcement are *constitutionally justified*. P has a choice-right with respect to unconstitutional action A if it is constitutionally justified that P can secure the judicial invalidation of A.

Further, a moment's reflection suggests that there are weaker and stronger versions of the Choice Theory. For a particular governmental action, P might justifiably have the *exclusive* power to enforce the government's duty of nonperformance—P might be the kind of "small scale sovereign" described by Hart—or, less stringently, P (among others) might justifiably possess the enforcement power. Finally, for reasons that I elaborated in my discussion of the Interest Theory, constitutional "justifiability" should be understood as moral justifiability.

The Choice Theory: Strong Version

P's "personal right" is violated if the government has performed some constitutionally (morally) unjustified action A and it is constitutionally (morally) justified that P have the exclusive power to enforce, or not, the government's duty to refrain from A.

The Choice Theory: Weak Version

P s "personal right" is violated if the government has performed some constitutionally (morally) unjustified action A and it is constitutionally (morally) justified that P have the power (perhaps nonexclusive) to enforce, or not, the government's duty to refrain from A.

If this is what "personal rights" entail within a Choice Theory, is the Personal Rights Thesis consistent with the Rule-Dependence Thesis? Insofar as constitutional doctrine safeguards choice-rights, why should doctrine entail the existence of particular types of rules?

Consider first the strong version of the Choice Theory. One kind of action the government can perform is the action of enacting a rule. The properties of the thus-enacted rule—in particular, its language and scope—are obviously relevant to the moral justifiability of the action of enacting it. A law that is, say, underinclusive or overinclusive relative to legitimate governmental purposes is thereby unjustified; a morally better law would be better tailored.[114] But it is hard to see how a particular person P would, morally, have the exclusive claim to invalidate or leave in place a morally and constitutionally unjustified rule. After all, the rule affects the interests or options of all persons who fall within its scope; each such person could plausibly claim, as a matter of her well-being or autonomy, that she should have the power to secure a judicial invalidation of the rule if P has such power. Indeed, insofar as existing constitutional doctrine licenses the wholesale judicial invalidation of unconstitutional rules—and it sometimes does—it is always the case that any person falling under a certain general description, and not a unique individual, has the power to secure that kind of relief.[115]

Another kind of action that the government might perform is the action of creating the jural position of a particular person, P: subjecting P to a particular duty, denying P a benefit (a power), imposing a sanction (a duty) upon her.[116] Insofar as such actions are unjustifiable, it is morally plausible that P should have the exclusive power to challenge them. In particular—and this fits nicely with the Kantian cast of the Choice Theory—it is morally plausible that *as a matter of P's autonomy*, P should have the exclusive power to enforce or not-enforce the government's constitutional and moral duty not to create some jural position of P's. If, for example, an unjustified legal duty is imposed upon P, then whether P should acquiesce in that duty is, first and foremost, P's business, and there is moral justification (of a kind consistent with the Choice Theory) for giving P, and no one else, the power to secure judicial relief against the duty.

114. This itself does not satisfy the Rule-Dependence Thesis, as I have framed it, but it would if the kinds of actions amenable to constitutional challenge were restricted to actions of rule-enactment, or to a subset of actions specified to include actions of rule-enactment.

115. This is implicit in *Salerno*'s "no set of circumstances" test—the implication is that anyone with standing can secure the facial invalidation of a rule satisfying the test—and in the Court's actual facial invalidations, *see* Adler, *Rights Against Rules*, *supra* note 1, at 128 n.425, 156 n.539 (citing some of these). In those cases the Court did not, surely, view the successful claimants as the *unique* persons able to secure the remedy of facial invalidation.

116. Strictly, where P's duty is established by general rule, there is no separate governmental action of subjecting P to a duty. The rule-enacter acts, once, to impose a duty upon a class of persons including P; and P's challenge to her own duty is a challenge to a fragment of the rule-enacter's action, not to that whole action or any other action as a whole. This technicality does not affect my argument in the following paragraphs.

