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RULES, RIGHTS, OPTIONS, AND TIME

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I. INTRODUCTION

Do we have constitutional rights that certain states of affairs exist (for example, that I burn an American flag and am not punished); or do we instead have constitutional rights that certain rules not exist (for example, that there be no rule forbidding the burning of American flags on pain of punishment)? I believe that as a positive account of at least most of our constitutional law, our constitutional rights are best conceived as rights against rules. However, the question remains, Why should the Constitution concern itself with rules rather than with states of affairs, with rule-differentiated act-types rather than rule-independent act-tokens? Must not its concern for the former be based on its concern for the latter?

The most plausible explanation for the constitutional concern with rules is that most states of affairs are constitutionally optional—neither forbidden nor mandated. By itself, however, that would not justify a concern with rules. The concern with rules must be based additionally on the fact that rules are temporally extended—that although today's application of a rule produces a state of affairs that is constitutionally permissible, over time the rule will likely produce states of affairs that, in conjunction with other rules, are constitutionally forbidden.

That then raises two final questions: (1) What makes the temporal extension of a rule constitutionally problematic if the same states of affairs could be brought about by the legitimate changing of rules? (2) Why should we assume that a rule will be temporally extended and not repealed at the point that its applications become constitutionally problematic?

I shall proceed as follows: First, I take as a premise a thesis that Matthew Adler has forcefully defended recently, namely, that on the best understanding of constitutional law, our constitutional rights are primarily if not exclusively rights against certain kinds of rules, not rights that certain states of affairs exist.[1] I then argue that if rules are constitutionally invalid, it must

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

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be because of their anticipated effects in the world—the states of affairs those rules are expected to bring about. Moreover, the relevant effects of rules are the effects they produce over time, not their effects (if any) at any given moment in time. This means that when we look at rules through the prism of constitutional inquiry, we must view them as temporally extended rather than as momentary.

A second implication of the Constitution's focus on rules is that most states of affairs are constitutionally optional. That is, the Constitution permits, but does not require, these states of affairs to be produced by governmental rules. If one, and only one, state of affairs were constitutionally permitted—if the Constitution were a comprehensive blueprint of permissible governmental actions—constitutional review would focus directly on states of affairs and not on the rules under which those states of affairs were produced.[2] There are different ways to explain optionality under the Constitution—one substantive, the other institutional. But whichever explanation is better, the result is the same: The government can choose among various rules without judicial interference.

I next take up the implications of constitutional optionality. One is that government may switch back and forth between constitutionally optional rules. Another is that the possibility of switching explains and justifies motive inquiry. For the switching between permissible rules may produce the same effects over time as an impermissible rule would produce were it to persist over that time period, and only motive inquiry can reveal the difference between legitimate switching and an impermissible rule.

This last point leads me to the central questions I wish to raise. How can a rule be impermissible if the very effects that are supposed to render it impermissible could have been permissibly produced by switching between permissible rules? And why, if the projected future effects of an impermissible rule are what render it unconstitutional, does not the same pattern of past effects render past switching between permissible rules unconstitutional? Finally, given that rules are frequently repealed or modified, what is the relevant time period in which to assess the effects of rules for purposes of determining constitutionality? If a putatively unconstitutional rule has already been repealed, so that we have a closed class of persons whose acts have been penalized under the rule, are they entitled to any relief if either they would be penalized under the new, constitutionally permissible rule or they could have been penalized under a possible constitutionally permissible rule?

2. Why do I equate a comprehensive blueprint of *governmental actions* with a single mandated *state of affairs*? Obviously, a requirement, say, that the government allow freedom of speech is itself consistent with different states of affairs—for example, with the state of affairs that includes A's speaking (and not being punished), and with the state of affairs that includes A's (voluntarily) not speaking. When I speak of a mandated state of affairs, therefore, I mean only that the *government* has no choice about how it must respond to individual choices. I do not mean that individuals themselves are so constrained.

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II. CONSTITUTIONAL RIGHTS AS RIGHTS AGAINST RULES

Assume two cities, A and B. A has a law forbidding "the public burning of the American flag." B has a law forbidding "burning objects on city streets and sidewalks." Johnson, angered by U.S. foreign policy, burns an American flag on a street in A. Jackson, similarly angered, burns an American flag on a street in B. Each is prosecuted under the aforementioned laws and defends on First Amendment grounds. Johnson will win his case.[3] Jackson, however, whose conduct and motivation were identical to Johnson's, will almost certainly lose. Given their identical conduct and motivation, what explains the difference in constitutional outcomes?

