



Stanford Law Review

THE SUBJECTS OF THE CONSTITUTION

Nicholas Quinn Rosenkranz

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Georgetown Public Law and Legal Theory Research Paper No. 10-25

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INTRODUCTION

Two centuries after *Marbury v. Madison*,¹ there remains a deep confusion about quite what a court is reviewing when it engages in judicial review. Conventional wisdom has it that judicial review is the review of certain legal *objects*: statutes, regulations. But strictly speaking, this is not quite right. The Constitution prohibits not objects but *actions*. Judicial review is the review of such actions. And actions require actors: verbs require *subjects*. So before judicial review focuses on verbs, let alone objects, it should begin at the beginning, with subjects. Every constitutional inquiry should begin with a basic question that has been almost universally overlooked. The fundamental question, from which all else follows, is the *who* question: *who has violated the Constitution?*

As judicial review is practiced today, courts skip over this bedrock question to get to the more familiar question: *how* was the Constitution violated? But it makes no sense to ask *how*, until there is an answer to *who*. Indeed, in countless muddled lines of doctrine, puzzlement about the *predicates* of constitutional violation follows directly from more fundamental confusion about the *subjects*.

This fundamental confusion, like most confusion in law, stems from insufficient attention to text. Individual words are important, of course, but equally important is textual structure. The words form clauses and take on grammatical functions within those clauses. Within their clauses, these words become subjects, verbs, objects. The grammatical relationship among these words may be just as revealing as the words themselves. Grammatical imprecision can cause—and has caused—deep analytical and doctrinal confusion. But careful attention to constitutional grammar can reveal—and will reveal—nothing less than the constitutional structure of judicial review.

Confusion about the *who* (and, relatedly, the *when*) of constitutional violation has been the root cause of many of the deepest puzzles of federal jurisdiction—puzzles of ripeness, of standing, of severability, of “facial” and “as-applied” challenges. Simply by focusing attention on this crucial constitutional feature, the *subjects* of the Constitution, these puzzles may be solved once and for all.

And as they are solved, it becomes clear that this approach constitutes a new model of judicial review. According to Harvard Law Professor Richard Fallon, federal courts scholars have been doing much the same thing since the original publication of *The Federal Courts and the Federal System*² in 1953—“asking much the same questions formulated by Henry Hart and Herbert

1. 5 U.S. (1 Cranch) 137 (1803).

2. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953).

Wechsler . . . and trying to answer them with roughly the same techniques.”³ This Article takes up Fallon’s challenge “to [r]eshape the Hart and Wechsler [p]aradigm,”⁴ by proposing a new starting point: the *who* of constitutional violation.

But the implications of this new paradigm are not limited to federal jurisdiction. It turns out that confusion over the deep puzzles of federal jurisdiction has had subtle but profound feedback effects on *substantive constitutional doctrine* as well. Once these jurisdictional puzzles are solved, the scope of constitutional rights and powers comes into new focus as well. These implications ripple through the most important and controversial doctrines of constitutional law, from the scope of the Commerce Clause to the reach of the First Amendment, from the meaning of equal protection to the content of privileges and immunities, from the nature of due process to the shape of abortion rights.

Parts I-III of this Article set forth a new model of judicial review. Part I argues that judicial review should begin by asking *who has violated the Constitution*. This seemingly innocuous question, which the Court has studiously avoided, turns out to be analytically incendiary, and not merely because it unmasks constitutional culprits. Part II then asks the *when* question: *when was the Constitution violated?* And it shows how the answer to *when* follows inexorably from the answer to *who*. Part III explains how these two simple questions dictate the structure of judicial review. And it shows how the structure of judicial review, in turn, informs the scope of substantive constitutional rights and powers.

Parts IV-VII apply this model to some of the most important sections of the Constitution—ones written in the active voice, with a single, explicit subject. Part IV applies this model to the First Amendment, where it both solves jurisdictional riddles and informs the substantive scope of rights, all in a way that harmonizes the six clauses of the Amendment. Part V applies the same analysis to the Commerce Clause, again solving a riddle about the structure of judicial review and in turn deducing the scope of the power. Part VI does the same with Section 5 of the Fourteenth Amendment. And Part VII draws out important parallels—textual, structural, and doctrinal—among the clauses discussed in the prior three parts. These parallels have not been recognized before, but they reflect a singular doctrinal logic and harmony—precisely because all of these clauses share a single *subject*.

The sequel to this Article will apply the same method to the most important clauses that do not have an explicit and precise subject. This Article establishes the primacy of the *who* question; the sequel will show how to answer it. The question is difficult in the case of Section 1 of the Fourteenth Amendment,

3. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 954-55 (1994).

4. *Id.* at 979.

because it begins “no State shall”—a clear subject (“State”), but no indication of the *branch* of state government. And more difficult still is the Bill of Rights, most of which is written in the passive voice. Its provisions have clear subjects, but in the passive voice, the grammatical subject is not the “logical subject,”⁵ the “doer,”⁶ the “agent.”⁷ In other words, these clauses all elide the question: *by whom?*⁸—the question of *object*. It is these difficult clauses that are the subjects of the sequel, *The Objects of the Constitution*.

In short, these two articles set forth a new model of judicial review, a new lens through which to read the Constitution. Reading the entire document through this new lens is the work of a lifetime. But grinding the lens—and training it on a few of the most important clauses—may be accomplished in two articles, this one and its sequel.

And all of it derives from nothing more complicated than asking the right first question.

I. WHO HAS VIOLATED THE CONSTITUTION?

The Constitution prohibits certain *actions*. This is the nature of legal prohibitions, as criminal law scholars know: violations of the Constitution, like violations of a criminal code, are effected by actions, by *actus rei*.⁹ Judicial

5. SYLVIA CHALKER & EDMUND WEINER, *THE OXFORD DICTIONARY OF ENGLISH GRAMMAR* 379 (1998 ed.) (entry for “subject”) (“To overcome the ambiguity of the word *subject*, traditional grammar sometimes qualified the word. Thus in addition to a *grammatical subject* there might be a *logical subject*, particularly with a passive verb.”).

6. *Id.*

7. *Id.*

8. See R.W. BURCHFIELD, *THE NEW FOWLER’S MODERN ENGLISH USAGE* 576 (rev. 3d ed. 1998) (“In passive constructions the active subject has become the passive agent, and the agent is (in this case) preceded by *by*. In practice, however, in the majority of passives, the *by-agent* is left unexpressed”); HARRY SHAW, *MCGRAW-HILL HANDBOOK OF ENGLISH* 12-13 (4th ed. 1978) (“When a verb appears in the passive voice, the actual performer of the action appears either in a prepositional phrase at the end of the sentence or is not specifically named at all.”).

9. See 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 11.4 (2d ed. 2003) (describing various formulations of the *actus reus* requirement and stating that “[o]ne of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime. . . . There must also be an act”). In constitutional law, as in criminal law, an omission can be an *actus reus*. See *id.* § 11.4(e) (“The Model Penal Code requires ‘an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor’s] commission of the crime.’” (alteration in original) (footnote omitted) (quoting MODEL PENAL CODE § 5.01(1)(c) (1962))). An omission can violate the Constitution, because the Constitution imposes certain duties to act. For example, the Constitution provides that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. The adverb “faithfully” gives the President substantial discretion to prioritize and allocate resources in the execution of the law. See Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1112 (1986) [hereinafter Black, *Further Reflections*] (“The President cannot do everything imaginable to bring it about that the laws be faithfully executed; he is limited by his own physical and mental

review is the constitutional review of such actions.¹⁰

powers, by other claims on these, and by the amplitude of the means put at his disposal by Congress.”). But if he were to refuse to execute the laws altogether, that omission would constitute a violation of the Take Care Clause. See CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 42-43 (1974) (“I, myself, feel no doubt that it is a violation of his constitutional duty for a president to use his discretionary power (which sometimes must be given him) over expenditures, for the improper purpose of dismantling altogether, or severely crippling, programs that have been regularly enacted in lawful form; this seems to me a violation of his duty to take care that the laws be *faithfully* executed. ‘Faithfully’ is a word that does not keep company with the disingenuous pretense that economy is the motive, when the real motive is hostility to the law.”); Black, *Further Reflections*, *supra*, at 1112 (“The duty has to be a duty to act prudently within these limits, without ulterior motive, sensitive to the force of the powerful conscience-stirring word ‘faithfully.’”); cf. Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 404 (1993) (“I suggest the [Thirteenth] Amendment . . . prohibits certain kinds of state *inaction*.”). Whether a constitutional violation ever requires mens rea is a much more difficult question. See *infra* note 84.

10. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (referencing “courts of justice, whose duty it must be to declare all *acts* contrary to the manifest tenor of the Constitution void” (emphasis added)); *id.* at 466 (“[E]very *act* of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.” (emphasis added)); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 542, at 405 (Melville M. Bigelow ed., William S. Hein 1994) (1833) (“[The judiciary faces] the constant necessity of scrutinizing the *acts* of [the other branches] . . . and the painful duty of pronouncing judgment, that these *acts* are a departure from the law or constitution . . .” (emphasis added)); see also *Nixon v. United States*, 506 U.S. 224, 238 (1993) (“[C]ourts possess power to review either legislative or executive *action* that transgresses identifiable textual limits.” (emphasis added)); *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 459 (1992) (“[T]oday we review the *actions* of Congress.” (emphasis added)); *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (referring to the judicial branch’s “power to negative the *actions* of the other branches” (emphasis added)); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (2d ed. 1986) (“The power which distinguishes the Supreme Court of the United States is that of constitutional review of *actions* of the other branches of government, federal and state.” (emphasis added)); BLACK’S LAW DICTIONARY 864 (8th ed. 2004) (defining judicial review as “[a] court’s power to review the *actions* of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive *actions* as being unconstitutional” (emphasis added)); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 6 (1980) (referencing “the power of judicial review to declare unconstitutional legislative, executive, or administrative *action*” (emphasis added)); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2297 n.2 (2008) (Scalia, J., dissenting) (“The Court must either hold that the Suspension Clause has ‘expanded’ in its application to aliens abroad, or acknowledge that it has no basis to set aside the *actions* of Congress and the President.” (emphasis added)); *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“We turn now to the question whether *action* of one House of Congress under § 244(c)(2) violates strictures of the Constitution.” (emphasis added)); cf. *Preseault v. I.C.C.*, 494 U.S. 1, 9 (1990) (“The primary issue in this case is whether *Congress has violated* the Fifth Amendment by precluding reversion of state property interests.” (emphasis added)); *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (“To the extent that the federal parties suggest that we should defer to Congress’ conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether *Congress has violated the Constitution*.” (emphasis added)); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (“[W]e conclude that *Congress has not violated* TWR’s First Amendment rights . . .” (emphasis added)); *Vance v. Bradley*, 440 U.S. 93, 94–95 (1979)

And actions require actors, just as verbs require subjects. Thus, a constitutional claim is necessarily a claim that some *actor* has acted inconsistently with the Constitution. And so, every constitutional claim should begin by pointing a finger. Every exercise of judicial review should begin by identifying a governmental¹¹ actor, a constitutional *subject*. And every constitutional holding should start by saying *who* has violated the Constitution.

If one were approaching constitutional law for the first time, one might have expected every constitutional judicial opinion to begin with the alleged constitutional culprit, the subject of the claim. After all, the Constitution itself affirms our popular sovereignty with the largest letters on the parchment, the first three words, the ringing *subject*. Its very claim to authority depends on *who* has ordained and established it: “We the People.”¹² Indeed, in English

(“The issue presented is whether Congress violates the equal protection component of the Fifth Amendment’s Due Process Clause by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system.” (footnote omitted)); *Schlesinger v. Ballard*, 419 U.S. 498, 578–79 (1975) (“We cannot say that, in exercising its broad constitutional power here, *Congress has violated* the Due Process Clause of the Fifth Amendment.” (emphasis added)).

11. See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995) (referring to the general principle “that our Constitution’s provisions, even when they don’t say so expressly, limit only some appropriate level of *government*” (footnote omitted)). For the moment, this Article will set aside the theoretical possibility that private individuals may violate certain constitutional clauses. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); *id.* amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”); Amar, *supra* note 9, at 403 (“[T]he Thirteenth Amendment clearly applies to . . . private action: Slavery, the Amendment commands, shall not exist.”); Akhil Reed Amar, *The Case of the Missing Amendments*: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155 (1992) (“The Thirteenth Amendment’s abolition of slavery and involuntary servitude speaks directly to private, as well as governmental, misconduct; indeed, it authorizes governmental regulation in order to abolish all of the vestiges, ‘badges[,] and incidents’ of the slavery system.” (alteration in original) (quoting *Civil Rights Cases*, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting))); Tribe, *supra*, at 219 (“The text [of the Twenty-First Amendment] actually forbids the private conduct it identifies, rather than conferring power on the States as such. This has the singular effect of putting the Twenty-First Amendment on a pedestal most observers have always assumed was reserved for the rather more august Thirteenth Amendment, which is typically described as the *only* exception to the principle that our Constitution’s provisions, even when they don’t say so expressly, limit only some appropriate level of *government*.” (footnote omitted)); *id.* at 220 (“The upshot is that there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws . . .”).

12. U.S. CONST. pmbl.; see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5 (2005) (“These words [of the Preamble] did more than promise popular self-

grammar, the first step is always to identify the subject.¹³ Before one can understand the logic of a sentence, let alone the authority of a constitution or the structure of a constitutional claim, one must always answer the essential, the first, the most basic question: *who?*

Yet, as a general matter, the Court is maddeningly vague about exactly who has violated the Constitution. If Congress makes a law, the President executes the law, and a constitutional right is violated, it must be that either Congress or the President violated the Constitution. And yet the Court rarely says that “Congress has violated the Constitution” or “the President has violated the Constitution.” Instead, it has hit upon a formulation that elides this most important question. It has taken to saying: “*the statute* violates the Constitution.”

This formulation derives, perhaps, from an odd linguistic quirk. Congress *acts* by making laws. But the *product* of the action of Congress—the statute, the public law—is also called an “Act of Congress.” In grammatical terms, “act” is both a noun (“an act”) and a verb (“to act”),¹⁴ as it has been since

government. They also embodied and enacted it. Like the phrases ‘I do’ in an exchange of wedding vows and ‘I accept’ in a contract, the Preamble’s words actually performed the very thing they described. Thus the Founders’ ‘Constitution’ was not merely a text but a deed—a *constituting*. We the People *do* ordain.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439 (1987) (“Indeed, this single idea [popular sovereignty] informs every article of the Federalist Constitution, from the Preamble to Article VII. It was thus no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: ‘We the People of the United States . . . do ordain and establish this Constitution for the United States of America.’” (omission in original) (footnote omitted)).

13. See, e.g., ALLEN H. WELD, WELD’S ENGLISH GRAMMAR 24 (Portland, Sanborn & Carter improved ed. 1849) (“In analyzing [sentence structure], . . . first look for the subject . . .”); ALONZO REED, INTRODUCTORY LANGUAGE WORK 9 (New York, Effingham Maynard 1891) (“[H]alf of all grammatical errors come from not ascertaining the nominative.”); see also CHALKER & WEINER, *supra* note 5 (entry for “subject”) (“[t]hat part of the sentence that usually comes *first* and *of which the rest of the sentence is predicated*.” (emphasis added)); cf. JOHN B. OPDYCKE, HARPER’S ENGLISH GRAMMAR 263 (Rev. ed., Steward Benedict ed. 1966) (“The traditional type of sentence analysis involves these steps: Tell what kind of sentence . . . read the independent clause or clauses, and the dependent clause or clauses; name the essential subject and predicate of every clause in the sentence and also the complete subject and predicate . . .”). While formal sentence diagramming postdates the Framing, see ALONZO REED & BRAINERD KELLOGG, HIGHER LESSONS IN ENGLISH 17-18 (New York, Clark & Maynard 1880), even grammar texts of the early nineteenth century make clear that the subject should always be taught first and analyzed first. See, e.g., WILLIAM COBBETT, A GRAMMAR OF THE ENGLISH LANGUAGE 110 (Rodopi B.V. 1983) (1818) (“[I]n grammar, as in moral conduct, one fault [in properly identifying the nominative] almost necessarily produces others. Look, therefore, at your *nominative*, before you put a *verb* upon paper . . .”); cf. LINDLEY MURRAY, ABRIDGMENT OF ENGLISH GRAMMAR: COMPREHENDING THE PRINCIPLES AND RULES OF THE LANGUAGE, at vi, 71 (Concord, J.B. Moore rev. ed. 1827) (systematically teaching and analyzing the nominative first); RALPH HARRISON, RUDIMENTS OF ENGLISH GRAMMAR 86 (Philadelphia, Whitehall Press 1798) (same).

14. See BLACK’S LAW DICTIONARY 42 (rev. 4th ed. 1968).

before the Founding.¹⁵ The Constitution itself avoids this grammatical ambiguity, always carefully referring to federal legislative output as “Law”¹⁶ or “legislation”¹⁷ (which Congress “makes”¹⁸ or “passes”¹⁹). But,

15. See, e.g., FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY 6 (London, J. Wilson & J. Fell 1765); 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 43 (London, J.F. & C. Rivington et al. 8th ed. 1786).

16. See, e.g., U.S. CONST. art. 1, § 2, cl. 3 (“The actual Enumeration shall be made . . . in such Manner as they shall *by Law* direct.” (emphasis added)); *id.* art. I, § 4 (“[T]he Congress may at any time *by Law* make or alter such Regulations The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall *by Law* appoint a different Day.” (emphasis added)); *id.* art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become *a Law*, be presented to the President of the United States If after such Reconsideration two thirds of [the originating] House shall agree to pass the Bill . . . and if approved by two thirds of [the other] House, it shall become *a Law*. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be *a Law*, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be *a Law*.” (emphasis added)); *id.* art. I, § 8, cl. 18 (“To make all *Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers” (emphasis added)); *id.* art. II, § 2, cl. 2 (“He shall . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established *by Law*: but the Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” (emphasis added)); *id.* art. VI, cl. 2 (“This Constitution, and the *Laws* of the United States which shall be made in Pursuance thereof” (emphasis added)); *cf. id.* art. IV, § 1 (“Full Faith and Credit shall be given in each State to the *public Acts*, Records, and judicial Proceedings of every other State. And the Congress may by general *Laws* prescribe the Manner in which such *Acts*, Records and Proceedings shall be proved, and the Effect thereof.” (emphasis added)).

17. See, e.g., *id.* amend. XIII, § 2 (“Congress shall have power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XIV, § 5 (“The Congress shall have the power to enforce, *by appropriate legislation*, the provisions of this article.” (emphasis added)); *id.* amend. XV, § 2 (“The Congress shall have the power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XVIII, § 2 (repealed 1933) (“The Congress and the several States shall have concurrent power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XIX, cl. 2 (“Congress shall have power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XXIII, § 2 (“The Congress shall have power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XXIV, § 2 (“The Congress shall have power to enforce this article *by appropriate legislation*.” (emphasis added)); *id.* amend. XXVI, § 2 (“The Congress shall have power to enforce this article *by appropriate legislation*.” (emphasis added)).