But where do rules come into the picture, here? In particular, why should rule-properties be relevant in this context to constitutional reviewing courts —as in fact they are—beyond identifying the particular jural position that P has or lacks? Why should it matter that a sanction (a duty) has been created for P *pursuant to* a rule that discriminates against speech, or that a benefit (a power) has been denied her *pursuant to* a law that is badly tailored in some way? Such rule-properties do not bear upon the moral justifiability of the challenged governmental action—the action of creating (or refraining from creating) P's jural position. As I argued at length in Part III, rule-properties do not figure among the justification conditions for setbacks to P's interests. These arguments would carry over quite smoothly to show that rule-properties do not figure among the justification conditions for changes to P's jural positions. Whether P should be sanctioned, or denied a benefit, depends upon what P has done, how virtuous she is, what her wealth or welfare level is, and perhaps upon whether similar others end up faring the same, but not upon whether the particular rule applied to her is discriminatory, overbroad, and so forth.

Nor, clearly, do rule-properties figure among the justifiability of P's *exclusively* having the power to invalidate the government's action of wrongly creating (or denying) jural positions of hers. As I have already explained, the moral reason (if any) that P has the exclusive power to judicially change her own jural positions is just that they are her own. P's autonomy is no less at stake in her exclusive power to invalidate a wrongful sanction imposed pursuant to a generally applicable rule than in her exclusive power to invalidate a wrongful sanction imposed pursuant to a discriminatory rule.

A similar point can be made about a third category of governmental action: an action that constitutes the application of a rule, but is not a change in anyone's jural position. For example, governmental officials might perform an action of torture, pursuant to a rule that authorizes "all necessary means, in the interests of national security." If P, indeed, has the exclusive moral claim to seek a judicial remedy against the wrongdoing officials, that is a consequence of the fact that *he* alone is being tortured, not a consequence of the scope of the rule. And the moral justifiability of such nonjural actions exclusively impinging on P is no more rule-dependent than the moral justifiability of changes in P's jural positions.[117]

Finally, there is a fourth category of actions that have no connection to rules at all—actions that are neither the enactments of rules nor the applications of rules (neither rule-applications that create jural positions

117. The cases where P challenges a jural position, or some nonjural application of a rule, could conceivably be lent a rule-dependent cast by formulating a tripartite schema, analogous to that considered above in the context of the Interest Theory. (For example, it might be stipulated that P's rights are violated if (1) the government has unjustifiably acted to impose a certain kind of jural position upon P; (2) P should have the exclusive power to challenge this action; and (3) this action flows from a certain kind of rule.) But the arguments I developed against the tripartite schema, in the context of the Interest Theory, would also hold good here. *See supra* Part III.D.

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nor rule-applications that affect claimants in other ways)—and clearly rule-properties have no role to play in constitutional doctrine here.

So much for the strong version of the Choice Theory. What about the weak version—according to which P's "personal right" is violated by the government's morally unjustifiable action A if it is morally justified that P have the power (perhaps nonexclusive) to enforce, or not, the government's duty to refrain from A? Rule-properties *can* enter the picture here—as with the Strong Version—if the challenged governmental action is the action of enacting a rule. Further, if that is the kind of governmental action at stake, the skeptical point I made above about the Strong Version—that it seemed implausible that a particular P ought to have the exclusive power to challenge rule-enactments—is inapplicable to the Weak Version. Again: P has a *personal right* in this kind of case, according to the Weak Choice Theory, provided that he falls within some class of persons (perhaps bigger than one) the members of which have a moral claim to seek a judicial invalidation of the rule. That class might, for example, be defined as all persons whose jural positions the rule changes; or as all persons whose welfare or autonomy it substantially affects; or perhaps as all persons who are well positioned to serve as "private attorneys-general" and mount a successful and cost-effective challenge against the invalid rule.