Matthew Adler has recently argued that our constitutional rights are rights against certain types of rules, not rights that privilege certain act-tokens, and that this explains the difference between Johnson and Jackson.[4] A's rule, under which Johnson was prosecuted, is constitutionally defective; but B's rule is not. This is why only Johnson and not Jackson has a constitutional grievance.

Now I believe Adler is correct when it comes to cases like the flag-burning ones. And Adler is surely correct when it comes to "equality" cases, whether under the Equal Protection Clause or under the equal protection component of other constitutional rights, such as freedom of speech and freedom of religion.[5]

Is Adler's thesis correct for every constitutional right? Are there some instances of conduct that are constitutionally privileged against all possible rules? I am doubtful. Even though Mrs. Marsh, who peacefully distributed the Watchtower without permission on the privately owned streets of Chickasaw, was constitutionally exempt from prosecution for trespass, is there some other constitutionally permissible rule that we can imagine under which she could have been prosecuted?[6] Or was hers an instance of conduct that was unconditionally constitutionally privileged? And what about cases of torture by governmental officials,[7] incarceration without a trial or without representation by counsel,[8] the requirement of an oath to hold federal office,[9] or the seizure of private property by governmental officials?[10] Are these not constitutionally forbidden acts regardless of whether these acts are in pursu-

3. *See* Texas v. Johnson, 491 U.S. 397 (1989).
4. *See* Adler, *supra* note 1.
5. *See* Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (unequal treatment of speakers based on content violates freedom of speech); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (unequal treatment of religious group because of religious rituals violates right to free exercise of religion). *See generally* Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENT. 287, 290–92 (1994).
6. *See* Marsh v. Alabama, 326 U.S. 501 (1946).
7. *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).
8. *See* U.S. CONST. amend. VI.
9. *See* U.S. CONST. art. VI, § 3.
10. *See* U.S. CONST. amend. V.

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ance of rules, and thus do they not give rise to rights that are not rights against rules?

The issue is not entirely free from doubt as a conceptual matter, for on at least one conception of these cases, what is unconstitutional is the government's legal approval of these acts of its agents, not the acts of the agents themselves.[11] (On this conception, however, even if the rights at stake in the cases mentioned *are* rights against rules, the Constitution permits the government no choice about what rules to have. In the cases I am concerned with, however, the government *does* have such a choice under the Constitution. And it is the existence of such a choice and its implication that, I believe, is the theoretically significant aspect of Adler's rights against rules.)

Fortunately, I can leave these questions for Adler and his critics to debate. For my purposes, all that is important is that there be a significant class of constitutional rights that consists of rights against rules in Adler's sense. The flag-burning cases—and indeed all of the many cases under the Equal Protection Clause and under the equal protection component of freedom of speech, freedom of religion, and even substantive due process—are a significant class of such cases.[12]

III. CONSTITUTIONALITY AS A PRODUCT OF RULES' EFFECTS

To say that constitutional law is concerned with the rules under which conduct is assessed and not with conduct apart from these rules is not to say that constitutional law is unconcerned with the effects of rules in the world. On the contrary, what makes rules unconstitutional or constitutional just *is* their effects in the world—whether they skew public debate, foster racial subordination, or oppress minority religions (constitutional disvalues), or whether they bolster national security, prevent breaches of the peace, or enhance governmental efficiency (legitimate and perhaps important or compelling governmental interests). In saying this, I am saying nothing particularly controversial, with this exception: I am rejecting any position that deems constitutionality to turn in whole or in part on the "social meaning" of rules, at least if "social meaning" is something other than the effects caused by compliance with and enforcement of the rules.[13] Put

11. *See* Larry Alexander & Paul Horton, WHOM DOES THE CONSTITUTION COMMAND? 13–14, 63–64 (1988).

12. *See* Alexander, *supra* note 5, at 290–92.

13. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

In speaking of rules' predicted effects, I am obviously speaking of a limited class of effects, namely, those brought about by compliance and the resource expenditures required for enforcement. I am not considering effects traceable to the popularity of the law, the reelection

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differently, I am rejecting any constitutional focus on the rulemakers and what the rulemakers intend to say *by* their rules as opposed to *in* their rules. Constitutional law is not a vehicle for passing judgment on rulemakers apart from passing judgment on their rules.