18. See, e.g., *id.* art. I, § 8 (“The Congress shall have Power . . . To *make* all *Laws* which shall be necessary and proper” (emphasis added)); *id.* amend. I (“Congress shall *make* no *law*” (emphasis added)); *id.* art. IV, cl. 2 (“This Constitution, and the *Laws* of the United States which shall be *made* in Pursuance thereof . . . shall be the supreme *Law* of the Land” (emphasis added)). The Constitution consistently pairs the verb “make” with the noun “law,” and the verb “pass” with the noun “bill.” The only exceptions are the Ex Post Facto clauses, and these exceptions are perhaps explained by the pairing of ex post facto *laws* and *bills* of attainder. *Id.* art. I, § 9, cl. 3 (“No *Bill* of Attainder or ex post facto *Law* shall be *passed*.” (emphasis added)); *id.* art. I, § 10, cl. 1 (“No State shall . . . *pass* any *Bill* of

unfortunately, Congress adopted the grammatically ambiguous sometime-noun from the beginning, styling its first law an “Act.”²⁰ And now, in common parlance, when Congress *acts* (lowercase, verb), the result is an *Act* (uppercase, noun) of Congress. But note the subtle difference between saying that “an *act* of Congress *violated* the Constitution” and saying that “an *Act* of Congress *violates* the Constitution.” The former (lowercase, past tense) focuses on *Congress*, its *action* in making the law, and the moment in the past when it was made; the latter (uppercase, present tense) focuses on the statute itself in the present, as though the statute were the culprit and its offense ongoing. No such confusion arises when discussing executive action explicitly, because “Act of the President” is not a term of art; thus one can say that “an action—or *act* [small “a”]—of the President *violated* [past tense] the Constitution” without inviting analytical confusion about the *who* or *when*.²¹ Likewise, in the legislative context, no such confusion arises if one focuses, as Chief Justice Marshall did, on “restriction on the *powers* of congress,” on the danger that “the legislature shall *do* what is expressly forbidden.”²² But in discussing legislative action, usage has varied from the analytically correct (“this *action* of Congress *violated* the Constitution”)²³ to the ambiguous (“this *act/Act* of Congress *violated/violates* the Constitution”)²⁴ to the incorrect (“this *statute*

Attainder, ex post facto *Law*, or *Law* impairing the obligation of Contracts. . . .” (emphasis added)).

19. See, e.g., *id.* art. I, § 7, cl. 2 (“Every Bill which shall have *passed* the House of Representatives and the Senate, shall, before it become *a Law*, be presented to the President of the United States If after such Reconsideration two thirds of [the originating] House shall agree to *pass* the Bill . . . and if approved by two thirds of [the other] House, it shall become *a Law*.” (emphasis added)); *id.* art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto *Law* shall be *passed*.” (emphasis added)).

20. Act of June 1, 1789, ch. 1, 1 Stat. 23 (calling the first laws of the United States the “Acts of the First Congress” and the first law “An Act to regulate the Time and Manner of administering certain Oaths”); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 245 (Max Farrand ed., rev. ed. 1966) (Madison notes that it was “[r]esd. that all Acts of the U. States in Congs. . . . shall be the supreme law of the respective States” (emphasis added)). In this, Congress was presumably following the English practice. See, e.g., Life Assurance Act, 1774, 14 Geo. 3, c. 48 (Eng.), available at http://www.opsi.gov.uk/RevisedStatutes/Acts/apgb/1774/capgb_17740048_en_1; see also ENGLISH PUBLIC LAW § 2.48, at 113 (David Feldman ed., 2004) (“The passing of Acts of Parliament [is] the principal form of primary legislation for England . . .”).

21. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-62 (1803) (analyzing at length precisely when the “act of the President” appointing and commissioning Marbury was complete).

22. *Id.* at 175, 178 (emphasis added); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“The first question made in the cause is, *has Congress power* to incorporate a bank.” (emphasis added)).

23. See sources cited *supra* note 10.

24. In some cases, the context and the (past) tense of the associated verb suggest that the Court was referring to Congress’s enactment of the statute. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 280 (1901) (“Indeed, in the only instance in which this court has declared *an act of Congress unconstitutional* as trespassing upon the rights of territories, (the Missouri

violates the Constitution”).²⁵

Compromise,) such *action* was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the Thirteenth Amendment to the Constitution.” (emphasis added)); *In re Emblen*, 161 U.S. 52, 56 (1896) (“Such being the state of the case, it is quite clear that (even if the *act of Congress was unconstitutional*, which we do not intimate) the writ of mandamus prayed for should not be granted.” (emphasis added)); *Marbury*, 5 U.S. at 178 (“[I]f the legislature shall *do* what is expressly forbidden, such *act* . . . is in reality [in]effectual.” (emphasis added)). In other cases, the context and the (present) tense of the associated verb make clear that the Court was referring to the statute itself. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002) (“This case presents the narrow question *whether the Child Online Protection Act’s* . . . use of ‘community standards’ to identify ‘material that is harmful to minors’ *violates the First Amendment*.” (emphasis added)); *United States v. Christian Echoes Nat’l Ministry, Inc.*, 404 U.S. 561, 565-66 (1972) (per curiam) (“Although the construction was based on a constitutional premise, it did not amount to a holding that an *Act of Congress is unconstitutional*, as contemplated by § 1252.” (emphasis added)); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (“We have no power *per se* to review and annul *acts of Congress* on the ground that they *are unconstitutional*.” (second and third emphases added)); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (“The right to declare a law unconstitutional arises because an *act of Congress* relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law.” (emphases added)). But in most cases, the Court’s reference to an “act of Congress” remains ambiguous, even in context. See, e.g., *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 316 (1985) (“In *McLucas v. DeChamplain*, this Court similarly entertained an appeal from an order that granted a preliminary injunction and in the process held an *Act of Congress unconstitutional*.” (second emphasis added) (citation omitted)); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 559 n.7 (1977) (Rehnquist, J., dissenting) (“*Marbury v. Madison* . . . established the authority of this Court to hold an *Act of Congress unconstitutional* . . .” (second emphasis added)); *Palmore v. United States*, 411 U.S. 389, 416 (1973) (Douglas, J., dissenting) (“In *O’Donoghue v. United States*, the Court held *unconstitutional an Act of Congress* reducing the salaries of trial and appellate judges in the District of Columbia.” (second emphasis added) (citation omitted)); *United States v. Raines*, 362 U.S. 17, 22 (1960) (“The delicate power of pronouncing an *Act of Congress unconstitutional* is not to be exercised with reference to hypothetical cases thus imagined.” (emphasis added)); *United States v. Realty Co.*, 163 U.S. 427, 439 (1896) (“It is true that in general an *unconstitutional act of Congress* is the same as if there were no *act*.” (emphasis added)); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) (“It is our duty, when required in the regular course of judicial proceedings, to declare an *act of Congress void* if not within the legislative power of the United States; but this declaration should never be made except in a clear case.” (emphasis added)).

25. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 165-66 (2006) (“We must decide whether this *statute* . . . violates the Constitution.” (emphasis added)); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) (“A *statute* that retroactively repudiates the Government’s contractual obligation may violate the Constitution.” (emphasis added)); *Virginia v. Black*, 538 U.S. 343, 347 (2003) (Stevens, J., plurality) (“In this case we consider whether the Commonwealth of Virginia’s *statute* banning cross burning . . . violates the First Amendment.” (emphasis added)); *id.* at 387 (Souter, J., concurring) (“I conclude that the *statute* under which all three of the respondents were prosecuted violates the First Amendment . . .” (emphasis added)); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (“We hold that this *statute* violates the Constitution.” (emphasis added)); *Roth v. United States*, 354 U.S. 476, 479 (1957) (“[T]he primary constitutional question is whether the federal obscenity *statute* violates the [Free Speech Clause] of the First Amendment . . .” (emphasis added)); *United States v. Nugent*, 346 U.S. 1, 10 (1953) (“Under the circumstances

From the Court's perspective, this last formulation no doubt possesses the (dubious) merit of euphemism. Judicial review is always a politically sensitive matter, and the Court understandably tries to avoid direct confrontation with the coordinate branches.²⁶ Unsurprisingly, then, when the Court does find that the Constitution has been violated, it prefers to avoid saying precisely who has violated it. This habit of mind is also abetted, perhaps, by the modern indulgence (unknown to the Framers) of plaintiffs who cannot identify their tortfeasors.²⁷ At any rate, by saying that "the statute violates the Constitution,"

presented, we cannot hold that the *statute*, as we construe it, *violates the Constitution*." (emphasis added)); *First Nat. Bank of Chi. v. United Air Lines*, 342 U.S. 396, 397-98 (1952) ("[W]e recently held . . . that a Wisconsin *statute*, much like that of Illinois, did violate the Full Faith and Credit Clause." (emphasis added)); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949) ("[A] federal court would not give effect, in either a diversity or nondiversity case, to a state *statute* that violates the Constitution of the United States." (emphasis added)); *United States v. Reynolds*, 235 U.S. 133, 148 (1914) ("In such cases this court must determine for itself whether a given *enactment* violates the *Constitution* of the United States . . ." (emphasis added)); *see also* *Rogers v. Tennessee*, 532 U.S. 451, 470 (2001) (Scalia, J., dissenting) ("Such a *statute* violates the *Ex Post Facto* Clause . . ." (first emphasis added)); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579-80 (1993) (Blackmun, J., concurring) ("It is for this reason that a *statute* that explicitly restricts religious practices *violates* the First Amendment." (emphasis added)).

26. *See* *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) ("The [constitutional avoidance] doctrine seeks in part to *minimize disagreement between the branches* by preserving congressional enactments that might otherwise founder on constitutional objections." (emphasis added)); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 610 (1869) ("This court always approaches the consideration of [constitutional] questions of this nature *reluctantly*; and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise." (emphasis added)); *see also* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-49 (1936) (Brandeis, J., concurring) (affirming the principle that the judiciary should avoid constitutional questions and enumerating seven strategies for doing so); *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Blair v. United States*, 250 U.S. 273, 279 (1919) ("Considerations of *propriety*, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless *obliged* to do so in the proper performance of our judicial function . . ." (emphasis added)); *cf.* *Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) ("The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 382 (1866) (Miller, J., dissenting) ("It is at all times the exercise of an extremely [sic] delicate power for this court of [sic] declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and by violating the Constitution, has rendered void its attempt at legislation.").

27. *See, e.g.,* *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988) (plaintiff unable to identify which manufacturer of asbestos products was responsible for his asbestos exposure); *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (plaintiff could not identify which manufacturer was responsible for the particular DES taken by her mother); *Summers*

the Court carefully avoids pointing a finger or casting express blame—even though, in other contexts, it expounds at length on the crucial structural importance of constitutional accountability.²⁸ In short, the Court’s preferred circumlocution hails from the familiar, passive, elusive, “mistakes were made” school of constitutional responsibility.²⁹

The analytical error is compounded by the notion—at once utterly commonplace and utterly mysterious—of “challenging a statute as-applied.”

v. Tice, 199 P.2d 1 (Cal. 1948) (plaintiff could not identify which defendant shot him); Ybarra v. Spangard, 154 P.2d 687, 691 (Cal. 1944) (plaintiff could succeed in medical malpractice suit arising from treatment rendered while unconscious, even though he could not identify particular doctor responsible, because at least one doctor in the group must have been responsible).

28. See *New York v. United States*, 505 U.S. 144, 168-69 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”); *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991) (“The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. Even with respect to ‘inferior Officers,’ the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.” (citation omitted)); *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting) (“[T]he Founders envisioned when they established a single Chief Executive accountable to the people [that thus] the blame can be assigned to someone who can be punished.”); see also *THE FEDERALIST* No. 70 (Alexander Hamilton), *supra* note 10, at 426 (“But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan is that it tends to conceal faults and destroy responsibility. . . . [T]he multiplication of the executive adds to the difficulty of detection It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.”); *id.* at 427 (“It is evident from these considerations that the plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, *second*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.”).

29. See John M. Broder, *Familiar Fallback for Officials: ‘Mistakes Were Made,’* N.Y. TIMES, Mar. 14, 2007, at A18; Dan Eggen & Paul Kane, *Gonzales: ‘Mistakes Were Made,’* WASH. POST, Mar. 14, 2007, at A01; see also President’s Address Before a Joint Session of the Congress on the State of the Union, 23 WEEKLY COMP. PRES. DOC. 59 (Jan. 27, 1987), available at <http://www.nytimes.com/1987/01/28/us/transcript-of-president-s-message-to-nation-on-state-of-union.html>; Jessica Garrison, *Obituaries, Ron Ziegler*, 63—*Press Secretary Remained Loyal to Nixon Throughout Watergate*, L.A. TIMES, Feb. 11, 2003, at B10.

This formulation, more than any other, has engendered profound confusion about the *who* of constitutional violation and thus the structure of judicial review. To speak of a challenge to “a statute” may sound like a euphemistic way of describing a challenge to the action—or the “Act”—of *Congress* in making it. But saying that the challenge is to the statute “as-applied” seems to suggest that the *President*—who decided how to apply the statute—is somehow to blame. Which is it?

To say that “a statute violates the constitution” is not merely harmless euphemism. This formulation has corrupted and confused the nation’s dialogue about its Constitution—in classrooms and courtrooms, in law reviews and editorial pages, constitutional seminars and high school civics classes. To say that “a statute”—rather than a government official—violates the Constitution is to conceal and abet a constitutional culprit. This sort of circumlocution renders our government more opaque and less accountable, so that the people do not know whom to blame, whom to vote against, whom to impeach.³⁰

But that is not the worst of it. To say that “a statute violates the constitution” is to perpetuate a pathetic fallacy³¹ that is profoundly analytically misleading. Statutes do not violate the Constitution any more than guns commit murder. Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental *action*.³² Government actors violate the Constitution. And, as will be shown, the structure of judicial review turns on which one committed the violation.³³

30. See, e.g., *supra* note 28.

31. See JOHN RUSKIN, 3 MODERN PAINTERS 70, 71 (1856) (defining a pathetic fallacy as the “attribut[ion] to [inanimate objects of] . . . characters of a living creature . . .” and describing it as “false appearances . . . entirely unconnected with any real power or character in the object, and only imputed to it by [those perceiving the object]”).

32. See BICKEL, *supra* note 10, at 1 (“The power which distinguishes the Supreme Court of the United States is that of constitutional review of *actions* of the other branches of government, federal and state.” (emphasis added)); BLACK’S LAW DICTIONARY, *supra* note 10 (defining judicial review as “[a] court’s power to review the *actions* of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive *actions* as being unconstitutional” (emphasis added)); CHOPER, *supra* note 10, at 6 (discussing “the power of judicial review to declare unconstitutional legislative, executive, or administrative *action*” (emphasis added)); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 465 (discussing “courts of justice, whose duty it must be to declare all *acts* contrary to the manifest tenor of the Constitution void” (emphasis added)).

33. Likewise, and for this same reason, a gerund should not be the subject in a formulation of judicial review. NEW OXFORD AMERICAN DICTIONARY 712 (Elizabeth J. Jewell & Frank Abate eds., 2001) (“[G]erund . . . n[oun:] . . . a form that is derived from a verb but that functions as a noun, in English ending in *-ing*, e.g., *asking* in *do you mind my asking you?*”). At first glance, it might be tempting to say, for example, that “*impairing* the obligation of contracts violates the constitution.” But this formulation, too, is terminally imprecise; it depends, of course, on who is doing the impairing. A state violates the constitution by impairing the obligation of contracts; the federal government does not. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” (emphasis added)); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 732-33 & n.9 (1984) (“It could not justifiably be claimed that the Contract

This is not a mere linguistic or grammatical point, but a deep structural implication of popular sovereignty, federalism, and separation of powers. Indeed, it is one of the principal structural differences between the United States Constitution and the government that the Framers left behind. As Madison himself emphasized:

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate Hence . . . all the ramparts for protecting the rights of the people,—such as their Magna Charta, their bill of rights, &c., —are not reared against the Parliament, but against the royal prerogative.³⁴

So in Great Britain, there was only one possible answer to the *who* question. But

[i]n the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition.³⁵

The United States Constitution restricts all different governmental actors. *And it restricts these different actors differently.*³⁶ Chief Justice Marshall understood this, recognizing that the *who* question is “of great importance,” and carefully holding that the Bill of Rights binds the federal government, not the states.³⁷ But a century later, the Court had entirely lost sight of the subjects of the Constitution. The textual and structural fact that different clauses bind different actors is now treated, in case after case, as an embarrassing drafting error, fit for judicial “correction.” It would be “unthinkable,” the Supreme Court repeatedly and unabashedly asserts, if a constitutional prohibition applied to one governmental actor and not another.³⁸ Yet it is hardly unthinkable—

Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government.”).

34. James Madison, Report on Virginia Resolutions (1800), *reprinted in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 569 (Jonathan Elliott ed., J.B. Lippincott & Co. 1876).

35. *Id.*; see also *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) (“[I]n the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, . . . as regards . . . any . . . subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide.”).

36. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“[The Constitution] organizes the government, . . . assigns, to different departments, their respective powers . . . [and] establish[es] certain limits not to be transcended by those departments [T]hose limits . . . confine the persons on whom they are imposed.”).

37. See *Barron v. Baltimore*, 32 U.S. 243, 247, 250-51 (1833).

38. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring) (assuming without discussion that the First Amendment applied to the Executive

indeed, it is an irrefutable textual fact—that different clauses apply to different government actors. As Chief Justice Marshall knew, this is a fundamental structural feature of our Constitution, reflecting the Framers’ deep insight that each branch and level of government poses different and distinct threats to individual liberty.³⁹ And it is essential to identify the constitutional culprit,

and the Judiciary, despite its textual limitation to “Congress”); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (“If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 144 (1951) (Black, J., concurring) (“I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that made the bill such an odious institution.”); see also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 706 (1995) (“[Despite its textual limitation to ‘Congress’], the Speech or Debate Clause . . . is best read not to bar analogous immunities of coordinate branches but rather, if anything, to invite them. And the same holds true . . . for its companion, the Article I, Section 6 Arrest Clause.”); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1156 (1986) (describing the “most popular” view that the First Amendment’s limitation to Congress “was an unaccountable slip of the pen by the Founding Fathers, and that no meaning could be attached to it”).

39. See, e.g., THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 10, at 464 (“The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. . . . Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter”); THE FEDERALIST No. 51 (James Madison), *supra* note 10, at 318 (“[S]eparate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty”); *id.* at 318-19 (“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must . . . be made commensurate to the danger of attack.”); *id.* at 320 (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”); THE FEDERALIST No. 48 (James Madison), *supra* note 10, at 305 (“After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.”); *id.* at 306-07 (“The legislative department[’s] . . . constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.”).

because judicial review of a legislative act is entirely different—formally, structurally, temporally different—from judicial review of an executive act.