Thus the Rule-Dependence Thesis and the Personal Rights Thesis *are* reconcilable within the Weak Choice Theory. Specifically, a doctrinal schema which said the following would satisfy both the Personal Rights Thesis (on a Weak Choice Theory of rights) and the Rule-Dependence Thesis: P has the power to secure a remedy from a constitutional reviewing court only if (1) government has enacted a constitutionally (morally) unjustified rule, and (2) that power, perhaps nonexclusive, is constitutionally (morally) justified. The issue, here, is whether the concept of "personal right" generated by the Weak Choice Theory—call this a Weak Choice Right—is robust enough to serve the function that "personal rights" serve within constitutional doctrine. This is exactly the issue that I discussed in Part III with respect to Weak Interest Rights.

Constitutional doctrine distinguishes between (a) persons who merely have Article III standing and are allowed to bring challenges against unconstitutional governmental action by virtue of "exceptional" doctrines such as overbreadth and third-party standing; and (b) persons who possess "personal rights" in a more robust sense. This distinction makes no sense if personal rights are Weak Interest Rights: Anyone who satisfies the Court's current test for Article III standing has a Weak Interest Right. Similarly, the distinction makes no sense if personal rights are Weak Choice Rights. Why? Think about an "exceptional" doctrine, such as overbreadth, which confers upon a claimant who allegedly lacks "personal rights" the power to secure judicial relief against unconstitutional governmental action. Why should that doctrine be in force? Because it is constitutionally (morally) justifiable for the claimant to have the power to secure judicial relief. Thus the

standard account of overbreadth: It is constitutionally (morally) necessary and justifiable to empower the overbreadth claimant in order to mitigate the "chilling effect" of the overbroad rule upon innocent speakers covered by the rule.[118] But if it is constitutionally (morally) justifiable to empower some P to secure constitutional relief, then P has a Weak Choice Right! That is just how a Weak Choice Right is defined. On a Weak Choice Theory, the overbreadth claimant and others with third-party standing are as much "personal" rights-holders as any other constitutional claimants are. The Court's oft-articulated distinction between (constitutionally justified) standing and genuine constitutional rights holding is simply not one that the Weak Choice Theory can sustain.

B. Hohfeld: Rights as Claim-Rights

Wesley Hohfeld provided a systematic and precise account of jural positions, one that remains the canonical account within legal discourse and scholarship. Hohfeld distinguished between claim-rights, liberties, powers, immunities, no-rights, duties, disabilities, and liabilities, and described the systematic connections between these eight kinds of positions. (For example, Hohfeldian claim-rights held by one person entail Hohfeldian duties governing the person against whom the claim-right is held: P has a claim right against Q to perform or refrain from performing action A if and only if Q has a duty to P to perform or refrain from performing A.) Hohfeld additionally used his framework to define the concept of a "right." Loosely speaking, he suggested, the term "right" could be used to refer to any of the four advantageous positions—a claim-right, liberty, power, or immunity—but more precisely, he thought, a right was simply a *claim-right*.[119]

Does the Rule-Dependence Thesis cohere with the Personal Rights Thesis if personal rights are simply claim-rights? This depends upon a further analysis of the concept of claim-right. Crucially, claim-rights—like all Hohfeldian positions—are relational. P holds a claim right *against Q* to perform or refrain from performing action A. Formally, "claim-right" is a trinary predicate relating two persons, P and Q, and an action A. Explicating the relational feature of claim-rights by reference to the duties that claim-rights entail simply shifts the question. P holds a claim-right against Q in virtue of Q's duty to P to perform or refrain from performing A. But what does it mean to say that Q owes the performance or nonperformance of A to P? Specifically, what does it mean to say that a governmental official has a relational, constitutional duty to a particular P not to perform some unjus-

118. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Broadrick v. Oklahoma, 413 U.S. 601 (1973); sources cited *supra* note 9.