I take this position because I believe that any other position would be either futile or perverse. For example, assume that we gauge the constitutionality of governmental benefits for religious groups by whether these benefits "mean" governmental endorsement of religion. Suppose that each member of the city council declares in the press that he or she strongly endorses religion. And suppose that the city council subsequently votes to extend bus transportation to children in religious schools. Is that law constitutionally tainted because we know its authors endorse religion?[14] Are all laws passed by that city council so tainted?

Or suppose you, unlike me, believe that racial preferences in higher education are beneficial and quite important. And suppose a racist legislature enacts a racial preference plan as an expression of the legislature's belief that racial minorities are inherently intellectually inferior and should be stigmatized by receiving preferences. Would you urge the courts to strike down these preferences because of the "meaning" the legislature wants to attach to them?[15]

Although I find social meanings to be much too squishy and elusive for principled adjudication—consider O'Connor's "endorsement test" under the Establishment Clause in this regard[16]—my objection to making social meanings the touchstone of constitutional law does not rest on this objection. Nor do I deny that to the extent laws have "social meanings" beyond their literal instructions, these social meanings will have effects in the world.[17] My problem is that I do not see how the writ of constitutional law can extend beyond the rules themselves to the rulemakers and the attitudes they intend to express.[18] Constitutional adjudication is an appropriate vehicle for passing judgment on rules but not on rulemakers.

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prospects of those who vote on it, and other effects of public attitudes toward what the law accomplishes, even if those effects are quite tangible. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (striking down a city's refusal to allow a group home for the mentally retarded, even though the citizenry's irrational fears and prejudices had a real effect on property values). *But see* Lee v. Washington, 390 U.S. 333, 334 (Black, J., concurring) (approving racial segregation of prisoners to avert interracial violence).

14. *Cf.* Everson v. Board of Education, 330 U.S. 1 (1947) (upholding as constitutional the provision of public transportation to parochial school students).

15. Because invalidation cannot guarantee a change in the legislature's attitudes, invalidating socially beneficial laws because of the legislature's "meaning" seems absolutely perverse. *See* Larry Alexander, *Affirmative Action and Legislative Purpose*, 107 YALE L.J. 2679, 2683 (1998).

16. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

17. *See* note 13 *supra*.

18. Suppose the legislature issues a proclamation to the effect that it hates a certain ethnic group and would do anything it could to subjugate that group were it not for federal law preventing it from doing so. That expression may suffuse the entire body of law with its hateful meaning, but would it render the laws unconstitutional, and if so, what would be the remedy?

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IV. CONSTITUTIONALITY AS A PRODUCT OF EFFECTS OVER TIME, NOT MOMENTARY EFFECTS

I have said that rules are to be constitutionally assessed by their effects, not the attitudes and values their authors intend to express by them (or the effects caused solely by that expression). But how can that be the case, given that the effects of the laws of cities A and B on Johnson and Jackson are identical, yet the constitutional outcomes differ?

The answer goes something like this. It is true that in the cases of Johnson and Jackson, the effects of A's rule and B's rule are the same. But if we assume that both rules will endure over time, then the cumulative effects of each will differ. A's rule will result in the suppression of those, and only those, who burn American flags, and who are usually expressing a narrow range of messages thereby. It will allow those who wish to communicate other messages, or the same message by other means, to do so. At the same time, A's rule will contribute very little to eliminating the danger of public conflagrations. B's rule, on the other hand, will suppress all and only those who burn objects in public, regardless of their communicative intent, if any. Over time, therefore, A's rule will more likely skew public debate than will B's rule and will be less effective than B's rule in promoting public safety.

The same point applies to other kinds of rules. For example, a rule that whites, but not blacks, may swim at a public pool is not unconstitutional because of its effects at any given instant in time. At 3:30 p.m. on Tuesday, only whites may be interested in swimming. At 4:30 p.m., after the whites have left, the blacks who wish to swim but cannot are no worse off than if the jurisdiction in question had no public pool, a constitutionally permissible condition. But over time, if the rule persists, the effects of the rule will be that whites will be able to swim and blacks will not. These effects are what make the rule unconstitutional.[19]

V. RULES AND CONSTITUTIONAL OPTIONALITY

If constitutional rights are primarily rights against rules rather than rights to engage in specific acts, then (most) rules that are constitutionally permissible must also be constitutionally optional. That is, constitutionally permissible rules are rules that are neither constitutionally forbidden nor constitutionally required.

Elizabeth Anderson and Richard Pildes urge that we assess the constitutionality of rules by reference to whether those rules reflect the (constitutionally) proper legislative attitude toward others and their interests. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). Although I cannot demonstrate it here, I believe that the Anderson and Pildes expressive theory boils down to one that makes both rules' effects and their underlying purposes constitutionally material—a theory no different from the one I portray here, and subject to the puzzles I illustrate. They, however, believe otherwise. *See id.* at 1531 n.35.