So, the first step in any act of judicial review must be to figure out the *subject* of the constitutional claim. The Constitution has allegedly been violated. *Who* has violated it?

II. WHEN IS THE CONSTITUTION VIOLATED?

The next step in this model of judicial review is easier than the first, but it too is essential for analytic precision. The subjects and the verbs of judicial review beget adverbs, one interrogative above all. *When* did the constitutional violation occur? At the moment of enactment? Of enforcement? Of adjudication? When was the constitutional firmament torn?

A violation of the Constitution is an *event*. There is a moment before the constitutional violation. There is a moment after the violation. And there is a moment—or perhaps a span of time—when the action that violates the Constitution actually happens. This is the *when* of constitutional violation. *Every constitutional violation must be located in time.*

This may seem obvious. And it is obvious, in that it follows obviously from the first, *who* question, the question of subject. But precisely because the Court has elided the *who* question, it has been forced to admit “equivocating” on the *when* question as well.⁴⁰ This sort of equivocation has led, most directly, to notoriously mushy ripeness doctrine, as will be discussed in Part III-B. But it has also led, indirectly, to profound errors in substantive constitutional law, as will be discussed in Parts IV-VII.

For the present, though, it suffices to see that that the *when* question follows inexorably from the *who* question. Consider, for example, garden-variety circumstances of judicial review, in which Congress has made a law and the President has executed it. Two governmental actors have acted, so there are two potential constitutional culprits. Congress may have violated the Constitution by enacting the law, or the President may have violated the Constitution by executing it. To know *when*, it is necessary to know *who*.

If the President has violated the Constitution, it is generally a simple matter

40. Only recently, for example, the Court acknowledged its “equivoca[ti]on” about precisely *when* an uncounseled interrogation violates the Sixth Amendment—during pre-trial interrogation or at trial. Not until a few months ago did the Court announce: “[W]e conclude that the . . . right to be free of uncounseled interrogation . . . is infringed *at the time of the interrogation*. That, we think, is *when* the ‘Assistance of Counsel’ is denied.” *Kansas v. Ventris*, 129 S. Ct. 1841, 1846 (2009) (emphasis added). The point was important in *Kansas v. Ventris* because it implied that “[the] case does not involve, therefore, the *prevention* of a constitutional violation, but rather the scope of the *remedy* for a violation *that has already occurred*.” *Id.* at 1846 (emphasis added). Note the analytical primacy of locating constitutional violations in time, before confronting questions of prevention or of remedy—and note how the Court failed to answer this fundamental question until 2009.

to figure out when. He presumably violated the Constitution at the moment when he executed the statute. In the paradigmatic case, this might be the moment when an FBI agent makes an unreasonable and unwarranted arrest.⁴¹ To the extent that the Court has any sort of implicit view about the *when* of constitutional violation, this is probably what it has in mind: the violation occurs when the President or his agents actually execute the law.

But there is another possibility, equally important but less common and less conceptually familiar. The President may not be the constitutional culprit. It may be, instead, that Congress violated the Constitution, simply by enacting the statute. If so, then the answer to the *when* question is crucially different. If Congress violated the Constitution, it must be that the moment of violation was *when Congress made the law*.

This is true as a matter of simple temporal logic. Per the arrow of time, Congress could not have violated the Constitution *before* it made the law at issue. Nor could it somehow have violated the Constitution *after* it made the law. To be sure, after the law is made, it may go on to have pernicious *effects*—particularly when it is executed—and those effects may require remedy.⁴² But by then, Congress may be in recess. Indeed, years and elections may have intervened, and Congress may be an entirely different body. The legislators who made the law at issue may have long since retired, or passed away. It makes no sense to say that *they* violated their oaths and violated the Constitution *at the moment of enforcement*, from their beds, or their graves. Nor does it make any sense to say that the *new* Congress, as constituted at the moment of *enforcement*, somehow violated their oaths and violated the Constitution, even though these new congressmen had nothing to do with *either* the enactment *or* the enforcement of the statute. It must be, then, that if Congress violated the Constitution, then it did so *at the moment when it made the law*. Euphemistically, “the Act of Congress *violates* the Constitution,” but to be precise, “the *act* of Congress *violated* the Constitution” on the day that Congress made the law. As the Office of Legal Counsel says, “[i]f [a] statute is unconstitutional, it is unconstitutional from the start.”⁴³

At first glance, it may seem odd to locate a constitutional violation at the moment of a law’s making. After all, it may seem that no one has been harmed

41. See U.S. CONST. amend. IV; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (“[A] violation of the [Fourth] Amendment is ‘fully accomplished’ at the time of an unreasonable government intrusion.”); *United States v. Leon*, 468 U.S. 897, 906 (1984) (“The wrong condemned by the [Fourth] Amendment is ‘fully accomplished’ by the unlawful search or seizure itself . . .”).

42. Cf. THE FEDERALIST No. 50 (James Madison), *supra* note 10, at 315 (distinguishing between legislative “abuses”—“breaking through the restraints of the Constitution”—and the subsequent “mischievous effects” of such abuses).

43. The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980) [hereinafter Attorney General’s Duty].

at that moment. Certainly no one has been wrongly arrested, or imprisoned, and these may seem like the paradigmatic constitutional harms. But, as will be shown, there is a deep constitutional logic to locating the moment of certain constitutional violations at the time of the making of the laws. In some cases, Congress is the subject, and in those cases, the constitutional violation happens at the moment when Congress makes the law.⁴⁴

This simple point has deep implications for the timing of constitutional *adjudication*, which falls under the doctrinal rubric of ripeness and mootness.⁴⁵ Obviously, the ripeness or mootness of a constitutional claim is, at least in part, a function of when the constitutional violation begins and ends. But the implications run much further than ripeness and mootness. The timing of the constitutional violation also properly informs analysis of other doctrines of federal jurisdiction, such as the vexed distinction between facial and as-applied challenges, as will be discussed in Part III. And these doctrines, in turn, exert a powerful but subtle influence on substantive constitutional doctrine, as will be shown in Parts IV through VII.

For the present, though, all that is necessary is to see the logical relationship between the *who* question and the *when* question. To figure out *when*, it is essential to know *who*.

44. It might be tempting to say that the President actually has a hand in “making” laws by signing bills. But the Constitution never speaks in these terms. “All legislative powers herein granted shall be vested in a Congress,” not “a Congress and a President.” U.S. CONST. art. I, § 1. “The Congress”—not “the Congress and the President”—“shall have power . . . To make all laws which shall be necessary and proper . . .” *Id.* art. I, § 8. The Constitution grants “Congress”—not “Congress and the President”—power to enforce various amendments “by appropriate legislation.” *See id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XVIII, § 2; amend. XIX; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2. And “Congress”—not “Congress and the President”—“shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” *Id.* amend. I. Never does the Constitution use the words “veto power,” let alone give the President a share of “legislative power.” Rather, Article I, Section 7, imposes a strictly binary *duty* on the President: “If he approve [a bill] he *shall* sign it, but if not he *shall* return it, with his objections to that House in which it shall have originated.” *Id.* art. I, § 7 (emphasis added). And if he shirks this duty for ten days (and Congress remains in session), then the bill becomes a law automatically. *See id.* art. I, § 7 (“If any bill shall not be returned by the President with ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless Congress by their adjournment prevent its return, in which case it shall not be a law.”). In short, the Constitution makes clear that Congress and Congress alone has power to “make” laws, even if the making is not *complete* until a bill is presented to the President and (a) ten days pass, (b) the President signs, or (c) Congress overrides a veto.

45. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) (describing mootness as “standing set in a time frame”); *id.* at 1389-92 (describing different possible times at which a constitutional violation would occur and be ripe for review).

III. THE CONSTITUTIONAL STRUCTURE OF JUDICIAL REVIEW

A constitutional challenge is a challenge to governmental action. Any such challenge should begin with a claim about who has violated the Constitution. To see why, start by considering the two primary⁴⁶ federal answers: Congress and the President. Congress and the President act in entirely different ways. The constitutional provisions that bind them are different. And the structure of judicial review should—but generally does not—reflect these fundamental differences.

Congress's power is "legislative [p]ower[]"⁴⁷—the "power to make . . . [l]aws"⁴⁸ Thus, a claim that Congress has violated the Constitution is generally⁴⁹ a claim that—by *making a law*—Congress exceeded its power or infringed a right. The Constitution provides that only "the Laws of the United States which shall be *made* in [p]ursuance [of the Constitution] . . . shall be the supreme Law of the Land"⁵⁰ If there is a violation at this stage, the flaw inheres in the law's *making*.⁵¹ The Court understood this point even before *Marbury*, when judicial review was a mere gleam in its eye.⁵² If a law was not *made* in pursuance of the Constitution,⁵³ then its *maker*—Congress—has violated the Constitution.

By contrast, the President's power is "executive [p]ower."⁵⁴ A claim that

46. Federal courts can also violate the Constitution, as will be discussed in the sequel to this Article.

47. U.S. CONST. art. I, § 1.

48. U.S. CONST. art. I, § 8.

49. One exception is a claim that Congress (or a single House) has violated the constitutional separation of powers by exercising executive or judicial, rather than legislative, power. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983).

50. U.S. CONST. art. VI, cl. 2 (emphasis added).

51. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819) ("Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that *such an act was not the law of the land*." (emphasis added)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A] legislative act contrary to the constitution is not law . . .").

52. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) ("[I]t is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being *made* contrary to, and in violation of, the Constitution" (emphasis omitted and added)).

53. *See Marbury*, 5 U.S. at 180 ("[I]n declaring what shall be the supreme law of the land, [the Constitution describes] . . . not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void" (original emphasis omitted)).

54. U.S. CONST. art. II, § 1.

the President has violated the Constitution is generally⁵⁵ a claim that—in *an act of execution*⁵⁶—the President exceeded his power or infringed a right.⁵⁷ If the President has violated the Constitution, the violation inheres *not in a statute but in an act of execution*. And that is an entirely different matter.

In many cases, there will be no confusion between the two. For example, if the President has acted pursuant to one of his freestanding constitutional powers—say, his power as Commander in Chief⁵⁸—and no Act of Congress is at issue, then it should be clear that any challenge is to an exercise of executive power.⁵⁹

But many other cases—indeed, the most common cases—are much trickier. The President’s executive power entails a duty “to take Care that the Laws be faithfully executed,”⁶⁰ and those “Laws” are made by Congress. So, in the garden-variety circumstances of judicial review, Congress makes a law, the President executes that law, and someone alleges a constitutional violation. Two government actors have acted, and so there are two possible constitutional culprits. If the Constitution has been violated in such circumstances, a crucial question remains: *who has violated it?* Did Congress violate the Constitution by making the law? Or did the President violate the Constitution by executing it?

As discussed in Part I, the Court is often willfully ambiguous about which one is the constitutional culprit in any given case—preferring to say, with euphemistic imprecision, that “the statute” violates the Constitution. The definitive Federal Courts casebook likewise elides the point, venturing only a passing reference to “the sometimes elusive distinction between review of the

55. An exception is a claim that the President has violated the constitutional separation of powers by exercising legislative or judicial, rather than executive, power. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

56. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 537 (2005) (“[T]he principle meaning of executive power is the authority to execute the laws.”).

57. The President might also violate the constitution in the exercise of his other Article II powers. He might, for example “make” an invalid treaty. *See* U.S. CONST. art. II.

58. *See id.* art. II, § 2.

59. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (“The threshold question before us is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’ . . . The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.”); *Youngstown*, 343 U.S. at 585-87 (“The President’s power, if any, to issue the order must stem either from an act of Congress, or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. . . . It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.”).

60. U.S. CONST. art. II, § 3.

validity of legislation and review of the application of legislation.”⁶¹ But the primary thesis of this Article is that, elusive or not, it is essential to know the constitutional culprit, because *judicial review of a legislative act is entirely different—formally, structurally, temporally different—from judicial review of an executive act*. These represent two utterly distinct forms of judicial review. In short, the constitutional structure of judicial review turns entirely on who has allegedly violated the Constitution.

The Court has dimly grasped that there are, indeed, two primary forms of judicial review. But it has, unfortunately, given the two forms inapposite names. And the nomenclature has confused everyone, including the Court itself. The Court adverts to the distinction between these two distinct forms increasingly often, and the distinction ostensibly determines the outcome in an increasing number of controversial cases.⁶² Yet the Court has never clearly explained the difference between the two. And while scholars have strived mightily to make sense of the Court’s pronouncements, in the end, they too have been misled by the imprecise taxonomy of the Court.

The Court has called these two distinct forms of judicial review “facial challenges” and “as-applied challenges.” The distinction between the two is

61. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 432-33 n.13 (6th ed. 2009).

62. See Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1521 (2008) (noting that Kennedy’s preference for as-applied instead of facial challenges had an impact in *Gonzales v. Carhart* and could be an indicator “that the Roberts Court will henceforth produce much more modest substantive due process decisions than the late Rehnquist Court”); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1735, 1756-57 (2006) (The Roberts Court has “a strong preference for as-applied rather than facial approaches to constitutional adjudication,” which affects “cases [that] cut across the broad swath of constitutional areas involving the question of facial as opposed to as-applied challenges: Congressional power under Section Five of the Fourteenth Amendment; substantive due process protection for abortion; and First Amendment limitation on campaign finance regulation”); William E. Thro, *An Essay: The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 EDUC. L. REP. 491, 503 (2007) (“[T]he Roberts Court seems committed to restricting facial challenges alleging overbreadth to some First Amendment contexts and, perhaps, to eliminating them altogether.”); Douglas W. Kmiec, *The Facial/As-Applied Challenge—Partially Aborted*, SLATE, May 23, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/05/23/the-facial-as-applied-distinction-partially-aborted.aspx>; Douglas W. Kmiec, *Facing Consensus: The Importance of the “Facial” vs. “As-Applied” Distinction in the Roberts Court*, SLATE, Apr. 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/29/facing-consensus-the-importance-of-the-facial-versus-as-applied-distinctions-in-the-roberts-court.aspx>; see also David G. Savage, *About Face*, A.B.A. J., Jul. 1, 2008, at 21 (“The U.S. Supreme Court under Chief Justice John G. Roberts Jr. has been sending a message to lawyers who want to challenge state laws as unconstitutional. It goes like this: Show us the proof. Be specific. And if you want us to throw out an entire law because it may infringe the rights of a few people, you may be wasting your time. Here’s another way to say it: Facial challenges are out. As-applied challenges are in.”); OrinKerr.com, *A Question for Judges and Law Clerks Both Current and Former*, <http://www.orinkerr.com/2006/04/20/a-question-for-judges-and-law-clerks-both-current-and-former> (last visited May 1, 2010).

said to be fundamental, and yet it has proven baffling to courts and scholars alike. This Part will demonstrate why the terms themselves are misleading malapropisms.

There are indeed two primary forms of judicial review. But the distinction that the Court has been grasping for is actually nothing other than the fundamental difference between judicial review of *legislative* action and judicial review of *executive* action. The line that the Court has been trying so unsteadily to draw should be drawn bold and straight based on *who* has allegedly violated the Constitution.

A. “Facial” vs. “As-Applied” Challenges

As described in Part I, the Court has tended to eschew straightforward holdings that “Congress has violated the Constitution” or “the President has violated the Constitution,” adopting instead the euphemistic pathetic fallacy that “the statute violates the Constitution.” This usage may have been harmless at first—a well-understood euphemism for “Congress violated the Constitution by making this law.” But the euphemism took on a life of its own, and the result has been a deep confusion about the two basic forms of judicial review.

The first step, harmless in itself, was that the euphemistic formulation crept backwards into descriptions of the pleadings, which, it is now said, pose constitutional “challenges,” not to “actions of Congress” or “actions of the President,” but to “statutes” themselves. This usage, which is so familiar today, was unknown to the Court for its first century. Justice Brewer was the first Supreme Court Justice⁶³ to write of a “challenge” to a “law” or a “statute,” in 1892,⁶⁴ early in his tenure, and he used that formulation repeatedly in his two

63. Six state court opinions had previously used the “challenge to statute” formulation. See *Livesay v. Wright*, 6 Colo. 92, 96 (1881) (“This, in effect, *challenges the statute* as unconstitutional.” (emphasis added)); *State v. Creditor*, 24 P. 346, 346 (Kan. 1890) (“He appeals, and *challenges the validity of the statute.*” (emphasis added)); *Mo. Pac. Ry. Co. v. Haley*, 25 Kan. 35, (1881) (“[T]he defendant’s counsel *challenge the constitutionality of the statute* in a long and able argument.” (emphasis added)); *State v. Dinness*, 41 Mo. App. 22, 22 (Ct. App. 1890) (“The defendant in his brief *challenges the constitutionality of the law* under which he was prosecuted.” (emphasis added)); *Hallenbeck v. Hahn*, 2 Neb. 377, 1872 WL 5832, at *12 (1872) (“We may well, therefore, call upon those who *challenge the validity of the law* of 1869 to point out the section of that instrument which has been disregarded in its enactment” (emphasis added)); *People v. Carpenter*, 24 N.Y. 86, 92 (1861) (“Those who *challenge the existence of the law*, were called on to show the notices were not given.” (emphasis added)). Interestingly, two of these six cases are from Kansas, where Justice Brewer served on the state supreme court, and three more are from neighboring states: Colorado, Missouri, and Nebraska. Apparently, this formulation was a mere regional colloquialism until Justice Brewer brought it from the Kansas Supreme Court to the United States Supreme Court. Special thanks to Research Assistant Ed Duffy for spotting this geographic pattern.

64. *United States v. Ballin*, 144 U.S. 1, 9 (1892) (Brewer, J.) (“[T]he law, as found in the office of the secretary of state, is beyond challenge.”).

decades on the Court.⁶⁵ But his colleagues resisted this formulation, realizing that the Constitution restricts governmental *action*, and that judicial review is the review of actions, not statutes.⁶⁶ Strikingly, not once in Justice Brewer's two decades on the Court did any other Justice refer to a "challenge" to a "law" or "statute."⁶⁷ Not until 1912, two years after Justice Brewer's death, did another Justice employ Justice Brewer's imprecise phrase.⁶⁸

65. See *South Dakota v. North Carolina*, 192 U.S. 286, 309 (1904) ("There is no challenge of the statutes by which they were authorized."); *Beals v. Cone*, 188 U.S. 184, 188 (1903) ("Neither did the plaintiff in error, prior to the judgment of affirmance in the supreme court, challenge the validity of any state statute on the ground of its repugnance to paramount Federal law."); *Travelers' Ins. Co. v. Connecticut*, 185 U.S. 364, 372 (1902) ("This whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*" (citation omitted)); *Parsons v. District of Columbia*, 170 U.S. 45, 51 (1898) ("In each case, therefore, where the party, whose property is subjected to the charge of a public burden, challenges the validity of the law under which it was imposed, it becomes the duty of the courts to closely consider the special nature of the tax and legislation complained of."); *Merchs.' & Mfrs.' Nat'l Bank of Pittsburgh v. Pennsylvania*, 167 U.S. 461, 463–64 (1897) ("[T]his would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the federal constitution. . . . Indeed, this whole argument of a right under the federal constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*" (citation omitted) (emphasis added)); *Seymour v. Slide & Spur Gold Mines*, 153 U.S. 523, 525 (1894) ("[I]f, by so doing, any laws of the state are violated, the state is the one to challenge the act . . .").