119. *See* Wesley N. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919). Hohfeld's views are carefully analyzed by Kramer, *supra* note 17, at 8–60; and Sumner, *supra* note 11, at 18–31.

tified action A, such that P's status as the beneficiary of this duty gives him a "personal constitutional right" against the performance of the action? The notion of relational, constitutional duties certainly has intuitive resonance. For example, if the official tortures P, it seems intuitively correct that this action is a wrong *to P*, not to the horrified onlooker or to the public interest lawyer well placed to bring a suit benefiting P and other torture victims; and thus that P is the genuine rights-holder here. But is this intuitive notion one that can be further explained?

There have been two main types of attempts within jurisprudence to provide a further explication of the concept of a relational duty or, equivalently, a claim-right. Interest Theorists have, among other things, provided an interest-based account of a claim right; and Choice Theorists have, among other things, provided a choice-based account of a claim right.[120] The interest-based account would say something like this: Q owes A or not-A to P if and only if P's welfare depends upon A or not-A, and with the right nexus (e.g., because A or not-A logically entails a benefit to P). The choice-based theorist could say what Hart says, namely: Q owes A or not-A to P if and only if P has the choice to waive Q's duty plus the choice to enforce that duty if unwaived.[121] My arguments above that Interest Theories and Choice Theories of rights cannot ground rule-dependence will obviously carry over to the case of claim-rights construed in interest or choice terms. Perhaps the intuitive idea of "wrong to" can be construed in a third way, which does not essentially depend upon P's well-being or autonomy; but no one has furnished such an account, at least in any detail.[122]

Notably, Hohfeld himself seemed to think that the relational quality of claim-rights and Hohfeldian duties was conceptually primitive.[123] No further analysis was possible, or so he suggested. If this were true (pace the Interest Theorists and Choice Theorists who have tried to provide further analyses), it would be hard to know whether a Claim-Right Theory of rights succeeds in

120. *See* Sumner, *supra* note 11, at 39–43.

121. Plus the choice to waive any remedy the enforcement court enters.

122. Zipursky analyzes relational duties in terms of relational *directives*. "Relational directives . . . enjoin persons to treat or to refrain from treating *other persons* in a particular way." P's performance of A is a breach of her relational duty to Q if the performance of A constitutes a mistreatment by P of Q pursuant to a relational directive. *See* Zipursky, *supra* note 55, at 59, 59–66. This analysis may well explain what relational *legal* duties are, but it does not explain what relational *moral* duties are, since moral duties are not created by directive. Thus Zipursky's analysis does not explain what it would mean for a person to have a moral claim-right (triggering an entitlement to judicial relief) against governmental action. Intuitively, where the government enacts an overbroad law that prohibits all pictures of naked children and thereby covers both P1 the kiddy-porn displayer and P2 the innocent parent, this governmental action violates P2's, but not P1's, moral claim-right; and if this is indeed P2's moral claim-right, it is his regardless of what existing *legal* directives say.

Why take personal, constitutional claim-rights to be *moral* claim-rights? As I have already suggested, constitutional criteria are at bottom moral criteria for most (if not all) of the domains where doctrine is rule-dependent. *See supra* text accompanying notes 101–02. Carl Wellman has recently provided an account of relational moral duties; this account falls within the category of choice-based accounts. *See* Carl Wellman, *Relative Moral Duties*, 36 AM. PHIL. Q. 209 (1999).

123. *See* Sumner, *supra* note 11, at 19.

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reconciling the Personal Rights Thesis and the Rule-Dependence Thesis or even to know how to assess that possibility. But I think that Hohfeld's views about primitivity are wrong, although I do not have the space to defend my own view at length in this article.[124] Understand that the kind of claim-right at stake here is a moral claim-right: It is P's moral (constitutional) claim against governmental official Q that permits him to hold the legal power to secure judicial relief against Q's action. Irreducible moral claim-rights, or irreducible moral relational duties, do not figure in modern moral philosophy—be it consequentialist, deontological, virtue-based, or some other kind. For example, the primitive concept of duty at work in consequentialism is nonrelative, namely, Q's nonrelative duty to perform or refrain from performing action A, depending on which action maximizes good consequences. The primitive concept of duty at work in deontological theories is also nonrelative, namely, Q's nonrelative duty to refrain from action A, notwithstanding the consequences.[125] The deontologist might say that Q has a nonrelative duty to refrain from A in virtue of the fact that A harms P (or that A involves Q's intention to harm P)—and thus, derivatively, that Q has a relative duty to refrain from A, owed to P—but note that what has just been provided is a deontological *analysis* of a claim-right. Moral claim-rights and relational duties will end up definable by reference to (nonrelative) duty, harm, choice, intention, motive, and other such morally standard concepts; and if so, the notion that rule-dependence might be an upshot of primitive claim-rights is a nonstarter.