19. *See* Alexander, *supra* note 5, at 300–07.

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The connection between rules-focus and optionality appears to be one of mutual entailment. Rules-focus entails optionality: If the unconstitutionality of A's rule means that Johnson escapes punishment, it must be because B's rule is not constitutionally required. For if B's rule were constitutionally required, then leaving aside questions of notice, the court in A could just order A's officials to punish everyone who burns an object in public, including Johnson. By hypothesis, the Constitution would not permit A to refuse to punish Johnson. If Johnson is entitled to escape punishment, it must be the case that B's law is not constitutionally required but is, instead, constitutionally optional.

Optionality also entails rules-focus. Johnson burns his flag. It is constitutionally optional whether he gets punished. If A has B's law, then A will permissibly punish Johnson. If A has no law against burning objects in public, then A will permissibly (or so we have stipulated) decline to punish Johnson. And, of course, if A has a law against burning American flags, it will attempt, but will not be permitted, to punish Johnson. Given that there are constitutionally forbidden but no constitutionally mandated rules prohibiting Johnson's act, we cannot determine whether Johnson's punishment for the act is constitutional, without knowing the rule under which he is punished.

Constitutional optionality has two versions. One version is substantive, captured by Justice Holmes's statement in his *Lochner* dissent that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[20] Or, in John Ely's updated version of that position, the Constitution does not enact either John Rawls or Robert Nozick.[21] It may forbid certain political moralities, but it permits rulemakers to choose among more than one political morality.

For example, suppose the Constitution permits rulemakers to enact either the Rawlsian liberal welfare-state corpus juris or the Nozickian libertarian corpus juris.[22] Suppose the former includes welfare grants of $3,000 per month to the poor, financed through redistributive taxation, and the latter includes a prohibition on all redistribution of wealth of this sort. This would explain why both generous welfare grants and no welfare grants are considered constitutionally permissible.[23]

We might assume additionally that genuine compromise between the permitted options—for example, welfare grants higher than Nozick would

20. Lochner v. New York, 198 U.S. 45, 75 (1905). Justice Holmes went on to say, "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views. . . . " *Id.* at 75–76.

21. John Hart Ely, DEMOCRACY AND DISTRUST 56–58 (1980).

22. A similar example is used in Alexander, *supra* note 5, at 296–99, and in Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 24–39 (1981).

23. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting the notion that welfare, though constitutionally permissible, is a "fundamental interest" under the Constitution).

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allow but lower than Rawls would require—would also be permissible. On the other hand, "compromises" introducing elements, such as race, that are immaterial under any constitutionally permitted political morality would be forbidden. Thus, Rawlsian welfare for whites but Nozickian welfare for blacks would be impermissible.

The second version of constitutional optionality sees it not as substantive but as institutional. That is, the Constitution may very well enact one political morality—be it Spencer's, Rawls's, Mill's, or Nozick's—but the courts will enforce only part of that political morality and treat the remainder as a "political question." Most of the mandated political morality will have the status of "underenforced constitutional norms."[24]

Whichever account of constitutional optionality we prefer, the result is the same. Rulemakers are permitted by the courts to act as if many rules are neither constitutionally forbidden nor constitutionally required. And constitutional optionality, whatever its justification, should not be a controversial assumption. Not only does it square with constitutional doctrine, but it also accounts for the relative importance the Constitution gives to legislative bodies, their selection and their powers. If the Constitution were a complete blueprint of nonoptional rules and completely judicially enforceable, legislatures would be relegated to minor details and the judiciary would assume an importance entirely out of proportion to the role implied by the document.[25]

24. *See* Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

25. There are two further but quite tangential points that I wish to make about the picture of constitutional adjudication that emerges from the preceding sections. First, technically, it is not individual rules that are constitutional or unconstitutional, but the entire set of rules—the entire corpus juris—of which they are a part. *Contra* Adler, *supra* note 1, at 14–18, 35–36. Thus, if A were to have on its books not only a rule prohibiting burning American flags in public, but also a second rule, carrying the same penalty, prohibiting public burning of any object that is *not* an American flag, the *set* of A's rules would be constitutionally permissible, and Johnson would have no better constitutional objection to his punishment than Jackson. The contrary position would throw constitutional analysis into the morass of determining how to individuate rules.