66. See, e.g., *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 468 (1905) (White, J.) ("It will be observed that the propositions *challenge the authority of the state to enact the statute* which formed the basis of the proceedings" (emphasis added)). See generally *supra* note 10.

67. The only quasi-exception is a single case in which another Justice quoted a Justice Brewer opinion with this formulation. See *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283, 296 (1898) (McKenna, J.) ("Indeed, this whole argument of a right under the federal constitution to *challenge the tax law* on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*." (emphasis added) (quoting *Merchs.' & Mfrs.' Nat'l Bank*, 167 U.S. at 464)).

68. See *Standard Stock Food Co. v. Wright*, 225 U.S. 540, 548 (1912) (Hughes, J.) ("The appellant challenges the constitutional validity of the statute . . ."). The formulation eventually caught on, of course, and there are countless subsequent examples. See e.g., *Williams v. Shaffer*, 385 U.S. 1037, 1039 (1967) ("The statute would be immune from the constitutional challenge."); *Baker v. Carr*, 369 U.S. 186, 338 (1962) ("constitutional challenge against this statute"); *Williams v. New York*, 337 U.S. 241, 243 (1949) ("the statutes were sustained over this constitutional challenge"); *Frost v. Corp. Comm'n*, 278 U.S. 515, 552 (1929) ("Nor would appellant seem to be placed in any better position to challenge the constitutionality of the statute by recourse to the rule that the possessor of a nonexclusive franchise may enjoin competition unauthorized by the state."); *Herbring v. Lee*, 280 U.S. 111, 117 (1929) ("T]here is no assignment of error here which challenges the validity of the statute on that ground . . ."); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 296 (1921) ("A writ of error which rested solely upon the challenge of the statute so construed would have presented no substantial claim and must have been dismissed as frivolous.").

While Justice Brewer's euphemistic imprecision may have been harmless at first, it has ultimately fostered deep analytical confusion about the constitutional structure of judicial review. The next step did not come until the 1970s, when the Court—correctly intuiting that there are two primary forms of judicial review—tried to locate the two within Justice Brewer's imprecise terminology. It started with Justice Brewer's confused idea that judicial review entails constitutional “challenges” to “statutes.” And so, from there, it chose to describe the two flavors of judicial review as “facial challenges to statutes”⁶⁹ and “as-applied challenges to statutes.”⁷⁰

These terms are both malapropisms, and the doctrine distinguishing between them is thus uncommonly confused. Under current doctrine, an “as-applied challenge” is somehow narrower, turning on the challenger's specific facts and implying a remedy tailored to those facts. A “facial challenge” is broader and more general, implying, somehow, that the statute is rotten to the core, and perhaps suggesting a sweeping remedial declaration that the statute is “void.”⁷¹ But when is the former appropriate and when the latter? Precisely what remedy is appropriate in each case? Indeed, what exactly do these terms—“facial” and “as-applied”—even mean?

69. The phrase “facial challenge” first appeared in a Supreme Court opinion in 1971, see *Lemon v. Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., concurring in judgment) (“Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment . . .”), and it appeared only four more times in the following decade, see *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 761 (1976) (“It has not been the Court's practice, in considering *facial challenges* to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.” (emphasis added)); *Young v. Am. Mini Theaters*, 427 U.S. 50, 94 (1976) (“Our usual practice, as the Court notes, is to entertain *facial challenges* based on vagueness and overbreadth by anyone subject to a statute's proscription.” (emphasis added)); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (“[W]hen considering a *facial challenge* it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.” (emphasis added)); *Alexander v. Ams. United Inc.*, 416 U.S. 752, 757 (1974) (“Because their objections to the Service's action included a *facial challenge* to the constitutionality of federal statutes . . .” (emphasis added)). Only in recent years has the phrase become ubiquitous. See, e.g., *Gonzales v. Carhart*, 540 U.S. 124, 167 (2007) (“appellees are making a facial challenge to a statute”); *Washington v. Glucksberg*, 521 U.S. 702, 739 (1997) (“making facial challenges to state statutes”).

70. The phrase “as-applied challenge” first appeared in a Supreme Court opinion in 1974, to distinguish from the phrase “facial challenge” which had been coined three years before. See *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (“[T]he ‘capable of repetition, yet evading review’ doctrine, in the context of election cases, is appropriate when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks.”).

71. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) (“If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application . . .”); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 32 n.134 (“[I]f a federal statute is found facially defective it ‘is void *in toto*, barring all further actions under it, in this, and every other case.’” (quoting *United States v. Petrillo*, 332 U.S. 1, 6 (1947))).

The Court has issued precious little guidance on the matter, merely emphasizing that it considers “as-applied” challenges to be the norm, and “facial” challenges to be a “disfavored” exception to the rule.⁷² According to the Court: “A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”⁷³

But this deceptively clear declaration has had an unhappy history, for the Court has sporadically chosen to ignore its own rule,⁷⁴ most controversially in the abortion context,⁷⁵ leading to vigorous dissents by Justice Scalia,⁷⁶ and

72. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (explaining that the Court “disfavor[s]” facial challenges because they “run contrary to the fundamental principle of judicial restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936))); *United States v. Raines*, 362 U.S. 17, 21 (1960) (explaining the Court’s preference for as-applied challenges because it would be “undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation” (quoting *Barrows v. Jackson*, 346 U.S. 249, 256 (1953))).

73. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

74. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (“We need not, however, resolve the viability of *Salerno*’s dictum”); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari) (“*Salerno*’s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.”); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); Dorf, *supra* note 71, at 236 (“[T]he Court has failed to apply [the *Salerno*] test. This discrepancy suggests that the *Salerno* ‘no set of circumstances’ principle does not accurately characterize the standard for deciding facial challenges.”); Marc. E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 374 (1998) (“In addition to the abortion cases, there have been numerous occasions in which the Court has apparently deviated from *Salerno*’s rigor and facially invalidated statutes without imposing any burden on the litigant to demonstrate that the statute would be unconstitutional in each and every application.”).

75. See *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (“[R]espondents have not demonstrated that the Act would be unconstitutional in a *large fraction* of relevant cases.” (emphasis added)); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006) (“Only a *few* applications of New Hampshire’s parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute’s unconstitutional application.” (emphasis added)); *Stenberg v. Carhart*, 530 U.S. 914, 1018-19 (2000) (Thomas, J., dissenting) (“Even if I were willing to assume that the partial birth method of abortion is safer for some small set of women, such a conclusion would not require invalidating the Act, because this case comes to us on a facial challenge. The only question before us is whether respondent has shown that ‘no set of circumstances exists under which the Act would be valid.’”); *Janklow*, 517 U.S. at 1175 (Stevens, J., respecting the denial of certiorari) (“*Salerno*’s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.”); *id.* at 1178 (Scalia, J., dissenting from denial of certiorari) (“It has become questionable whether, for some reason, this clear principle [*Salerno*] does not apply in abortion cases. As I observed three Terms ago in a case very similar to this one, we have sent mixed signals on the question”); Dorf, *supra*

rampant confusion in the courts of appeals.⁷⁷ Just two years ago, the Court acknowledged the uncertain vitality of the rule, but declined to resolve the uncertainty.⁷⁸

Meanwhile, in the last thirty years alone, hundreds of pages of scholarship have tried to make sense of this issue. Scholars agree that the distinction between “facial” and “as-applied” challenges is fundamental, but they agree about little else. There is sharp disagreement about when courts do entertain facial challenges and about when they should. Indeed, there even appears to be disagreement about the very meaning of the terms. The scholarship on this point is exceptionally rich, and each of these articles reflects important insights. In particular, Henry Monaghan,⁷⁹ Michael Dorf,⁸⁰ Matthew Adler,⁸¹ Marc Isserles,⁸² and Richard Fallon⁸³ have each set forth remarkably sophisticated

note 71, at 237 (“Two Justices have . . . argu[ed] that, at least as applied to abortion regulations, the Court’s standard is one that invalidates laws deemed unconstitutional ‘in a large fraction of the cases,’ not necessarily in every case.”).

76. *E.g.*, *Janklow*, 517 U.S. at 1178-81 (Scalia, J., dissenting from denial of certiorari) (“It has become questionable whether, for some reason, this clear principle [standard for facial challenges] does not apply in abortion cases. As I observed three Terms ago in a case very similar to this one, we have sent mixed signals on the question”); *Ada v. Guam Soc. of Obstetricians and Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia, J., dissenting from the denial of certiorari) (criticizing the lower court decision for failure to adhere to the *Salerno* standard).

77. *See Ada*, 506 U.S. at 1011 (Scalia, J., dissenting from the denial of certiorari) (criticizing the lower court decision for failure to adhere to the *Salerno* standard); *Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 57 (1st Cir. 2004) (“Despite the Supreme Court’s clear application of the [abortion] undue burden standard in *Casey* and *Stenberg*, it has never explicitly addressed the standard’s tension with *Salerno*.”). *Compare* *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (“We believe the Court effectively overruled *Salerno* for facial challenges to abortion statutes.”), *with Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (“The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. . . . Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.” (citations omitted)).

78. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (“While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’ . . . Washington’s primary system survives under either standard” (internal citations omitted)).

79. *See* Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195; Monaghan, *supra* note 71.

80. *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003); Dorf, *supra* note 71.

81. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) [hereinafter Adler, *Rights Against Rules*]; Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000) [hereinafter Adler, *Constitutional Adjudication*]; Adler & Dorf, *supra* note 80.

82. *See* Isserles, *supra* note 74.

83. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party*

(and sharply different) conceptual accounts of the distinction between “facial” and “as-applied” challenges. There is wisdom in each of these accounts. But the ultimate answer to this riddle is at once simpler and more fundamental than these accounts suggest.

B. Lex Ipsa Loquitur

Begin, again, with the all-important *who* question: *who has violated the Constitution?* Part I demonstrates that the answer will, at least sometimes, be Congress. Some clauses of the Constitution are written in the active voice, with “Congress” as their only subject; at least if one of these clauses is at issue, then Congress must be the answer to the *who* question. The second question in any exercise of judicial review should be the *when* question: *when was the Constitution violated?* And, as Part II demonstrates, if the answer to *who* is Congress, then the answer to *when* must be *when Congress made the law*.

But consider that, at the moment of the law’s making, there has been no enforcement, and there are no facts about the application of the statute. At that moment, there is only the text of the statute and the text of the Constitution. And so, if Congress has violated the Constitution at that moment, *the violation must inhere in the text of the statute itself*.⁸⁴ It must be theoretically possible, at that moment, “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”⁸⁵

Think, for example, of the First Amendment, whose explicit subject is Congress. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press”⁸⁶ On July 14, 1798, despite the First Amendment, Congress made just such a law: the Sedition Act

Standing, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*]; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) [hereinafter Fallon, *Overbreadth*].

84. The only possible exception is if a legislative violation of the Constitution can inhere in the *motive* for the legislative action rather than the text. The Court has occasionally suggested as much, although the sounder view is that an impermissible legislative motive cannot render an otherwise permissible act unconstitutional:

[I]f a government-enacted rule of conduct is constitutionally inoffensive both on its face and as applied to the particular individual challenging it, the fact that the rule would not have been promulgated (or the practice put in place) but for the enacting body’s desire to achieve a constitutionally forbidden result tells us nothing more than that the government body engaged in an *unsuccessful attempt* to violate the Constitution. So too, the fact that the rule would not have been promulgated or the practice established but for the enacting body’s consideration of a factor the Constitution tells it never to consider—if there are such factors—hardly suffices to render the rule of conduct promulgated, or the practice put in place, constitutionally void.

Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 23 (footnote omitted).

85. *United States v. Butler*, 297 U.S. 1, 62 (1936).

86. U.S. CONST. amend. I.

of 1798, which made it a crime to

write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute⁸⁷

The simple point, here, is that *Congress* violated the First Amendment. And the violation occurred *on July 14, 1798*, the day that it made this law.⁸⁸ The *who* was *Congress*. The *when* was *the moment of enactment*. And thus, inevitably, the *how* was visible *on the face of the statute*.⁸⁹

In short, the answer to the *who* question dictates the structure of judicial review. *A challenge to an action (or "Act") of Congress must be "facial."* It makes no sense to speak of "as-applied" challenges to legislative actions, because the challenged action is complete before the application begins. Or, to put the point another way, when an action (or "Act") of Congress is challenged, *the merits of the constitutional claim cannot turn at all on the facts of enforcement*. If someone were arrested pursuant to the Sedition Act, precisely what he published and when and where would, of course, be essential to the criminal case against him. *But those facts would be irrelevant to his constitutional defense*. Exactly what he published cannot matter to the merits of the constitutional claim, for the simple reason that the constitutional violation was complete before he took pen to paper. Because he challenges the action of Congress in making the law, his constitutional defense must be based not at all on his particular facts, which happened much later. His challenge must be based, instead, on the text of the Sedition Act and the text of the First Amendment. Thus, it would be irrelevant that *his particular speech* could have

87. 1 Stat. 596 (1798).

88. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964); Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, reprinted in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 34, at 540, 541 [hereinafter *Jefferson, Kentucky Resolutions*] ("That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled 'An Act in Addition to the Act entitled "An Act for the Punishment of certain Crimes against the United States,"' [the Sedition Act] which does abridge the freedom of the press, is not law, but is altogether void, and of no force."); see also James Madison, *Report on Virginia Resolutions* (1800), reprinted in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 34, at 546, 564 ("[E]ven if [Article III] could be strained [to provide jurisdiction for criminal sedition], it could have no effect in justifying the Sedition Act, which is an act of legislative, and not of judicial power" (emphasis added)).

89. See Isserles, *supra* note 74, at 363-64 ("[A] 'valid rule facial challenge' . . . predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases."); *id.* at 365 ("The term 'facial challenge' suggests a constitutional challenge asserting constitutional invalidity 'on the face' of the statute—that is, some constitutional flaw evident in the statutory terms themselves.").

been prohibited by some *other* statute—perhaps because it defamed a government official with “actual malice.”⁹⁰ The constitutional claim is not that the underlying speech is privileged against *all* laws, but that Congress violated the First Amendment by enacting *this* law.⁹¹

Thomas Jefferson understood all this, which is why his Kentucky Resolution declared this “act of the Congress” (small “a”) to be “altogether void, and of no force,”⁹² and why he later pardoned everyone convicted under the Sedition Act, *regardless of what exactly they had written*: “I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity”⁹³ Because Congress is the subject of the clause, the inquiry is inherently facial, and individual facts cannot matter; no one can rightly be prosecuted under such a “law.” Of late, the Court has lost sight of this fundamental point,⁹⁴ but in simpler times, it was well understood:

When *an act of Congress* is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.⁹⁵

This insight, in turn, has deep implications at the merits phase, influencing the structure of doctrinal tests—and thus the scope of substantive constitutional rights.⁹⁶ To see the point, consider this sort of constitutional review from the legislative perspective. If Congress is the subject, then the claim is that Congress violated the Constitution. Congressmen are “bound by Oath or Affirmation[] to support th[e] Constitution,”⁹⁷ and they have an independent obligation to assess the constitutionality of their actions.⁹⁸ It is quite a serious

90. See *Sullivan*, 376 U.S. at 279-80 (establishing that the First Amendment permits civil lawsuits against public officials for “defamatory falsehood[s] relating to [their] official conduct . . . made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

91. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 379-80 & n.1 (1992) (holding a hate-speech ordinance “facially unconstitutional” under the First Amendment, and reversing a conviction thereunder even though the defendant’s “conduct could have been punished under any of a number of laws,” including laws banning “terroristic threats,” and even though defendant’s expression constituted fighting words); *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); see also Adler, *Rights Against Rules*, *supra* note 81; Adler, *Constitutional Adjudication*, *supra* note 81.

92. See Jefferson, Kentucky Resolutions, *supra* note 88, at 541.

93. Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), in 4 THE WRITINGS OF THOMAS JEFFERSON 555, 555-56 (H.A. Washington ed., 1854) (emphasis added).

94. See, e.g., *United States v. Raines*, 362 U.S. 17, 22-23 (1960).

95. *United States v. Butler*, 297 U.S. 1, 62 (1936) (emphasis added).

96. See, e.g., Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 532 (1966).

97. U.S. CONST. art. VI, cl. 3.

98. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (“The Congress is a coequal

matter to charge that they violated the Constitution that they swore to support. If, indeed, they have, then that may constitute excellent grounds for voting them out of office. But if Congressmen are to be charged with the profound responsibility to support the Constitution, it must be that constitutional tests applicable to legislative action are ones that conscientious congressmen could theoretically apply. And so, if Congress is the subject, then the appropriate doctrinal test must be one whose inputs are available at the moment of enactment, *on the face of the statute*.⁹⁹

This is the idea that the Court has been grasping for with its doctrine of “facial challenges to statutes.” The notion of a challenge to a *statute* is a deceptive euphemism; the challenge is to the *action* of a governmental actor. And a “facial challenge,” in particular, is a challenge to the action of a *legislature*. But one word in the Court’s phrase does point in the right direction. These challenges are “facial” in the important sense that, under these circumstances, the constitutional violation must be visible on the *face* of the statute. If Congress has violated the Constitution by making an impermissible law, then it has violated the Constitution at the moment of making the law. And so, it must be possible to identify a constitutional flaw on the face of the statute itself. Thus, a “facial challenge” is *nothing more nor less than a claim that Congress (or a state legislature) has violated the Constitution*.

In short, facial challenges are to constitutional law what *res ipsa loquitur* is to facts—in a facial challenge, *lex ipsa loquitur*: the law speaks for itself.

C. Execution Challenges

By contrast with purportedly disfavored “facial challenges to statutes,” the Court purports to prefer “as-applied challenges to statutes.”¹⁰⁰ But this latter phrase is even more conceptually muddled than the former. As discussed above, the foundational error, born of euphemistic usage, is the suggestion that the statute, rather than the action of a governmental actor, has violated the Constitution. But, here, the error is compounded by the odd suggestion that the challenge is to the statute “as-applied.” This phrase, more than any other, has engendered profound confusion about the *who* of judicial review. If someone

branch of government whose Members take the same oath we do to uphold the Constitution of the United States.”); *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002) (“Each branch has an independent obligation to read the Constitution in the best way it knows how.”).