C. Dworkin: Rights as Trumps

Ronald Dworkin has defended a view of rights that has proved important within constitutional scholarship: the view of rights as trumps.[126] Clearly, and at a minimum, Dworkin means this by trump-right: P has a trump-right only if considerations of general welfare do not, without more, justify infringing that right. For example, P's constitutional trump-right against governmental action A entails that more is required to justify A (over not-A) than the mere fact that A increases overall well-being. But this conceptual connection between trump-rights and overall welfare cannot, alone, serve as a full definition of a trump-right. (For instance, where a governmental action A is unjustifiable on welfarist grounds alone, what makes it *P* who holds the trump-right against A?) And Dworkin is less clear about what must be added to complete the analysis of trump-rights.[127]

124. *See* Wellman, *supra* note 122, at 218 (arguing that a relative duty is not indefinable).

125. On these issues, see generally Kagan, *supra* note 88, at 25–105.

126. *See* Dworkin, *supra* note 16. There is a large scholarly literature on Dworkin's work. One important contribution, which includes in-depth discussions of Dworkin's theory of rights, is RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 15.

127. *Cf.* Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123 (1978) (claiming that Dworkin has failed to present a clear, coherent view of rights).

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On one plausible interpretation of Dworkin, a trump-right involves an aspect of P's *well-being* that cannot justifiably be overridden on general-welfare grounds alone.[128] Dworkin's theory then becomes a variant of an Interest Theory of rights, and the kind of arguments advanced in Part III will, if good, apply here as well. The conditions under which governmental action implicates a distinctive interest of P's do not make essential reference to rules. But a "trumping interest" is one type of distinctive interest.[129] Thus, the conditions under which governmental action implicates a *trumping* interest of P's do not make essential reference to rules. For example, P may well have a trumping interest in free speech; the freedom to perform speech-acts of type S, or not, may be so important to him that more is required for governmental constraint of P's utterances of type S than a simple utilitarian justification. If so, this interest of P's is implicated whenever the legal rule that restricts his activities includes within its scope some S-type action—whether or not the rule is speech-targeted, or narrowly tailored, or overbroad, or improperly motivated in some way.[130] Similarly, the general point in Part III that the justification conditions for harmful governmental action are not rule-dependent carries over to the specific case of justified interference with trumping interests. The government is justified, say, in prohibiting P from saying S if utterance S itself violates some vital interest of another person. But whether S does *that* will be true regardless of the scope of the rule that includes it.

What if trump-rights are defined by reference to some fact about P other than his welfare? One can certainly read Dworkin as proposing that P's trump-rights may be infringed even absent a harm, strictly speaking, to P. For example, Dworkin says that "[a] goal [as opposed to a right] is a nonindividuated political aim, that is, a state of affairs whose specification does not . . . call for *any particular opportunity or resource or liberty* for particular individuals."[131] This suggests that an impairment of either P's resources for welfare or his autonomy can suffice to make P the holder of a trump-right against the action that causes the impairment, even if that action is not actually welfare-reducing for P. But we are still operating within the broad ambit of an Interest Theory (in the case of resources for welfare) or within

128. This seems to be Donald Regan's construal of Dworkin. *See* Regan, *supra* note 15, at 120–24.

129. Strictly, this may not be true, given the narrow way I have defined "distinctive interest"—as distinctive in its effect on the well-being of the rights-holder—but the arguments I developed above with respect to "distinctive interest" in this narrow sense could, I think, be readily broadened to cover trumping interests.