Second, in a world of constitutional options, questions of standing loom large. *See* Alexander, *supra* note 5, at 307–09. Consider Allan Bakke, who objected constitutionally to the admissions rule at the University of California medical school that favored minorities over whites. Regents of the Univ. of Calif. at Davis v. Bakke, 438 U.S. 265 (1978). Even if that rule was unconstitutional, there were an indefinite number of constitutionally permissible (if not wise) admissions rules available, under many of which Bakke would not have been admitted. The University of California could have taken the top scores on the MCATs, in which case Bakke would have been admitted, but it also could have constitutionally chosen open admissions, or preferences for tuba players, and so on. Does anyone who would have gotten into the medical school under some constitutionally permissible rule have standing to object to a constitutionally impermissible rule? If so, many minorities as well as whites would have had standing to challenge the admissions rule. If not, why did Bakke have standing? (Or, to update this example, if a state university adopts an admissions rule that automatically admits the top, say, four percent of each high school class, and does so because of the rule's racial impact, it has arguably acted unconstitutionally under current precedents—see Larry Alexander & Kevin Cole, *Discrimination By Proxy*, 14 CONST. COMMENT. 453 (1997)—but who of those not admitted will have standing to complain?)

Indeed, given that it is entire sets of rules that are unconstitutional, it might appear that anyone who can point to a constitutionally optional alternative set under which he would be better off will have standing to complain that the set is unconstitutional. If the rule against

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VI. OPTIONALITY AND SWITCHING

Assume two opposing rules are both constitutionally optional. For example, assume that punishing those who burn objects in public is constitutionally permissible but not constitutionally required. The rulemaker may choose to ban public burnings, or it may choose not to ban them.

Assume that the rulemaker has chosen to ban public burnings and has enacted a rule to that effect. It now has a change of mind (or a change of personnel) and wishes to repeal the rule. May it do so? To deny this choice would be to say that constitutional options exist only at the time of the first legislative choice (in the entire history of the constitutional regime!). After that, the rulemaker would be frozen into one of the optional political moralities. This would effectively mean that constitutional optionality would not exist.

Therefore, because we assume constitutional optionality does exist, we must conclude that the rulemaker is always free to change its mind and switch from one constitutionally optional rule (really, set of rules) to another. There may be some very limited freezing principles that retard such switching—for example, the Takings Clause,[26] the Obligations of Contracts Clause,[27] and the nonretroactivity aspect of the Due Process clauses[28] operate to qualify the ability to change from one optional rule to another—but basically, a rulemaker is constitutionally free to change at any time from one constitutionally optional rule to another.

VII. OPTIONALITY AND LEGISLATIVE MOTIVATION

The permissibility of legislative switching among constitutionally optional rules having been established, consider the following variant on our original hypothetical: City A, constitutionally forbidden to enact a rule targeting those who burn American flags, decides (1) to enact a rule forbidding all public burning of objects immediately upon being informed that someone is about to stage a protest and burn an American flag and (2) then to repeal that rule immediately after the protest. In other words, City A has adopted—albeit informally—a "metarule" to switch back and forth between enacted rules "No burning allowed" and "Burning allowed" in such a way as to

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burning objects in public is kept on the books *because* of its impact on burners of American flags, and is deemed unconstitutional for that reason—see Section VII *infra*—someone charged with burning trash on the street could conceivably have standing to challenge the rule's application to him on the ground that there is a constitutionally optional set of rules that does not include a rule prohibiting burning objects in public. Indeed, conceivably anyone would have standing who was suffering from the impact of *any* rule within the unconstitutional corpus juris! But what remedy could he get?

26. U.S. CONST. amend. V.
27. *Id.* art. I, § 10.
28. *Id.* amends. V and XIV, § 1.

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prevent those who wish to burn American flags from doing so but otherwise to allow public burnings.

Suppose now that Johnson burns his American flag and is arrested for violating the "no burning" rule, which was enacted immediately before his act—assume he had proper notice of it—and which was repealed immediately thereafter. Does Johnson have a valid constitutional objection?

The answer has to be yes. The real rule here—one that persists unchanged over time—is the metarule defined by the rulemaker's purpose, not the momentary published rules that are, in effect, merely the metarule's applications. Given constitutional optionality and the permissibility of switching, the courts must treat legislative motivation as material. Otherwise, they would be unable to distinguish the constitutionally legitimate phenomenon of legislative switching among permissible rules from the constitutionally illegitimate phenomenon of applying a single impermissible rule constantly over time.