99. See FALLON ET AL., *supra* note 61, at 70 (“[D]oes Congress in voting to enact a bill . . . typically make or purport to make . . . a [constitutionality] determination? With respect to the validity of the statute as applied in particular situations, how could they?”); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868, 1909 (2005).

100. See cases cited *supra* note 72.

“challenges a statute as-applied,” who has allegedly violated the Constitution?

The Court has never asked this question in a general and systematic way, let alone ventured a definitive answer. And remember, the Court insists that “as-applied” challenges are the most common and preferred form of constitutional challenge.¹⁰¹ This is not some exotic variant; this is, allegedly, bread-and-butter judicial review. And yet, in this most common and most preferred form, the Court regularly sidesteps this most basic question—*who has violated the Constitution?*—choosing instead to employ a distinctly ambivalent phrase. When a challenge is to “a statute as-applied,” which governmental actor is allegedly to blame?

As discussed above, if Congress has violated the Constitution by making a law, then the violation occurred at the moment of the making of the law, and it should be possible to identify the violation at that moment, on the face of the statute. This is the idea that the Court has been grasping for with its notion of a “facial challenge.”

But, as the Court seems to sense, that will be the more unusual case.¹⁰² More often, the clause at issue will bind *the President* (or state executive). The President will be the answer to the *who* question. The President will have violated the Constitution, *in the application of the law*. And the answer to the *when* question follows: the violation will have occurred *at the moment of execution*. Here, the violation will *not* be visible on the face of the statute. Indeed, *the act of Congress will itself be constitutionally blameless*. Here, unlike in a “facial challenge,” the facts of execution will be relevant to an assessment of the merits—indeed, here, those facts *will be* the constitutional violation.¹⁰³ Here, no congressman has violated his oath; rather, if anyone has, then the President has violated his. Here, the execution of the statute by the President—not the action of Congress in making the statute (and certainly not the statute itself)—*is* the violation of the Constitution.

To see the point in practice, take a case like *Marshall v. Barlow’s, Inc.*¹⁰⁴ Congress makes a law that purports to authorize searches that are (by hypothesis) unreasonable. Then federal agents search someone unreasonably. The Fourth Amendment has been violated.¹⁰⁵ Who has violated it? Under current practice, the person searched would probably “challenge the statute as-applied.” To speak of a challenge to “a statute” sounds like a euphemistic way

101. See cases cited *supra* note 72.

102. Cf. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”).

103. See Monaghan, *Overbreadth*, *supra* note 71, at 5 (“[An ‘as-applied’] challenge is wholly fact dependent: Do the determinative facts shown by the evidence fall on the protected side of the applicable rule of constitutional privilege?”).

104. See *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

105. See *id.*

of describing a challenge to the action—or the “Act”—of *Congress* in making it. But saying that the challenge is to the statute “as-applied” seems to suggest that the *President*—who decided how to apply the statute—is somehow to blame. If the Constitution has been violated, there are two possible culprits. Again, the crucial question, the one that the Court has studiously elided, is: *who has violated the Constitution?*

To identify the subject of the constitutional claim, begin by identifying the relevant subject of the Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁰⁶

The Fourth Amendment is written in the passive voice, so it does not specify who may violate it. But text and structure strongly suggest that the Fourth Amendment is concerned with executive and judicial actions rather than legislative actions. The first clause of the Amendment appears to prohibit the executive act of unreasonable *searching*, not the act of *authorizing unreasonable searches*; as the Court has said, “[t]he wrong condemned by the [Fourth] Amendment is ‘fully accomplished’ *by the unlawful search or seizure itself*.”¹⁰⁷ And the second, Warrants Clause of the Amendment, which is concerned with the authorizing of searches, is directed not at Congress but at the Judiciary (and perhaps at the executive branch).¹⁰⁸ So unless a statute can itself be considered a “warrant,” it is not quite right to say, as the Court did in *Marshall v. Barlow’s, Inc.*, that the “Act [of Congress] is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent.”¹⁰⁹ The act of Congress did not violate the Fourth Amendment; the act of the President did.

To put the point another way, the text of the Fourth Amendment does not follow the model of the First Amendment. It does not say, for example, “Congress shall make no law authorizing unreasonable searches and seizures.”¹¹⁰ If it did, then Congress would indeed be the constitutional culprit. But as written, it seems that Congress might purport to *authorize* a Fourth Amendment violation, but it cannot actually *commit* a Fourth Amendment violation. Indeed, the Court generally seems to realize as much, which explains why *Marshall v. Barlow’s, Inc.* is the only case in the Court’s history that has purported to strike down an action (or “Act”) of Congress under the Fourth

106. U.S. CONST. amend. IV.

107. *United States v. Leon*, 468 U.S. 897, 906 (1984) (emphasis added).

108. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772-73 (1994).

109. 436 U.S. at 325 (emphasis added).

110. *Compare* U.S. CONST. amend. I.

Amendment.¹¹¹ *It is the President who violates the first clause of the Fourth Amendment, by executing an unreasonable search.*¹¹²

And so, consider the fundamental structural differences between challenges to *executive* action (for example, a claim that the President violated the Fourth Amendment by executing a search) and challenges to *legislative* action (for example, a claim that Congress violated the First Amendment by making a law). As discussed above, Thomas Jefferson realized that the merits of a First Amendment challenge to, for example, the Sedition Act should turn not at all on what the defendant actually wrote. The constitutional violation was complete on July 14, 1798, when Congress made the Sedition Act, before the defendant took pen to paper. In that case, the challenge is “facial” and *lex ipsa loquitur*—the enforcement facts are irrelevant and the law speaks for itself. But in the Fourth Amendment context, the reverse is true: the statute matters little if at all, while the enforcement facts are crucial. The statute does not matter because the search would have been a Fourth Amendment violation with or without it. But the litigation will very much turn on the defendant’s specific facts—what exactly was searched, and when, and where. Here the enforcement facts do not postdate the constitutional violation; here the enforcement facts *are* the constitutional violation. Again, “[t]he wrong condemned by the [Fourth] Amendment is ‘fully accomplished,’” not by enacting a statute purporting to authorize an unreasonable search, but “*by the unlawful search or seizure itself.*”¹¹³ In other words, *a constitutional claim under the first clause of the Fourth Amendment is never a “facial” challenge, because it is always and inherently a challenge to executive action.*

This is the idea that the Court has been grasping for with its notion of “as-applied challenges to statutes.” The Court’s phrase is fatally misleading, in its willful hedge on the all-important *who* question. But one word points in the

111. See CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2117, 2121-22, 2146 (2004 Supp.), available at <http://www.gpoaccess.gov/constitution/pdf2002/supplemental.pdf>. The only other possible example appears to be *Boyd v. United States*, 116 U.S. 616 (1886), but that case—no model of clarity—expressly conflates the Fourth and Fifth Amendments, and it does not clearly state which one forbade the making of the law at issue. See 116 U.S. at 630 (“[T]he Fourth and Fifth Amendments run almost into each other.”).

112. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 (1971) (elaborating the “Fourth Amendment’s protection against unreasonable searches and seizures *by federal agents*” (emphasis added)). Admittedly, another interpretation of the first clause of the Fourth Amendment is possible. Returning to the text, one could emphasize that it does not literally guarantee a right of *individuals* to be free from *particular* unreasonable searches but rather a “right of *the people* to be *secure* . . . against unreasonable searches and seizures.” U.S. CONST. amend. IV (emphasis added). One could argue that this right is not actually violated by a single, isolated, unreasonable, FBI search, because one search does not render the people insecure. Rather, on this theory, the Clause is violated only by a systemic, *legislative threat* of such searches, for it is the general prospect of such searches that would render the people insecure.

113. *United States v. Leon*, 468 U.S. 897, 906 (1984) (emphasis added).

right direction. In these cases, it is the *application* of the statute that violates the Constitution. These challenges should perhaps be called “as-executed challenges” or, better, simply “execution challenges,” to gesture more clearly toward the President, whose duty it is to “take Care that the Laws be faithfully *executed*.”¹¹⁴ If the execution of a statute is unconstitutional (because, for example, it involves an unreasonable search), then it is the President who has violated the Constitution. Just as “facial challenges” are challenges to actions (“Acts”) of Congress, “*as-applied challenges*” are challenges to actions of the President.¹¹⁵

This simple point is essential to a proper understanding of the constitutional structure of judicial review. The most common form of judicial review—the kind that the Court has misleadingly called “as-applied challenges to statutes”—is not the review of actions (or “Acts”) of Congress at all. This most common form of judicial review is nothing other than constitutional review of *executive* action.

D. *The Forms of Judicial Review*

To summarize, the Court got off on the wrong foot with its euphemistic formulation that statutes—rather than governmental actors—violate the Constitution. From this formulation, it followed, per Justice Brewer, that constitutional cases would be styled “challenges to statutes.” And then, when the Court correctly sensed that there are two primary forms of judicial review—one somehow broader, more abstract, and more unusual, and the other narrower, more concrete, and more common—it tried to locate this distinction within its well-intentioned but inapt euphemism. And so, it named these two forms of constitutional litigation: “facial challenges to statutes” and “as-applied challenges to statutes.” These phrases—and the doctrines that gloss them—are so conceptually confused precisely because they willfully elide the all-important *who* question.

First-rate scholars have struggled mightily to make sense of these doctrines, but they too have been thrown off the scent by these unfortunate phrases. And they have been thrown off for another reason too. For decades,

114. U.S. CONST. art. II, § 3 (emphasis added).

115. One treatise alone seems to understand this point, but its brief discussion has been widely ignored by courts and scholars. See 1 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 2:6, at 44 (6th ed. 2002) (“Sometimes it is said of a statute which is not void ‘on its face’ that it nevertheless is invalid as applied. This is a malapropism, however, for a provision which is only invalid as applied in the facts of a particular case is possibly capable of valid application in another fact situation. In reality, it is only the implementing action which purports to apply the legislation and not the provision itself which is invalid in such cases.” (citations omitted)). This is exactly right, but this crucial point has been lost on the many first-rate scholars who have written about “facial” and “as-applied” challenges. Not one of the leading articles on this topic cites to this passage. Indeed, amazingly, *not a single article available on Westlaw, on any topic, cites to this passage.*

the academy has focused on individual rights—which is to say, it has generally focused on constitutional questions from the perspective of, not government actors, but individuals. From this perspective, it may seem churlish or nitpicky to ask: *rights against whom?* From the perspective of individual rights, the matter of who has violated the Constitution may seem distinctly secondary, particularly if one is inclined to believe that majestic constitutional rights are, or should be, rights “against the world.” So the academy has focused almost exclusively on the *scope* of constitutional rights—eliding, with the Court, the question of precisely *who* might violate them.

The line of scholarship that has come closest to the mark starts with the superb work of Professor Henry Monaghan. Monaghan posited a valid rule requirement,¹¹⁶ a personal “right to be free from being burdened by an unconstitutional rule.”¹¹⁷ There is a crucial insight here, in the notion that a constitutional violation may inhere in a rule, rather than the application of a rule. But by framing this insight as a personal “right” against invalid rules, one loses sight of the *source* of invalid rules, the *subject* of certain clauses of the Constitution. A rule is invalid if and only if a *legislature* violated the Constitution by *making* it. And nothing quite so ethereal as “our conception of the ‘rule of law’”¹¹⁸ is required to explain the valid rule requirement; the requirement is properly found in constitutional text and grammar. Likewise, in a pair of important articles,¹¹⁹ Matthew Adler, following Monaghan, argues that constitutional rights are rights against rules—but he grounds the claim in esoteric political philosophy rather than constitutional text, and so he overstates the claim. In fact, *some* constitutional rights are rights against rules, precisely because some constitutional provisions have Congress as their subject.¹²⁰ In a later article, Adler and Michael Dorf argue that some constitutional rules are “existence conditions” and others are “application conditions,”¹²¹ but they do

116. See Monaghan, *supra* note 79.

117. Monaghan, *supra* note 71, at 9.

118. Monaghan, *supra* note 79, at 196.

119. Adler, *Rights Against Rules*, *supra* note 81; Adler, *Constitutional Adjudication*, *supra* note 81.

120. Adler’s first article on this point seemed to say that *all* constitutional rights are rights against rules. See, e.g., Adler, *Rights Against Rules*, *supra* note 81, at 3 (“Constitutional rights are rights against rules.”). His second article, however, tempered the claim. See Adler, *Constitutional Adjudication*, *supra* note 81, at 1375 (“*Rights Against Rules*, read as a whole, does not present the rule-dependence claim as a universal one—indeed, I stated explicitly that my focus in the article was on the subset of doctrines that furnish substantive challenges to conduct-regulating rules—but some of my language was sloppy and did suggest, incorrectly, that rule-dependence was universally true.” (citations omitted)). This second formulation comes closer to the mark. But neither article identifies the link between rights against rules and the subjects of the Constitution. *Some* rights are rights against rules precisely because some constitutional provisions are restrictions on legislative action.

121. Adler & Dorf, *supra* note 80, at 1119 (“A constitutional provision states an ‘existence condition’ for some category of nonconstitutional law (federal statute, federal

not venture an explanation for which ones are which and why.¹²² The answer is in the subjects of the Constitution: if Congress is the subject of the rule, then the rule is what they would call an “existence condition,” whereas if the President is the subject of the rule, then the rule is what they would call an “application condition.” And Richard Fallon is profoundly right to recognize the relationship between the Court’s confused “facial” / “as-applied” dichotomy and substantive constitutional doctrine; but as a doctrinalist, he takes the substantive doctrine as given and attempts to derive the “facial” / “as-applied” dichotomy therefrom.¹²³ The better approach starts a step earlier, with constitutional text and structure: the subjects of the Constitution (legislatures / executives) dictate the structure of judicial review (“facial” / “as-applied”), and the structure of judicial review, in turn, may imply the proper structure of substantive doctrinal tests (*lex ipsa loquitur* / fact-intensive as-executed).

In short, statutes and regulations do not violate the Constitution; governmental actors do. And it is essential to determine which governmental actor has done so in any given case. The distinction that the Court has been grasping for with its muddled distinction between “facial” and “as-applied” challenges to “statutes” is actually the fundamental distinction between challenges to *legislative* action and challenges to *executive* action. These are the two primary forms of judicial review.

E. *Before and After the Merits*

These two *forms* of constitutional review are crucially, structurally distinct,

common law, federal regulation, state law, and so forth) if it states a necessary condition for any proposition to fall within that category. A constitutional provision states an ‘application condition’ for nonconstitutional law if the provision limits the legal force of a proposition of nonconstitutional law by some means other than vitiating the status of that proposition as law.” (citation omitted)).

122. *Id.* at 1166-67 (“[W]e do not mean here to take a position on which rights-conferring constitutional provisions and doctrines are best read as existence conditions, which are best read as application conditions, and which are best read as existence conditions in some circumstances and application conditions in others.”). Adler and Dorf grasp that attention to the subjects and objects of constitutional provisions might resolve the question. *Id.* at 1168 (“The First Amendment takes the form of a prohibition on lawmaking by Congress, but other provisions establish (or recognize) ‘rights.’ . . . Are these distinctions important? A sufficiently ingenious and hardworking constitutional archeologist such as Professor Akhil Amar can find hidden meanings in these particular word choices . . .”). However, they decline to employ this method. *Id.* at 1121 (“[N]othing in our distinction between existence and application conditions entails a textualist approach to constitutional interpretation or ontology. We use the term ‘constitutional provision’ for stylistic reasons, but by this we simply mean some norm or principle or, more generally, some proposition of constitutional law.”).

123. See Fallon, *As-Applied and Facial Challenges*, *supra* note 83, at 1324 (“[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable *substantive* tests of constitutional validity.”); see also Fallon, *Overbreadth*, *supra* note 83.

and the distinctions manifest at all three *phases* of judicial review. As discussed above, the implications at the merits phase are profound: review of legislative action must be “facial” and so the doctrinal test must be *lex ipsa loquitur*, whereas review of executive action must be “as-executed” and the doctrinal test will probably be fact-intensive. But there are also deep implications before the merits, at the *jurisdictional* phase, and after the merits, at the *remedies* phase. This Subpart will briefly sketch some of those implications.

1. *Before the merits*

a. *Ripeness*

At the jurisdictional phase, there are deep implications for ripeness doctrine. As the Court has said, “ripeness is peculiarly a question of *timing*,”¹²⁴ and it is essential to know the timing of the constitutional violation to determine the proper timing of judicial review. One of the primary factors in the ripeness inquiry is “whether the courts would benefit from further factual development of the issues.”¹²⁵ The valence of that factor will be entirely determined by who has violated the Constitution. If *Congress* has violated the Constitution *by making a law*, it should never be the case that “the courts would benefit from further factual development of the issues.”¹²⁶ Post-enactment facts should never matter to the merits of such a claim, because the constitutional violation is already complete.

By contrast, if the answer to the *who* question is the President—if the challenge is rightly framed as a challenge to executive action—then the constitutional violation is not consummated until the moment of execution. The merits of such a challenge will turn, crucially, on the facts of execution, because those facts will themselves constitute the alleged violation. Here, any pre-enforcement challenge may well be premature, precisely because “the courts would benefit from further factual development of the issues.”¹²⁷ And here it may truly be said that the case involves “contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹²⁸ Here, a pre-enforcement challenge is anticipatory in a far deeper sense. *Here, such a*

124. *Blanchette v. Conn. Gen. Ins. Corp.* (Regional Rail Reorganization Act Cases), 419 U.S. 102, 140 (1974) (emphasis added).

125. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also* Scharpf, *supra* note 96, at 532.

126. *Ohio Forestry Ass’n*, 523 U.S. at 733.

127. *Id.*

128. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3532 (2d ed. 1984)); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990) (same); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (same).

*challenge actually precedes the constitutional violation itself.*¹²⁹

To be sure, it does not necessarily follow that all challenges to legislative actions are ripe immediately after enactment or, conversely, that all challenges to executive action are unripe until the execution occurs. Other factors properly inform the Court's ripeness calculus.¹³⁰ There may be good reasons for *delaying* judicial review of *legislative* action, including the necessity of sufficiently adverse parties and a sufficiently concrete dispute. Conversely, there may be good reasons for *allowing* an anticipatory challenge to *executive* action, particularly to avoid irreparable harm. But for present purposes, the important point is that any legislative violation of the Constitution is complete at the moment of enactment, and any subsequent facts must be irrelevant to the merits; whereas an executive violation of the Constitution happens later, and the facts of execution may be essential to the inquiry. So if the *who* is Congress, then the challenge is more likely to be ripe earlier—indeed, most strikingly, it might be ripe immediately after enactment, and before any enforcement whatsoever. A pre-enforcement challenge to an act of Congress is anticipatory, in the limited sense that it is anticipating and attempting to prevent the harm of *enforcement*; but it does not anticipate the constitutional *violation*, because the violation is already complete.¹³¹ By contrast, a pre-enforcement challenge to an act of the President is anticipatory in a more profound sense; such a challenge anticipates the constitutional violation itself.

b. *Standing*

Standing concerns the *who* of constitutional adjudication, “the *party* seeking to get his complaint before a federal court.”¹³² The current doctrine is as follows: “To satisfy the ‘case’ or ‘controversy’ requirement of Article III,

129. See *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974) (holding that a challenge to discriminatory criminal *enforcement by executive officials and adjudication by judicial officials* is unripe, because it “rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to . . . proceedings . . . before petitioners. Important to this assessment is the absence of allegations that any relevant criminal *statute* . . . is unconstitutional” (emphasis added)).