130. More precisely, I should say this: (1) On the view that P's trumping interest in free speech of type S persists even where P's speech-act is nonexpressively harmful, P's trumping interest is implicated whenever a legal rule includes within its scope some S-type action of P's; and (2) on the contrary view, P has no trumping interest in an S-type speech-act that is nonexpressively harmful *even if* the rule that restricts that action is targeted at speech rather than at nonexpressive act-properties. So on neither view are the conditions for implicating P's trumping interest rule-dependent. *See supra* note 33 and accompanying text.

131. Dworkin, *supra* note 16, at 91 (emphasis added).

the ambit of a Choice Theory (in the case of autonomy). And that is not really surprising, given the dominant role of Kantian and Millian themes within modern normative theorizing.

To be sure, an analysis of trump-rights could, creatively, be developed that depends neither on welfare nor autonomy. This was true of relational duties, and it is equally true here. But such an analysis reconciles the Rule-Dependence Thesis and the Personal Rights Thesis at the very high cost, I suggest, of being normatively arbitrary. That is to say: Either (1) P's personal right ends up being some variant of a Choice Right or Interest Right (as on some interpretations of Dworkin and some further specifications of Hohfeld), in which case the two theses are irreconcilable; or (2) it does not, in which case the ascription of "rights" (thus understood) will seem far removed from what really draws a nexus between P and unjustified governmental action, namely, the involvement of P's well-being or his freedom.

CONCLUSION

Rights and rule-dependence are inconsistent. More precisely: On an Interest Theory of rights, the Rule-Dependence Thesis and the Personal Rights Thesis are consistent only if rights are defined so weakly that an unconstitutional governmental action violates the "rights" of everyone with Article III standing to challenge this action. Similarly, on a Choice Theory of rights, the Rule-Dependence Thesis and the Personal Rights Thesis are consistent only if rights are defined so weakly that an unconstitutional governmental action violates the "rights" of everyone whose power to challenge the action in court is constitutionally justified (including overbreadth claimants and claimants with third-party standing, who have been traditionally thought to lack constitutional rights). The cases of Hohfeldian rights and Dworkinian rights reduce to the cases of interest- and choice-based rights because these latter exhaust the plausible generic normative bases (well-being and autonomy) for characterizing the connection between a person and an unjustified action that makes her a "rights-holder" with respect to that action.

Where does this leave constitutional law? One possibility is to abandon rule-dependence; the other is to abandon the Personal Rights Thesis. I take the latter to be a less radical alteration of our current jurisprudential framework, given the pervasively rule-dependent shape that constitutional doctrine has had for some time and the fact that exceptions to the Personal Rights Thesis (for overbreadth and third-party standing) are already officially recognized. Constitutional doctrine without personal rights would identify certain kinds of unjustified governmental actions, including certain kinds of actions of rule-enactment, that could be judicially challenged by persons who possessed standing and satisfied other Article III requirements. (For example, the action of enacting a discriminatory and unjustified rule

could be challenged under the Equal Protection Clause, but the action of enacting an unjustified rule that merely had a disparate impact upon some group could not.) Reviewing courts would be focused on particular types of unjustified governmental actions because (given their epistemic and other limitations) it is morally better not to empower courts to invalidate every type of injustice. Note that the structure I have just described would seem to readily incorporate the current array of rule-dependent doctrines: These doctrines, such as overbreadth, discrimination, and narrow-tailoring doctrines, would be seen, quite straightforwardly, as doctrines for identifying justiciably unjust rules. In *Rights Against Rules*, I tried to show, in some detail, that current rule-dependent doctrines governing a particular type of rule—duty-imposing rules backed by sanctions—could indeed be plausibly reconstructed as doctrines for identifying justiciably unjust rules.[132] It would be nice to generalize this aspect of *Rights Against Rules*, but that is not something I have the space to do here.

132. *See* Adler, *Rights Against Rules*, *supra* note 1, at 91–132.

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