Other examples illustrate this point. Suppose a city wants to bar blacks from the city's swimming pool. A rule "no public swimming for blacks" would violate the Equal Protection Clause. On the other hand, a public swimming pool open to all would be a constitutionally permissible redistribution of wealth, and the closing of the public swimming pool would be a constitutionally permissible libertarian measure. So the city instructs the lifeguard on duty to hang the "pool open" sign whenever whites show up to swim, and to hang the "pool closed" sign whenever blacks show up. Because the rule "public swimming for whites but not blacks" is unconstitutional, so too is the instruction to the lifeguard. *It* is the operative rule for constitutional assessment, not the published rules "pool open" and "pool closed" that are merely its applications.[29] So the rulemaker's purpose matters whenever we are dealing with rules that are constitutionally optional on their face. The purpose essentially defines the real rule that must be constitutionally evaluated. Is *it* constitutionally optional, or is *it* constitutionally forbidden? This best explains why the Supreme Court has deemed legislative motivation to be material in equal protection cases such as *Washington v. Davis*[30] and *Personnel Administrator of Massachusetts v. Feeney*[31] and in First Amendment cases such as *Wayte v. United States*.[32] The laws in these cases were constitutionally optional on their face. Therefore, it is material whether they were

29. And consider the many possible constitutionally legitimate reasons for which each Chinese applicant to run a laundry could have been denied a license in Yick Wo v. Hopkins, 118 U.S. 356 (1886). How do we know that the members of the San Francisco Board of Supervisors were not switching among the various possible legitimate rules for awarding licenses? Because whatever legitimate reasons might have been applicable had they merely been changing their minds about what reasons to choose, the circumstantial evidence was overwhelming that they were not changing their minds but were consistently following a single illegitimate purpose or metarule, namely, to exclude Chinese. *See* Alexander, *supra* note 5, at 302–04.

30. 426 U.S. 229 (1976).

31. 442 U.S. 256 (1979).

32. 470 U.S. 598 (1985).

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enacted for reasons that were also constitutionally optional as opposed to constitutionally forbidden.[33]

Earlier I argued that the constitutionality of rules turned on their effects over time. Here I have argued that constitutionality turns on the rulemakers' purposes. Am I not contradicting myself?

The answer is that constitutionality turns on both purposes and effects. The legislative motivation behind the rule *defines* the rule for purposes of constitutional evaluation. For instance, City A's motivation to suppress only the burning of American flags converts its published rule, "No burning of objects in public," into its real rule, "No burning of American flags in public." *And it is the latter rule that is evaluated by its effects.* In other words, ultimately the constitutionality of all rules turns on their effects over time. Purpose is important, however, in determining what the rules actually are.[34]

VIII. RULES AND TIME

I have argued that rules must be constitutionally evaluated based on their effects, which of necessity means their effects over time. I have also argued that if the Constitution is concerned with rules rather than with the particular act-tokens that fall under them, then that entails the view that rules are usually constitutionally optional; and I have argued that the converse relation holds as well, namely, that constitutional optionality entails a concern with rules. I have further argued that if rules are constitutionally optional, rulemakers may switch back and forth among them. Finally, I have argued that rulemakers may not (apparently) switch back and forth among constitutionally optional rules if they are really consistently following an unconstitutional metarule.

If all of these arguments are correct, however—and I believe that they are—then we are left with a theoretical mystery: Why do we project a rule

33. This analysis also shows the futility of recent attempts to get around such antidiscrimination laws as California's Proposition 209, which prohibits, inter alia, racial discrimination in admissions to public universities. CAL. CONST. art. 1, § 31. Administrators who select facially nonracial admissions criteria "in order to promote racial diversity" are not avoiding the law but are violating it. They are choosing close proxies for race for racial reasons, and we must assume that if the reasons remain constant over time, the proxies will change if necessary. *See* Alexander & Cole, *supra* note 25. The real rule is "admit so as to promote racial diversity," which is forbidden.

34. Because legislative purposes can render otherwise constitutionally optional rules unconstitutional, improperly motivated legislative *inaction* and *repeals* of rules are as unconstitutional as improperly motivated enactments. The status quo is no more constitutionally privileged than change, given that the status quo may itself be the product of improperly motivated failure to act. And that means that the courts must impose a remedy whenever they find a constitutionally improper rule that renders the entire set of optional rules unconstitutional. However, given that there are perhaps many constitutionally optional alternative sets of rules, which such set should they impose? They cannot evade this problem, because the legislature may not act. And if the legislature does not act, the corpus juris must be judicially altered. But which of the alternative sets of rules should be chosen? (Notice how this problem of remedy is merely the flip side of the problem of standing mentioned in note 25 *supra*.) *See also* Alexander, *supra* note 5, at 307–09.