130. *Id.*

131. Some scholars have intuited that First Amendment challenges ripen earlier than most, but they have not grounded that intuition in the First Amendment’s distinctive *who* and *when*, which derive from its distinctive *subject*. See, e.g., RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 227 n.5 (5th ed. 2009); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970) [hereinafter Harvard Note] (“Rather than serving to postpone and limit the scope of judicial review, [the First Amendment overbreadth doctrine] asks that review be hastened and broadened. . . . The specific rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws against privileged activity is not their only vice.”); *id.* at 864 (“Lack of dependence on a particular fact situation renders an overbreadth claim ‘ripe’ almost whenever asserted.”). See generally Part IV, *infra*.

132. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

which is the ‘irreducible constitutional minimum’ of standing, a plaintiff must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”¹³³

This doctrine has been subject to withering academic criticism. According to one scholar, “It is difficult to conceive of a constitutional doctrine more riddled with confusion, more unanimously savaged by commentator and court, more important and yet more neglected than the access doctrines which encompass standing jurisprudence.”¹³⁴

In the most compelling critique of this doctrine, Ninth Circuit Judge William Fletcher has argued that standing should not be a preliminary jurisdictional inquiry, but rather that “standing should simply be a question on the merits of plaintiff’s claim”;¹³⁵ in his view, there should be no generic standing doctrine purportedly derived from Article III but rather a careful focus on the substantive constitutional clause at issue, which “should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it.”¹³⁶

Confusion about the *who* of constitutional *adjudication*, like confusion about the *when*, derives directly from pervasive inattention to the *who* and *when* of constitutional *violation*. Whether on current doctrine or on Judge Fletcher’s view, before one can answer the ultimate question of standing—*who are proper parties to a constitutional case?*—one must answer the logically and chronologically prior *who* question: *who has allegedly violated the Constitution?* Before asking who can *vindicate* a right, ask first who can *violate* it.

When Congress violates the Constitution by making a law, the violation is likely to affect many people. In some cases, it may affect all taxpayers, or perhaps even all citizens. When the President violates the Constitution in the

133. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72 (1982)).

134. Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1863 (1996); see also *Flast*, 392 U.S. at 129 (Harlan, J., dissenting) (“constitutional standing [is] a word game played by secret rules”); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 15-16 (1984) (“Regrettably, it long since has become ‘commonplace to begin any discussion of the doctrine of standing by decrying the confusion which persists in this area of the law.’ This conventional introduction remains appropriate today.” (citation omitted)); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (“The structure of standing law in the federal courts has long been criticized as incoherent.”).

135. Fletcher, *supra* note 134, at 223.

136. *Id.* at 224; see also *id.* at 223 n.18.

execution of a law, the violation is likely to affect a much smaller number.¹³⁷ In terms of current standing doctrine, one could say that if the subject is Congress, then a violation probably causes more people “injury in fact.” In Judge Fletcher’s terms, if the subject is Congress, then, perhaps, implicitly, more people are entitled to enforce the legal duty. Either way, the standing inquiry turns in part on the subject of the relevant constitutional clause. This simple point resolves deep paradoxes of overbreadth and taxpayer standing, as will be shown in Part IV. But for the present, the important point is that one cannot answer the second *who* question—*who are proper parties to a constitutional case?*¹³⁸—until one has answered the first: *who has allegedly violated the constitution?*

2. *After the merits*

Again, the two primary forms of constitutional review are judicial review of legislative action and judicial review of executive action. These two forms also differ in their remedial implications.

If Congress violated the Constitution by making a law, basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the pre-violation status quo.¹³⁹ This remedial principle is reflected in constitutional text and doctrine. The Constitution provides that only those “Laws of the United States *which shall be made in Pursuance [of the Constitution]* . . . shall be the supreme Law of the Land.”¹⁴⁰ And as the Court has insisted ever since *Marbury v. Madison*, “Laws” not “made in pursuance thereof” are “void *ab initio*,”¹⁴¹ “facially invalid,”¹⁴² or

137. Cf. *McKinney v. Pate*, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994) (“[I]t is crucial to note the distinction between ‘legislative’ acts and . . . executive’ acts. Executive acts characteristically apply to a limited number of persons (and often to only one person) . . . Legislative acts, on the other hand, generally apply to a larger segment of—if not all of—society.” (citation omitted)).

138. See Monaghan, *supra* note 45.

139. This suggests that ordinary severability doctrine should not apply when Congress (or a state legislature) is the subject of the constitutional claim. Cf. Dorf, *supra* note 71, at 261 (stating that the Court “correctly recognizes this overbreadth doctrine” is not subject to the *Salerno* presumption of severability, and that the presumption should also not apply to laws infringing on other “fundamental rights”). Future work will analyze severability implications in detail. See NICHOLAS QUINN ROSENKRANZ, *THE SUBJECTS OF THE CONSTITUTION* (Oxford University Press, forthcoming 2011).

140. U.S. CONST. art. VI, cl. 2 (emphasis added).

141. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void . . .” (emphasis omitted)); *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 401 (5th Cir. 2008) (“If that act . . . is invalid . . . the act is void *ab initio*, and it is as though Congress had not acted at all.”);

simply “not law” at all.¹⁴³ Again, the clearest example is the Sedition Act, and though there was no Supreme Court review of the Act at the time, there was presidential review,¹⁴⁴ and Thomas Jefferson understood the remedial point perfectly. He pardoned everyone convicted under the Sedition Act, *regardless of what exactly they had written*: “I discharged *every person* under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity”¹⁴⁵

Matters are entirely different if the President has violated the Constitution in the execution of a statute. In such a case, the statute should not be declared “a nullity;” indeed, the statute itself is constitutionally blameless. It has proven to be capable of unconstitutional *application*—but *every* statute is capable of

Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 365, 371-72 (1929) (“When the Supreme Court of the United States pronounces an act of Congress ‘void,’ it ordinarily means void *ab initio*, because [it was] beyond the power of Congress to enact . . .”).

142. See, e.g., *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774, 788 (2004) (Scalia, J., concurring) (“subject to facial invalidation”); *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (“applying the ‘strong medicine’ of overbreadth invalidation”); *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.17 (2001) (“Overbreadth must be substantial to trigger facial invalidation . . .” (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973))); *L.A. Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 37 (1999) (“The Court of Appeals affirmed the District Court’s facial invalidation.”).

143. *Marbury*, 5 U.S. at 177 (“[A] legislative act contrary to the constitution is not law”); see also *Chi., Indianapolis, & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913) (“That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law.”); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) (“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819) (“Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that *such an act was not the law of the land*.” (emphasis added)); THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 10, at 465 (“By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 920 (1990) (“The Supreme Court has said more times than one can count that unconstitutional statutes are ‘no law at all.’”).

144. See generally Easterbrook, *supra* note 143 (arguing that the President must make independent constitutional judgments and may use his constitutional power to effectuate those judgments); cf. Issues Raised by Foreign Relations Authorization Bill, 14 Op. Off. Legal Counsel 37, 47 (1990) (“[T]he Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute is not a law.”).

145. Letter from Thomas Jefferson to Mrs. Adams, *supra* note 93, at 556 (emphasis added).

unfaithful, and thus unconstitutional, application.¹⁴⁶ The fault in such a case lies with the President. And so the proper remedy in such a case may include an injunction running against executive officials, underscoring that they have constitutional as well as statutory constraints.¹⁴⁷

Here again, the structure and the scope of the remedy turn on who has violated the Constitution.

IV. THE SUBJECT OF THE FIRST AMENDMENT

Thus far, this Article has set forth a new model of judicial review in the abstract; the rest of it will apply the model to several of the most important clauses of the Constitution.

The First Amendment is an apt place to begin, because it illustrates the full power of this new model. Reading the First Amendment through this new lens helps solve *jurisdictional* riddles about standing and ripeness: the *who* and *when* of First Amendment judicial review.¹⁴⁸ It helps solve *remedial* riddles about First Amendment severability and injunctive relief. Most importantly, it helps solve *substantive* riddles about the scope of First Amendment rights.

And the First Amendment is an apt first example for another reason too. In one sense, it presents an unusually easy case, because the First Amendment, unlike the rest of the Bill of Rights, is written in the active voice. It has an express subject, and thus a clear answer to the *who* question. Yet precisely because, as a textual matter, the First Amendment is such an easy case, it presents the starkest counterpoint to conventional wisdom—which willfully ignores the subject of the First Amendment.

A. Overbreadth

It is a bedrock principle of standing doctrine 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. . . . [C]onstitutional rights are

146. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be *faithfully* executed . . .” (emphasis added)).

147. See *Ada v. Guam Soc. of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from the denial of certiorari) (“The practical effect of holding a statute unconstitutional ‘as applied’ is to prevent its future application in a similar context, but not to render it utterly inoperative.”); *Marbury*, 5 U.S. at 170-73 (“If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. . . . It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute. . . . This difference is not considered as affecting the case. . . . This, then, is a plain case for a mandamus . . .”).

148. See Monaghan, *supra* note 45.

personal and may not be asserted vicariously.”¹⁴⁹ But, in one special context, there is an exception to this principle: “[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’”¹⁵⁰

Overbreadth doctrine has prompted an enormous amount of careful scholarship,¹⁵¹ but neither the Court nor anyone else has ever adequately explained several central features of the doctrine. First, why is it (purportedly¹⁵²) limited to the First Amendment?¹⁵³ Second, why is “the statute’s very existence”¹⁵⁴ a constitutional problem in the First Amendment context but not in other contexts? Third, why is a violation in this context so serious as to require automatic reversal—that is, why are claims of overbreadth apparently immune from harmless error doctrine?¹⁵⁵ Fourth, why, in this context, does the general presumption of severability apparently not apply?¹⁵⁶

To the extent that anyone has offered rationales for these anomalous doctrines, they seem to boil down to an instinct that the First Amendment is special.¹⁵⁷ “According to [the most common] account [of overbreadth

149. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

150. *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)); *see also* *Virginia v. Hicks*, 539 U.S. 113, 118-20 (2003) (“The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep,’ suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” (quoting *Broadrick*, 413 U.S. at 615.)); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (“[T]he Court did recognize an exception to [standing] for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties.”); Fallon, *As-Applied and Facial Challenges*, *supra* note 83, at 1321-22 (“[O]verbreadth doctrine was viewed as infringing the usual third-party standing rule that one party may not assert the rights of another.”); Isserles, *supra* note 74, at 369 (“[An] exception to the rule barring third-party standing is the First Amendment overbreadth doctrine.”).

151. *See, e.g.*, Fallon, *supra* note 83; Isserles, *supra* note 74; Monaghan, *supra* note 71.

152. *But see* Dorf, *supra* note 71, at 264-77 (documenting and justifying overbreadth analysis outside the First Amendment context).

153. *See* *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”); *Schall v. Martin*, 467 U.S. 253, 268-69 n.18 (1984) (“[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”).

154. *Broadrick*, 413 U.S. at 612.

155. *See* Monaghan, *supra* note 79, at 209-10 (“[T]he First Amendment generally does forbid harmless error analysis in overbreadth cases.” (citing *Gooding v. Wilson*, 405 U.S. 518, 521 (1972))).

156. Dorf, *supra* note 71, at 261 (stating that the Court “correctly recognizes this overbreadth doctrine” is not subject to the *Salerno* presumption of severability, and that the presumption should also not apply to laws infringing on other “fundamental rights”).

157. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-*

doctrine], the First Amendment enjoys a special status in the constitutional scheme. Any substantial ‘chilling’ of constitutionally protected expression is intolerable.”¹⁵⁸ But what makes the First Amendment so special? Why is there concern about “chill”¹⁵⁹ in this context and not other contexts? To say that “the First Amendment needs breathing space”¹⁶⁰ is all well and good, but why does free speech require more “breathing space” than any other constitutional right? Conventional wisdom justifies all this with a heady mix of intuition and political philosophy.¹⁶¹

And indeed, the First Amendment is unique. But nothing so ethereal as intuition or political philosophy is necessary to see why. To see how the First Amendment is unique, one need look no further than its *subject*. Again, in this model of judicial review, the first question that the Court should ask is: *who has allegedly violated the Constitution?* In the First Amendment context, the *who* question should be easy. Like the rest of the Bill of Rights, the First Amendment is a restriction on federal governmental *action*. But unlike the rest of the Bill of Rights, the First Amendment is written in the *active* voice, with a clear and express subject. Its ringing first words are: “Congress shall make no

GOVERNMENT 26 (3d ed. 2008) (“The principle of the freedom of speech springs from the necessities of . . . self-government.”); *id.* at 69 (“[I]t is that authority of these truth-seeking activities which the First Amendment recognizes as uniquely significant when it says that the freedom of public discussion shall never be abridged. It is the failure to recognize the uniqueness of that authority which has led the Supreme Court to break down the difference between the First Amendment and the Fifth.”); *id.* at 91 (“The unabridged freedom of public discussion is the rock on which our government stands.”). *But see* Dorf, *supra* note 71, at 264-65 (criticizing the normative premise underlying the limitation of overbreadth challenges to the First Amendment) (“To treat some democracy-preserving constitutional provisions as privileged contravenes the Constitution’s own architecture.” (citing LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 25-27 (1991))); John Christopher Ford, *The Casey Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1458 (1997) (rejecting the normative premise that First Amendment rights are more important than other constitutional rights, and therefore rejecting the argument that this normative premise justifies limiting the overbreadth doctrine to the First Amendment).

158. Fallon, *Overbreadth*, *supra* note 83, at 867.

159. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (“The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (“The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute.”); *Broadrick*, 413 U.S. at 630 (1973) (Brennan, J., dissenting) (“[The Court] recognize[s] that overbreadth review is a necessary means of preventing a ‘chilling effect’ on protected expression.”).

160. *Broadrick*, 413 U.S. at 611 (majority opinion).

161. *See supra* note 157.

law”¹⁶² The first question of First Amendment judicial review must be: *who has violated the First Amendment?* And as a matter of text and grammar, there is only one possible answer: “Congress.”

The Court has never drawn the connection between the unique *subject* of the First Amendment and the unique *doctrines* of First Amendment judicial review. Likewise and with very few exceptions,¹⁶³ scholars have largely ignored the unique subject of the First Amendment. In 1965, when the Court first declared that an act of Congress violated the First Amendment,¹⁶⁴ the Court carefully answered the *who* question: “Here the Congress—expressly restrained by the First Amendment from ‘abridging’ freedom of speech and of press—is the actor.”¹⁶⁵ But by 1971, the Court started treating the subject of the First Amendment as nothing more than an embarrassing drafting error fit for judicial correction,¹⁶⁶ and the academy soon followed suit.¹⁶⁷

162. U.S. CONST. amend. I.

163. Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 326 (2000) (“[T]he First Amendment applies, by its terms, to Congress and not to the President or the courts [This] may suggest nothing more than that the Framers did not fear the power of the President or the federal courts. Or, it may suggest that the Framers’ principal concern was legislative prior restraints.”); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1158 (1986) (“Article I, section 1 of the Constitution states: ‘All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.’ If this is the ‘Congress’ intended by the framers of the Bill of Rights, then the first amendment clearly prohibits the legislative branch of the federal government from making laws that abridge freedom of speech and press and just as clearly places no prohibitions upon either the judicial or executive branches.”); cf. John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J. L. & PUB. POL’Y 169, 170 (1992) (“[T]he question under the Free Exercise Clause has to do with the law in the abstract—with the content of the rule it adopts—and not with the law’s application in any particular case. If the Free Exercise Clause means what it says, it prohibits the enactment of certain kinds of laws. Because the Clause is a rule for legislatures, we can ask the right questions under the Clause by putting ourselves in the position of the legislature and asking whether the statute in *Smith* was a law prohibiting the free exercise of religion.” (emphasis added)).

164. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 678 (2002) (“[T]he first time the Court struck down an act of Congress on First Amendment grounds was in 1965.” (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306 (1965))).

165. See *Lamont*, 381 U.S. at 306.

166. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (assuming without discussion that the First Amendment applies to the Executive and the Judiciary, despite its textual limitation to “Congress”); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 101-03 (1982) (“In *Pentagon Papers*, no underlying congressional legislation was alleged to specifically authorize the President to prevent publication by the New York Times of various secret reports on the Vietnam War. Indeed, as Justice Marshall pointed out, ‘on at least two occasions Congress [had] refused to enact legislation that would have . . . given the President the power that he [sought] in [that] case.’ And yet the Court applied conventional First Amendment analysis despite the clear terms of that Amendment limiting the powers of Congress. There is no discussion of this point, which is something of a triumph of avoidance since the case evoked nine opinions from the Justices.”); see also *Citizens United v. FEC*, No. 08-205, slip op at 9 (U.S. Jan. 21, 2010)

This attitude seems particularly hard to defend when the text is so clear.¹⁶⁸ One can easily see how the abstract nouns of the First Amendment—"speech,"¹⁶⁹ "press,"¹⁷⁰ "religion"¹⁷¹—would prove difficult to define, particularly at the edges. But law students are always surprised to learn that the *subject* of the First Amendment poses any difficulties whatsoever. The word "Congress" is not ambiguous; indeed, it is one of the few words that the Constitution itself actually defines—and the definition appears prominently, in Article I, Section 1.¹⁷² Yet, the Court and the academy now seem determined

("Courts, too, are bound by the First Amendment.").

167. Denbeaux, *supra* note 163, at 1156 (describing the "most popular" view that the First Amendment's limitation to Congress "was an unaccountable slip of the pen by the Founding Fathers, and that no meaning could be attached to it"); *see also* AMAR, *supra* note 12, at 316; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1240 n.60 (1995) ("The First Amendment explicitly limits only Congress, not other branches of the federal government, yet it has been understood to restrict the executive and judicial branches as well."); *cf.* Amar & Katyal, *supra* note 38, at 706 ("[Despite its textual limitation to 'Congress'], the Speech or Debate Clause . . . is best read not to bar analogous immunities of coordinate branches but rather, if anything, to invite them. And the same holds true . . . for its companion, the Article I, Section 6 Arrest Clause.").