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into the future and use its anticipated future effects to hold it unconstitutional, whereas the same effects in the past do not impugn rules?

To illustrate this mystery, I shall expand the original hypothetical:

City A has had a rule banning the public burning of American flags on the books for one year. It has now been repealed. Johnson burned an American flag while the law was in effect and is currently being prosecuted.

City B has had a rule banning all public burning for one year, and the rule remains on the books. It just so happens that the only people who have wanted to burn objects in public during the past year have been those who wanted to burn American flags. Jackson did burn an American flag and is now being prosecuted.

City C has alternated between a "no public burning" rule and having no rule regulating public burning. It has done so because it has changed its mind for constitutionally legitimate reasons. It just so happens, however, that all those prosecuted during the times the "no public burning" rule was in effect were those burning American flags in political protests. Jensen was such a person and is now being prosecuted.

City D has, like City C, switched back and forth between the same alternatives. Unlike City C, however, City D has been consistently motivated by its desire to punish those, and only those, who burn American flags. Jencks_1, a flag burner, is being prosecuted under the "no public burning" rule in effect when he acted. A new city council, composed of radicals sympathetic to flag burning, has taken office after Jencks_1's arrest.

City E is like City D, except that the new city council took office *before* Jencks_2's flag burning and left the "no public burning" rule on the books for legitimate reasons.

City F has just repealed a "no public burning" law and enacted a "no burning an American flag" rule that will sunset in one month, when a new city council, composed of radicals sympathetic to flag burning, will take office. Jinks burned an American flag after the "no burning an American flag" rule was enacted and is being prosecuted.

Now according to the arguments I have given, Johnson (City A), Jencks_1 (City D), and Jinks (City F) are being prosecuted unconstitutionally. On the other hand, Jackson (City B), Jensen (City C), and Jencks_2 (City E) are being permissibly prosecuted. Yet all burned American flags in protest. The past effects of the rules in each city were the same. Moreover, the future effects of some of the unconstitutional rules—for example, City D's and City F's—appear to be more benign than the past effects of the constitutionally permissible rules in effect in B, C, and E. Indeed, the past *and* future effects in D and E appear indistinguishable; yet Jencks_1 is prosecuted unconstitutionally in D, but Jencks_2 is not prosecuted unconstitutionally in E.

I regard this pattern of results and the asymmetry between future effects and past effects as sorely in need of justification. Unfortunately, I have none to offer.

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IX. CONCLUSION

Somewhere, something has gone wrong. Perhaps Adler and I are wrong, and constitutional rights are not rights against rules. If that is the misstep, however, then, as Adler's formidable article demonstrates, there is a lot of explaining to do.

Or perhaps, contrary to what I have argued, constitutional law *is* an expressivist battleground, concerned with evaluating rulemakers and the "meanings" they express (intentionally?) by their rules rather than with evaluating the rules based on the rules' more straightforward effects. Perhaps judicial invalidation on constitutional grounds is itself meant primarily to express contrary meanings rather than to see that public debate is unskewed, or that public pools are open to everyone, or that other similarly tangible results are brought about. Perhaps, but I seriously doubt it. It is true that we, like dogs, can tell the difference between being tripped over and being kicked, but it matters to us only when we care about the attitude of our injurer. Constitutional law seems, to me at least, to be properly concerned with rules and their tangible—and remediable—effects, not with legislative attitudes.[35]

Unless, however, I am wrong about either of these two points, then, I believe, we end up with the odd pattern of constitutional judgments I

35. For sake of completeness, let me put on the table three possible approaches to rights against rules, in addition to the expressivist approach, that might avoid the conundrum I have described.

First, one might argue that improper purposes alone, without regard to effects, invalidate rules in the same way that discriminatory motivation invalidates a private hiring decision by an employer even if there exist proper grounds for the same hiring decision. We may believe that refusing to hire on account of race is wrong and actionable irrespective of effects.

I do not know if the ban on racially prejudiced decision making is unconcerned with predicted effects, but even if it is, very little of constitutional rights against rules can be explained by analogy to bans on prejudiced decision making. Laws suppressing viewpoints such as anti-American sentiment may be based on concerns that are otherwise perfectly proper—such as protecting onlookers from serious offense, or preventing incitement of the audience to violent action—yet nonetheless be unconstitutional. Constitutionally improper purposes need not be prejudiced or immoral. Even unconstitutional racial purposes may reflect stereotypes—even well founded ones—rather than prejudices.