168. *See* GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 42-43 (2004) ("Modern law, of course, applies the First Amendment to the President, the courts, and the states, and *a fortiori* to the federal treaty-making authority, but that is a textually indefensible maneuver. To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation. . . . [T]he First Amendment by its terms does not apply to executive and judicial action.").

169. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (analyzing nude dancing as "speech").

170. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 161 (1973) (Douglas, J., concurring) ("TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of 'press' as used in the First Amendment . . ."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

171. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding that a refusal to declare a belief in God is a form of religious expression protected by the First Amendment); *Davis v. Beason*, 133 U.S. 333, 342 (1890) (holding that "religion" in the First Amendment refers only to one's belief in a deity, rather than the "cultus or form of worship of a particular sect."); *cf. Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion) (holding that defendant's system of beliefs, which did not recognize a deity qualified as a "religion" or its functional equivalent under the selective service statute); *United States v. Seeger*, 380 U.S. 163, 187-88 (1965) (holding that defendant's belief in "some power manifest in nature" was sufficiently analogous to belief in a Supreme Being to qualify as a religion under the selective service statute).

172. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."); *see* Denbeaux, *supra* note 163.

to treat this most determinate word of the First Amendment as if it were an inkblot.¹⁷³

And this hysterical blindness is doubly strange because this unique *textual* feature of the First Amendment explains and justifies the unique *doctrine* of First Amendment judicial review. After applying this new model of judicial review, the relationship between the text and the doctrine becomes clear. The key to these doctrinal riddles is to be found in the subject of the First Amendment.

Again, the answer to the *who* question is Congress. And the answer to the *when* question follows. If Congress violates the First Amendment by making an overbroad law abridging speech, then it must be that Congress violates the First Amendment *when it makes the law*. The *who* is Congress. The *when* is the moment that Congress makes the law.

Such a constitutional violation has nothing to do with the application of the law to any particular person. The violation is complete before the law is applied at all. A First Amendment freedom-of-speech challenge cannot be an “as-applied” or “as-executed” challenge to executive action; it must be a “facial challenge”—that is, a challenge to *legislative action*. The alleged constitutional violation must be visible on the face of the statute: *lex ipsa loquitur*.¹⁷⁴ And the claimed remedy is a declaration that the product of the legislative action—the “law”—is not law at all.¹⁷⁵

So there is nothing anomalous about allowing someone to complain about such a “law,” even though some different statute could have been written to forbid his particular conduct. As Henry Monaghan was the first to realize, overbreadth is not rightly understood as an odd exception to third-party standing doctrine. Rather, it is a first-party claim that the “law” on which the other side relies is not law at all.¹⁷⁶ Monaghan puts this point in terms of

173. Cf. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 248-49 (1987) (statement of Judge Robert H. Bork) (comparing the Ninth Amendment to an indecipherable “ink blot”).

174. Cf. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”).

175. See sources cited *supra* notes 141 & 143.

176. See Monaghan, *supra* note 71, at 4 (“[A]n overbreadth litigant [does not] invoke the rights of third parties; as ‘a theoretical matter the [overbreadth] claimant is asserting his own right not to be burdened by an unconstitutional rule of law, though naturally the claim is not one which depends on the privileged character of his own conduct.’” (quoting Harvard Note, *supra* note 131, at 848)); see also Dorf, *supra* note 71, at 242-49 (discussing additional justifications for the valid rule requirement); Fletcher, *supra* note 134, at 244 (“Someone who makes an overbreadth challenge to a statute . . . is not directly asserting [an] other person’s rights to engage in protected conduct; rather, she is asserting her right to be free from control by an invalid statute.”); Isserles, *supra* note 74, at 367 (“One difficulty with the third-party standing bar is its apparent inconsistency with a litigant’s right to be judged in

“rights,” positing a personal “right to be free from being burdened by an unconstitutional rule.”¹⁷⁷ But the point is better understood in terms of legislative powers.¹⁷⁸ The First Amendment forbids Congress from making certain laws. If Congress violates the prohibition, then the resulting “law” was not made “in pursuance” of the Constitution and so is not supreme law of the land.¹⁷⁹

Consider the Court’s definitive explanation of overbreadth, viewed through this new lens:

[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on *overly broad statutes* with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’ Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that *the statute’s very existence* may cause others not before the court to refrain from constitutionally protected speech or expression.¹⁸⁰

The Court got off on the wrong foot by speaking of “attacks on overly broad *statutes*” rather than attacks on *actions* (or “Acts”) of Congress.¹⁸¹ So it obscured the all-important *who* question. But nevertheless, the Court dances tantalizingly close to the subject of the First Amendment with its *rationale* for overbreadth doctrine—which it frames, tentatively and self-consciously, as a

accordance with a constitutionally valid rule of law. Thus, the overbreadth challenger might claim that he or she is asserting a personal right to be free from prosecution because an overbroad law that permits some unconstitutional applications *cannot be enforced against anyone*.” (emphasis added)).

177. Monaghan, *supra* note 71, at 9.

178. See Dorf, *supra* note 71, at 248 (“The Constitution does not create, in so many words, an individual right to be judged only by a constitutional law. But the Constitution certainly forbids a court from enforcing an unconstitutional law.”).

179. See U.S. CONST. art. VI; sources cited *supra* notes 141 & 143.

180. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citation omitted) (emphasis added); see also *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (“It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.” (citations and footnotes omitted)); sources cited *supra* note 150.

181. Of course, *Broadrick v. Oklahoma* is a state case, but for ease of exposition this Subpart focuses on federal First Amendment cases. The subjects of the Fourteenth Amendment and incorporation of the Bill of Rights will be discussed in the sequel, *The Objects of the Constitution*.

“judicial prediction or assumption.”¹⁸² According to the Court, overbreadth doctrine is justifiable because, in this context, “*the statute’s very existence* may cause others not before the court to refrain from constitutionally protected speech or expression.”¹⁸³ Exactly so, but this is no mere “judicial prediction or assumption.” To the contrary, this is the prediction and assumption *of the Constitution itself*. The First Amendment is written as it is—with active voice and congressional subject—*precisely to make the very “mak[ing]” of such “laws” into constitutional violations and the “very existence” of such “laws” into cognizable constitutional harms.*

In short, unique First Amendment overbreadth doctrine follows from unique First Amendment text and grammar. The key to overbreadth is the subject of the First Amendment.

B. Taxpayer Standing

Standing doctrine under the Establishment Clause of the First Amendment raises a parallel set of riddles, though the parallel has gone unnoticed. “As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing.”¹⁸⁴ The reasons given for this rule are powerful, sounding in separation of powers. “[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”¹⁸⁵ And “[b]ecause the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing ‘would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.’”¹⁸⁶

But, despite these weighty separation-of-powers principles, the Court has created a special exception, applicable to one clause only. Under current doctrine, a taxpayer-plaintiff may, under some circumstances, challenge an

182. *Broadrick*, 413 U.S. at 612.

183. *Id.*

184. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality opinion); *see also* *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (“[A taxpayer’s] interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”).

185. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

186. *Hein*, 551 U.S. at 600 (plurality opinion) (citing *Mellon*, 262 U.S. at 489).

action (or “Act”) of Congress (but not an action of the executive branch¹⁸⁷) in alleged violation of one particular clause: the Establishment Clause of the First Amendment.¹⁸⁸

Again, the question is why. Why does taxpayer standing offend separation-of-powers principles in every context except the Establishment Clause? And why is this exception limited to challenging congressional action and not executive action? As a descriptive matter, one might simply say that *Flast v. Cohen* liberalized taxpayer standing, and then subsequent cases limited *Flast* to its particular context,¹⁸⁹ which happened to be challenges to congressional action under the Establishment Clause. But is this a mere accident of doctrinal evolution? Or is there a reason, rooted in constitutional text and structure, why a broader conception of standing is appropriate in the Establishment Clause context and not in other contexts?

The riddle of Establishment Clause taxpayer standing is precisely parallel to the riddle of Speech Clause overbreadth. Here, again, is an important jurisdictional doctrine, ostensibly rooted in separation of powers—and an exception, which applies to one clause only. And here, too, no one has thought to draw a connection between this *doctrinal* exception and the exceptional *grammar* of the First Amendment.

Ninth Circuit Judge William Fletcher has argued that “a plaintiff’s standing to enforce a constitutional right must depend on the nature of the underlying right.”¹⁹⁰ Exactly so. But to understand the nature of the underlying right, one must know *who* is capable of violating it. And Judge Fletcher is correct that “whether taxpayer standing should be permitted . . . can be answered only by reference to the meaning and purposes of the particular clause at issue.”¹⁹¹ But

187. *Id.* at 604 (“*Flast* ‘limited taxpayer standing to challenges directed only [at] exercises of congressional power’ under the Taxing and Spending Clause.” (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982)); *cf. id.* at 608-09 (“In short, this case falls outside the narrow exception that *Flast* created to the general rule against taxpayer standing established in [*Mellon*]. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents’ lawsuit is not directed at an exercise of congressional power and thus lacks the requisite logical nexus between taxpayer status and the type of legislative enactment attacked.” (internal citations omitted))).

188. *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968).

189. See *Hein*, 551 U.S. at 608-09 (no taxpayer standing to challenge Executive Branch discretionary spending as violating the Establishment Clause); *id.* at 609-10 (“[N]o taxpayer standing to sue under Free Exercise Clause of First Amendment” (characterizing *Tilton v. Richardson*, 403 U.S. 672, 689 (1971))); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-44 (2006) (no taxpayer standing to sue under Commerce Clause); *Valley Forge*, 454 U.S. at 479-82 (no taxpayer standing to challenge Executive Branch action taken pursuant to Property Clause of Art. IV); *Schlesinger v. Reservists Comm.*, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Art. I); *United States v. Richardson*, 418 U.S. 166, 175 (1974) (no taxpayer standing to sue under Statement and Account Clause of Art. I).

190. Fletcher, *supra* note 134, at 266.

191. *Id.* at 270.

to understand the meaning and purposes of the clause at issue, one must first identify its subject.

Again, the First Amendment, unlike the rest of the Bill of Rights, is written in the active voice. It includes both the Free Speech Clause and the Establishment Clause—and the two clauses share a subject. The Establishment Clause provides: “Congress shall make no law respecting an establishment of religion.” The subject, once again, is “Congress.” So when one asks the first question of Establishment Clause judicial review—*who has allegedly violated the Establishment Clause?*—there is only one possible answer. The *who* must be Congress. And the *when* must be the moment that Congress makes a law respecting an establishment of religion.

And suddenly the impulse behind the taxpayer-standing exception becomes clear. Here, as in overbreadth, the *who* and *when* suggest that the constitutional harm does not inhere in the *enforcement* of the law against someone in particular; it inheres in the *enactment* of such a statute. Indeed, just as the Free Speech Clause is offended by the “very existence” of a statute abridging free speech,¹⁹² the Court has said that the Establishment Clause is offended by the *mere appearance* that Congress has endorsed a religion.¹⁹³ If Congress, by law, appropriates money to build a national church, it is not the making of the *church* that violates the Constitution; it is the making of the *law*. A challenge under the Establishment Clause must be “facial” in the sense that the establishment must be visible on the face of the statute. (Indeed, it is no coincidence that Justice White coined the phrase “facial challenge” in a seminal Establishment Clause case.¹⁹⁴) And so, at least on Judge Fletcher’s view, to justify standing, one should not need to allege that one is offended by *seeing the church*; after all, one sees churches every day, and there is no constitutional

192. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

193. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O’Connor, J., concurring) (“A government *statement* ‘that religion or a particular religious belief is favored or preferred’ violates the prohibition against establishment of religion because such ‘[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” (alteration in original) (emphasis added) (citations omitted) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring))); *Allegheny*, 492 U.S. at 597 (plurality opinion) (“[W]hen evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether ‘the challenged governmental action is sufficiently likely to be *perceived* by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’” (emphasis added) (quoting *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985))); *id.* at 593-94 (majority opinion) (“The [Establishment] Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief” (emphasis added)).

194. *Lemon v. Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., concurring) (“Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment”).

harm in that. Congress violates the First Amendment not by making the church but by making the law. The violation is complete before the first brick is laid. On Judge Fletcher's view, perhaps one need allege only that one is offended by *reading the law*.¹⁹⁵

The Court came tantalizingly close to seeing all this just two terms ago, in its most recent taxpayer-standing case. In *Hein v. Freedom from Religion Foundation*,¹⁹⁶ taxpayers sought to challenge certain executive expenditures as inconsistent with the Establishment Clause, but the Court held that the *Flast* exception did not apply in such circumstances. Taxpayers may have standing, the Court held, to challenge actions (or "Acts") of Congress under the Establishment Clause, but they do not have standing to challenge actions of the executive.¹⁹⁷

A majority of the Court found this distinction implausible. Justice Scalia, concurring, branded it "utterly meaningless,"¹⁹⁸ and "disingenuous,"¹⁹⁹ and he lambasted the plurality for "offer[ing] no intellectual justification"²⁰⁰ for it. Likewise, Justice Souter, in dissent, saw "no basis for this distinction in either logic or precedent."²⁰¹

But, of course, it should now be clear that there is a basis for this distinction in constitutional *text*. The First Amendment, unlike the rest of the Bill of Rights, is written in the active voice, with a clear subject. Once again, it says: "*Congress* shall make no law respecting an establishment of religion."²⁰² If Congress makes such a law, then Congress has violated the First Amendment. The violation is complete when the law is made. So perhaps one could say, in terms of current doctrine, that the "injury in fact" to the taxpayer

195. See Fletcher, *supra* note 134, at 228 ("Mrs. Flast's interest in the dispute was not markedly different from that of most of the rest of the population . . . Yet the Court granted standing because it sensed, without being able to articulate it fully, that a broad grant of standing was an appropriate mechanism to implement the establishment clause interest at stake.").

196. 551 U.S. 587 (2007).

197. *Id.* at 608-09 (plurality opinion); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) (denying taxpayer standing because "the source of the[] complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property. *Flast* limited taxpayer standing to challenges directed 'only [at] exercises of congressional power.'" (second alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968))); *Flast*, 392 U.S. at 102 ("[A] taxpayer will be a proper party to allege the unconstitutionality only of *exercises of congressional power* under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the *administration* of an essentially regulatory statute." (emphases added)).

198. *Hein*, 551 U.S. at 618 (Scalia, J., concurring).

199. *Id.* at 633.

200. *Id.* at 628.

201. *Id.* at 637 (Souter, J., dissenting); cf. Fletcher, *supra* note 134, at 268 (finding the same distinction, drawn in *Valley Forge*, 454 U.S. at 479, to be "[nothing] more than an intellectually disingenuous way to undercut *Flast* and to return to the status quo ante").

202. U.S. CONST. amend. I (emphasis added).

(indeed, perhaps, the “injury in fact” to any citizen²⁰³) is complete as soon as he reads the statute.

But, as the Court senses, it does not follow that a taxpayer can challenge *executive* action under the Establishment Clause. The Court’s instinct is sound, but here again, as in the overbreadth context, the Court has created analytical confusion by putting the point in terms of a jurisdictional doctrine, here taxpayer standing; having read the subject of the First Amendment out of substantive constitutional law,²⁰⁴ the Court reads it back in as a jurisdictional exception.²⁰⁵ The point is better understood as a substantive one, as is clear from the Court’s parade-of-horribles argument. If standing were allowed in cases like this one, the Court worries, that rule “would effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer . . . [who] would enlist the federal courts to superintend . . . the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials.”²⁰⁶ Quite so. But this parade of horrors rings hollow as a *jurisdictional* argument. After all, if such suits are frivolous, they can be dismissed just as quickly for failure to state a claim as for lack of jurisdiction; and, on the other hand, if these “myriad daily activities” of the executive branch actually do violate the Constitution, why shouldn’t they be subject to judicial review?

The parade of horrors rings hollow as a *jurisdictional* argument, but it meshes perfectly with a *substantive* argument grounded in constitutional text. The First Amendment provides that “Congress shall make no law respecting an establishment of religion.”²⁰⁷ The “myriad daily activities” of the executive branch *cannot* violate the Establishment Clause *on the merits*—for the simple reason that *the executive branch is not the subject of the First Amendment*.²⁰⁸

This would be a fine LSAT question if it weren’t so easy. (A) The President violates the Establishment Clause by mentioning God in his State of

203. See *Flast v. Cohen*, 392 U.S. 83, 115-16 (1968) (Fortas, J., concurring) (“Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer’s status, would be acceptable as a basis for this challenge.”); Fletcher, *supra* note 134, at 269 (“I would prefer to read the establishment clause as protecting all members of our society, not merely taxpayers, from excessive entanglement of church and state. . . . [A] member of the society should not have to show that he pays federal taxes to invoke judicial enforcement of the clause.”).

204. See *supra* note 166.

205. Cf. Fletcher, *supra* note 134, at 223-24 (“[S]tanding should simply be a question on the merits of plaintiff’s claim. . . . If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it.”).

206. *Hein*, 551 U.S. at 610-12 (plurality opinion).

207. U.S. CONST. amend. I.

208. See also *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (finding nonjusticiable a First Amendment challenge to executive action—U.S. Army surveillance—for fear that such cases “would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action”).

the Union. (B) The Marshal of the Supreme Court violates the Establishment Clause by declaiming “God save the United States and this Honorable Court.” (C) Massachusetts violates the Establishment Clause by establishing Congregationalism as a state religion.²⁰⁹ (D) None of the above. A poor reader might get tripped up by the religious *predicates* in each case, but a good grammarian needs look no further than the *subject*.

It is startling that none of the Justices make this textual point in *Hein*, even though it maps so neatly onto the doctrinal distinction between legislative and executive action on which the case turns. And this oversight is doubly startling since one of the Court’s leading textualists, Justice Alito, wrote the plurality, and another, Justice Scalia, wrote the concurrence. Indeed, it is triply startling to realize that not once in this case—not in Justice Alito’s plurality, not in Justice Kennedy’s concurrence, not in Justice Scalia’s concurrence, not in Justice Souter’s dissent—not once did any Justice quote the words of the First Amendment. In the combined thirty pages of opinions—all concerning a new doctrinal distinction between legislative and executive action under the Establishment Clause—not once does one find the words: “Congress shall make no law respecting an establishment of religion.”

To be sure, the subject of the First Amendment does not *necessarily* justify the result in *Flast*. One could believe that Article III requires an “injury in fact” beyond that alleged in *Flast*, even after conceding that Congress had violated the First Amendment in the case. But Judge Fletcher has shown how difficult it is to derive a standard of “injury in fact” from anything other than the substantive clause at issue.²¹⁰ And in any case, regardless of one’s view on the *Flast* question, the subject of the First Amendment does provide a complete explanation for the result in *Hein*: taxpayers should not be able to challenge executive action under the Establishment Clause, quite regardless of standing.