Second, one might argue that laws resulting from certain legislative purposes are invalidated, not because we know their effects will be bad, but because courts cannot predict and assess their effects with any reliability. Instead, courts use certain legislative motives as proxies for defective legislative deliberations, which are conclusively presumed to lead to bad effects. In other words, constitutionally desired effects are to be achieved, not by direct judicial implementation through invalidation of legislation that fails to produce those effects, but through a judicially enforced *rule* invalidating all legislation that is enacted for specific illegitimate purposes, regardless whether the legislation ultimately differs in its effects from legislation enacted for proper purposes. *See, e.g.*, Mitchell N. Berman, "Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions," pp. 39–40 n. 94 (unpublished draft of May 27, 2000, on file with the author).

The principal problem with this argument is that it results in identical laws in separate but otherwise similar jurisdictions having different constitutional statuses. For example, if jurisdictions A and B are otherwise similar, and even have the same number of prospective flag-burners and prospective burners of other objects, but A enacts its no burning law in order to get flag burners, while B enacts an identical law in order to protect the public, the "skewed

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presented in the previous section. That pattern surely needs to be justified or denied, neither of which I can do. As the King of Siam was wont to say, "It's a puzzlement."[36]

I do have an intuition, however, that the source of this problem—and the remedial and standing problems that go with it—is constitutional optionality. If the Constitution, contrary to Holmes, does enact a single, coherent political philosophy, then rules will be either mandated or forbidden but will not be optional. Legislative motivation will not matter. A mandated rule will be constitutional regardless of why the legislature enacted it, and a forbidden rule cannot be redeemed by good intentions. Switching between permissible rules will be impossible because only one set of rules will be permissible. And the remedy for unconstitutional enactments will be to reestablish the constitutionally mandated corpus juris.

Optionality may carry with it the virus of incoherence. Rights against rules may best describe large portions of constitutional doctrine, but ultimately rights against rules and its corollary of the constitutional optionality of rules suggest a picture of constitutional law in which we care only *why* people are treated by government as they are and not about *how* they are treated. Such a picture ultimately seems a radical distortion of why we care about constitutional rights.

deliberations" theory would deem A's law, but not B's, to be unconstitutional. Yet however reliable or unreliable are judicial predictions of effects, the effects of these two laws are identical (that is, except for the effects we might predict when either the circumstances or the legislatures change—the effects that I regard as important). Conclusively presuming them to be different might seem nonsensical. If A committed constitutional error in its deliberations, then it would appear to be harmless error.

Of course, one could still argue that, although different results in cases of identical laws enacted for different purposes look nonsensical, over the long run the purpose-focused rule will perform better than an effects-focused rule. In other words, if the constitutional concern is, say, a skewing of public debate, then a constitutional rule invalidating all legislation enacted to favor or disfavor certain viewpoints might, in the long run, produce less skewing than an effects-focused rule, even if in specific cases the former rule produced as much or more skewing than the latter. This is Berman's point, and he may be correct. If so, then my puzzles evaporate.

Third, one might argue by analogy to criminal recklessness that it is wrong to risk harm to another without a sufficient reason for doing so. If the government, as the community, risks stifling speech for no sufficient reason (because it objects to the message), then it has acted recklessly without regard to whether harm results.

Now it is true that one can make a case for governmental recklessness here in terms of culpability. But it is doubtful that actual wrongdoing, as opposed to culpability, can be shown. For example, suppose a driver takes what he believes is a substantial and unjustifiable risk of hitting a pedestrian, but we can see that the driver will not in fact hit the pedestrian. If such were possible, would we enjoin the driver? No. The driver will in fact cause no harm, despite his culpability. On the other hand, even if the driver is driving quite safely, if we can see that he will hit a pedestrian, we will enjoin him despite his lack of culpability.

In the case of laws such as the "no public burning" law that are enacted for improper reasons (because they will stifle flag burning), there are good reasons for the law—public safety—that coexist with the bad. If the good reasons outweigh the bad—which they may since the same law enacted for good reasons is permissible—then the law produces no net social harm. We have government culpability, perhaps, but not an enactment that will cause harm. The proper analogy in the criminal law context would be a reckless act that we know will fail to cause the harm it risks and will actually produce a benefit. We must punish the defendant for his culpability, but we would not enjoin his conduct.

36. Richard Rodgers & Oscar Hammerstein, THE KING AND I.

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