209. Cf. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (holding that the first eight amendments do not bind state actors); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-33 (1998) (explaining that the Framers intended the Establishment Clause to prevent not only the federal establishment of religion, but the federal disestablishment of existing religious establishments in many of the states, like Congregationalism in Massachusetts).

210. See Fletcher, *supra* note 134, at 233 (“[I]t impedes rather than assists analysis to insist that ‘case or controversy’ under Article III requires as a minimum threshold an ‘injury in fact’ . . . or a ‘distinct and palpable injury’ If such a requirement of injury is a constitutional minimum that Congress cannot remove by statute, the Court is either insisting on something that can have no meaning beyond a requirement that plaintiff be truthful about the injury she is claiming to suffer, or the Court is *sub silentio* inserting into its ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury that Congress is forbidden to change.”); *id.* (“[Nature and degree of injury] must be seen as part of the question of the nature and scope of the substantive legal right on which plaintiff relies.”); see also Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 188-89 (1992) (“In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts.” (footnote omitted)).

Hein would have been a far easier case if the Court began with the text of the Establishment Clause—and attended, first and foremost, to its *subject*.

C. The Scope of First Amendment Rights

Thus far, this Part has shown how this new model of judicial review can make sense of several exceptional First Amendment jurisdictional doctrines. But the implications of this model extend far beyond matters of jurisdiction. As has been shown, the subjects of the Constitution determine the structure of judicial review. And the structure of judicial review, in turn, has profound feedback effects on the scope of substantive constitutional rights.²¹¹

To take this next step, consider yet another clause of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²¹² One of the most controversial questions about the substantive scope of the Free Exercise Clause is whether it requires a religious exemption from generally applicable laws. For example, can Congress forbid all use of peyote, or does the Free Exercise Clause require that religiously inspired use of peyote be exempted?

In *Employment Division v. Smith*, the Supreme Court, per Justice Scalia, held that the Free Exercise Clause does not require a religious exemption from generally applicable laws.²¹³ But this holding was quite controversial. It

211. Richard Fallon came closest to seeing this point in his superb article, Fallon, *As-Applied and Facial Challenges*, *supra* note 83, at 1324 (“[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity.” (emphasis omitted)). He is the only one to fully grasp that the “facial”/“as-applied” dichotomy is inextricably linked to substantive doctrinal tests. But, as a doctrinalist, he starts with substantive constitutional doctrine, which he takes as given, and from there he attempts to derive guidelines for the “facial”/“as-applied” dichotomy. The model presented here starts one step earlier, with constitutional text and constitutional subjects. And from there, it reveals that the inferences run in the opposite direction. The text reveals the subject of each clause, legislative or executive, which inherently determines the “facial” or “as-applied” structure of judicial review. And that structure, in turn, powerfully informs the proper substantive doctrinal test.

212. U.S. CONST. amend. I (emphasis added).

213. 494 U.S. 872, 878-79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”). Some commentators have read the Court’s opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as modifying the *Smith* rule to permit invalidation of facially neutral laws based on legislative history and extrinsic evidence of invidious religious motivation. See, e.g., Stephen L. Carter, Comment, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 128-29 (1993). But *Lukumi* is better read merely to apply, rather than amend, the general rule of *Smith*. See *Lukumi*, 508 U.S. at 557-59 (Scalia, J., concurring); R. Ted Cruz, Recent Development, *Animal Sacrifice and Equal Protection Free Exercise*: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 17 HARV. J.L. & PUB. POL’Y 262, 263 (1994) (“Rather than modifying or abandoning *Smith*, the Court utilized the *Smith* test to strike down the laws as violative of free exercise.”); cf. Laurence H. Tribe, *supra* note 84 (“[I]f a government-

garnered only five votes at the time,²¹⁴ and some Justices seem inclined to overrule it.²¹⁵ It also prompted emphatic protests both in the academy and in Congress. Professor Michael McConnell wrote an acclaimed article in the *Harvard Law Review* arguing that Justice Scalia's own originalism should have led him to the opposite conclusion.²¹⁶ Meanwhile, Congress set about trying to write a law that would reverse the Court's holding²¹⁷—a statute that was, itself, later struck down, in large part, by the Supreme Court.²¹⁸ The issue remains a controversial one to this day.

In the majority and dissenting opinions, and in McConnell's seminal article and countless other articles on this question, and in congressional debates over the legislative response, this fundamental issue of Free Exercise law received an unusually thorough airing. Constitutional precedents were parsed and

enacted rule of conduct is constitutionally inoffensive both on its face and as applied to the particular individual challenging it, the fact that the rule would not have been promulgated (or the practice put in place) but for the enacting body's desire to achieve a constitutionally forbidden result tells us nothing more than that the government body engaged in an unsuccessful attempt to violate the Constitution. So too, the fact that the rule would not have been promulgated or the practice established but for the enacting body's consideration of a factor the Constitution tells it never to consider—if there are such factors—hardly suffices to render the rule of conduct promulgated, or the practice put in place, constitutionally void.” (emphasis omitted) (footnote omitted)).

214. Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined Justice Scalia's majority opinion. *Smith*, 494 U.S. at 873. Justice O'Connor concurred in the judgment, but expressly disputed the principle relied upon by the majority. *Id.* at 893 (O'Connor, J., concurring) (“Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.”).

215. See *City of Boerne v. Flores*, 521 U.S. 507, 544-45 (1997) (O'Connor, J., dissenting) (“I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there.”); *id.* at 566 (Breyer, J., dissenting) (“I agree with Justice O'Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided”); *Lukumi*, 508 U.S. at 559 (Souter, J., concurring) (“I have doubts about whether the *Smith* rule merits adherence.”).

216. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 (1990); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111, 1116-19 (1990) (decrying *Smith*'s lack of attention to history and outlining an originalist argument against *Smith*); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 185-86 (1992) (outlining a historical argument against *Smith*). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (offering a point-by-point response to McConnell's arguments and proposing an originalist justification for *Smith*).

217. The result was the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne*, 521 U.S. 507; see also *id.* § 2(b), 107 Stat. at 1488 (“The purposes of this Act are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened”).

218. *City of Boerne*, 521 U.S. 507.

repared. Constitutional history was examined with uncommon meticulousness. But the most powerful argument received almost²¹⁹ no attention whatsoever. It is a simple argument, based on constitutional text. And it begins, of course, with the *subject* of the First Amendment.

Justice Scalia, avowed originalist,²²⁰ began by analyzing “[a]s a textual matter,”²²¹ what constitutes “prohibiting the free exercise [of religion].”²²² By framing the question this way, and quoting the predicate without the subject, he skipped over the *who* question altogether.²²³ But in this model of judicial review, the first step is to determine who has allegedly violated the Free Exercise Clause. To stylize—and federalize (bracketing issues of incorporation)—the facts of *Employment Division v. Smith*: Congress passes a statute banning the use of peyote, and the President enforces the law against someone using peyote in a religious ceremony. Two governmental actors have acted: Congress and the President. The defendant claims that his Free Exercise rights have been violated. The first question that the Court should ask is: *who has allegedly violated the Free Exercise Clause?*

The defendant’s first instinct would be to hedge and to say that he “challenges the statute as-applied,”²²⁴ if only because this is the Court’s preferred formula.²²⁵ As discussed, above, this euphemistic formulation deliberately obscures the *who* question by positing a challenge to an inanimate *statute* rather than a challenge to a governmental *action*. And to the extent that this euphemism does imply anything about the *who* question, it points in both directions at once. To say that he challenges “the statute” may sound like a polite way of saying that he challenges the action (or “Act”) of Congress in making the law that banned peyote. But the words “as-applied,” seem to point

219. See AMAR, *supra* note 209, at 255; Bybee, *supra* note 163; Harrison, *supra* note 163, at 169-74.

220. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . .”).

221. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

222. *Id.* (alteration in original) (internal quotation marks omitted).

223. In fairness to Justice Scalia, *Smith* was a state case. It did not concern the First Amendment directly, but rather First Amendment rights incorporated against the states through the Fourteenth Amendment. Incorporation greatly complicates the *who* question, as will be discussed at length in the sequel to this Article, *The Objects of the Constitution*. For ease of exposition, however, the rest of this Subpart will use a stylized hypothetical based on *Smith*—but the hypothetical is a *federal* law and a *direct* application of the Free Exercise Clause.

224. *Cf. Smith*, 494 U.S. at 878 (“Respondents in the present case . . . contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional *as applied* to those who use the drug for other reasons.” (emphasis added)).

225. See cases cited *supra* note 72 and accompanying text.

in the other direction, suggesting that somehow the application, or execution, of the statute *against him* is the problem—and thus, that the *President*, who executed it, is the constitutional culprit. Which is it? Who has violated the Free Exercise Clause? The defendant understandably favors a formulation that points, vaguely, in both directions.

When pressed, perhaps, the defendant would say that the President violated the Free Exercise Clause by arresting and prosecuting him. He was in the middle of a religious ceremony, and the FBI burst in and arrested him, precisely because he was doing something that his religion requires. It certainly seems plausible—indeed, it seems irrefutable—that the FBI's actions prohibited the free exercise of his religion.

But, of course, this answer to the *who* question is untenable. Again, the First Amendment is written in the active voice and it has just one subject, shared by all its clauses. It says: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²²⁶ The predicate is “mak[ing a] law.” And the subject is “Congress.” As a matter of grammar and logic, the President (and his FBI agents) cannot violate this clause. So Congress must be the answer to the *who* question. If the Free Exercise Clause has been violated, it must be that Congress has violated it.

The answer to the second question—*when?*—is equally easy, and it follows directly from the first. If Congress violates the Free Exercise Clause by making a law prohibiting the free exercise of religion, then it must be that the violation happens *when Congress makes such a law*. All this should be familiar from the discussion above; the answers to the *who* and *when* questions are the same for Free Exercise as for Free Speech and Establishment—because, of course, all these clauses share a subject.

But these answers are quite awkward for the peyote defendant. He must say, in answer to *who*, that *Congress* prohibited the free exercise of religion. He must say, in answer to *when*, that Congress violated the Constitution *on the day that it made the law at issue*—long before he used peyote in this particular religious ceremony, and perhaps before he used peyote at all, or even before he joined this religion.²²⁷ *There can be no “as-applied” challenge under the Free Exercise Clause*, because application of the statute occurs long after the alleged constitutional violation is complete. When pressed on the *who* question, he must lay the blame squarely at the feet of Congress and level a very serious charge. He must say that congressmen violated their oath to support the Constitution by voting for this law. And he must say that Congress as a whole “prohibit[ed] the free exercise [of religion]”²²⁸ on that day.

226. U.S. CONST. amend. I (emphasis added).

227. See AMAR, *supra* note 209, at 255 (“The . . . First Amendment text speaks of the moment when ‘Congress’ ‘make[s]’ a ‘law,’ a moment when the religious practice may not even exist.” (alteration in original)).

228. See U.S. CONST. amend. I.

But how odd these charges seem when leveled at a law *that says nothing about religion*. Recall that the hypothetical law Congress made is entirely general, and religion-neutral: *No one may use peyote*. Can one really say that congressmen violate their oath by voting for such a law and that Congress violates the First Amendment by passing it? After all, the text of the statute gives no notice that it implicates religion in any way. If Congress violates the Free Exercise Clause by making a religion-neutral law, merely because some religion somewhere has—or might someday have—a practice that would violate the law, then Congress has violated the Free Exercise Clause almost every day since 1791, by making “civic obligations of almost every conceivable kind.”²²⁹

This cannot be the constitutional rule. If Congress is to bear the constitutional blame, then it must be that Congress can, in theory, avoid the blame. It must be, in other words, that a conscientious congressman can identify a Free Exercise violation at the moment Congress makes the law. But at that moment, there are no enforcement facts. No one has been arrested for using peyote in a religious ceremony. At that moment, there is only the naked text of the statute. And thus, it must be that any Free Exercise violation is visible *on the face of the statute*. A conscientious congressman who does not want to violate the First Amendment must carefully scrutinize any statute that says “religion,” or “worship,” or “church,” or “prayer,” or any other words that may signify a legal distinction based on religion.²³⁰ But it cannot be that he violates his oath when he votes for a law with no such words, merely because it turns out that the behavior regulated has religious significance for someone somewhere.²³¹

229. *Smith*, 494 U.S. at 888.

230. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 819 (1999) (“The First Amendment’s first addressee—its first word—is Congress, and its initial directive is to that body to ‘make no law.’ A Congress attempting to regulate religion as such—either openly or furtively—is obviously aware of what it is doing, and the First Amendment speaks to it and says no: ‘Congress, Make No Law!’”).

231. See Hamburger, *supra* note 216, at 937-38 (“[M]any Americans, especially dissenters seeking an expansion of religious liberty, repeatedly spoke of civil authority as if it could be differentiated from the scope of religion or religious freedom. This assumption is apparent in the language of the First Amendment, which begins, ‘Congress shall make no law.’ Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, *the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise*.” (emphasis added) (footnotes omitted)); see also AMAR, *supra* note 209, at 255; Amar, *supra* note 230, at 819-20 (“[A] Congress passing a sincerely secular law pursuant to its legitimate enumerated powers might not even be aware that the law might adversely affect some religious group somewhere of whose practices it is ignorant, or of whose existence it is wholly unaware. (Indeed, the group or the religious practice may not yet exist.) And so there is an obvious difference, under the Necessary and Proper Clause and the interlocking First Amendment, between a law banning a despised religion by name (or through some clever sham), and a law banning the importation of an item that some religious group (unbeknownst to Congress) deems important to its religious life.”); Harrison, *supra* note 163, at 169-74; cf. Bybee, *supra*

Part III.A argued that the Court's distinction between "as-applied challenges to statutes" and "facial challenges to statutes" is muddled precisely because it obfuscates the all-important *who* question; the distinction the Court is grasping for is the distinction between challenges to legislative action and challenges to executive action. This discussion of the Free Exercise Clause illustrates the point. What the Court styles "as-applied challenges to statutes" are simply challenges to executive action—at the federal level, actions of the President. But this sort of challenge should be unavailable under the Free Exercise Clause, simply because the President is not its subject. Congress is the subject of the Clause and only Congress can violate it. What the Court calls a "facial challenge to a statute" is simply a challenge to legislative action—for example a claim that an action (or "Act") of Congress prohibits the free exercise of religion. *So a challenge under the Free Exercise Clause should always be "facial," not "as-applied."*

The phrase "facial challenge to a statute," is unfortunate, because it posits a challenge to an inanimate statute rather than a challenge to an action of a particular governmental actor, but one word points in the right direction. The challenge is "facial," in the important sense that, when one challenges legislative action, the constitutional violation must be visible on the face of the law. In this sort of challenge, *lex ipsa loquitur*: the law must speak for itself.

And that is precisely the holding of *Employment Division v. Smith*. If Congress makes a law that uses religious words—"religion," "worship," "church," "prayer," etc.—such a law, *on its face*, implicates the Free Exercise Clause. The words invite First Amendment scrutiny, because they may restrict religious beliefs or practices "as such."²³² But a law that uses no such words—a law that is "neutral, generally applicable"²³³ and "not specifically directed at . . . religious practice"²³⁴—does not, *on its face*, prohibit the Free Exercise of religion.

Thus, focusing on the subject of the First Amendment does not merely explain anomalous jurisdictional doctrines like overbreadth and taxpayer standing. It also resolves crucial and contested questions of substantive constitutional law, like the scope of the right to free exercise of religion.

D. *The First Amendment as a Whole*

This Part has applied a new model of judicial review to the First Amendment. It has shown how focusing on the subject of the Amendment—and thus the *who* and *when* of its violation—helps make sense of mysterious jurisdictional doctrines like overbreadth and taxpayer standing, as well as

note 163.

232. *Smith*, 494 U.S. at 877 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

233. *Id.* at 881.

234. *Id.* at 878.

controversial substantive issues like the scope of the right to free exercise. This Part has proceeded piecemeal, clause by clause. But this model also suggests a more holistic approach to the First Amendment.²³⁵

The First Amendment has six clauses, but they all share a single subject: the first word, “Congress,” serves as the subject for all six. The clauses are linked, perhaps, by their concern with matters of freedom of conscience. And they are linked, too, by the Founding presumption that these were all subjects over which Congress lacked enumerated power.²³⁶ But perhaps they are, therefore, linked in other ways as well. Perhaps their shared subject should imply parallel doctrines, both jurisdictional and substantive.

This Part has already drawn the parallel between overbreadth and taxpayer standing—ostensible exceptions to fundamental jurisdictional doctrines, each applicable to one First Amendment clause only. Perhaps these doctrines could be unified and harmonized into a general principle of liberalized standing (and ripeness²³⁷) requirements for challenges to legislative action.

Likewise, Part IV showed that Free Exercise challenges must be challenges to actions (or “Acts”) of Congress, and so they must be “facial” in the sense that religion must be visible on the face of the statute; enacting a religion-neutral statute cannot violate the clause. This same principle applies to the Press Clause,²³⁸ as it should. But Justice Scalia²³⁹ and Judge Easterbrook²⁴⁰

235. On reading the Constitution holistically, see AMAR, *supra* note, at xi-xii (discussing the pitfalls of interpreting constitutional provisions in isolation); Akhil Reed Amar, Heller, HLR, and Holistic Legal Reasoning, 122 HARV. L. REV. 145, 174 (2008) (“[T]he key is to read the Constitution in a holistic fashion”); Amar, *Intratextualism*, *supra* note, at 796 (“Of course, a holistic textualism also calls for special skill, seeing and showing how different clauses cohere into larger patterns of constitutional meaning, and those more familiar with the document itself will be advantaged.”); see also Burt Neuborne, “The House Was Quiet and the World Was Calm, The Reader Became the Book,” 57 VAND. L. REV. 2007, 2073 (2004) (“Reading the Bill of Rights holistically as you would a great poem does not eliminate hard cases. It does, however, direct a judicial reader to a confrontation with the text in ways that are deeper and more likely to generate coherence than other competing ways to read the document. We owe the text the effort.”).

236. See AMAR, *supra* note, at 38-41.

237. See *supra* note 129. But see *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

238. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (dictum) (“[T]he States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.”); see also *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969) (rejecting a freedom of the press challenge to the application of federal antitrust laws to business arrangements between two newspaper publishers); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (suggesting in dicta that a tax directed at newspapers might not have been unconstitutional had it applied generally).

239. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring) (“When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only where the government prohibits conduct precisely because of its communicative attributes.” (internal quotation marks omitted)); *Barnes v. Glen Theatre, Inc.*,

are correct that it should also apply to the Free Speech Clause.²⁴¹ Because Free Speech challenges, like Free Exercise challenges, are challenges to actions (or “Acts”) of Congress, they too must be “facial,” in the sense that the targeting of speech “as such”²⁴² must be visible on the face of the statute—and a speech-neutral statute, like a religion-neutral statute, should not trigger scrutiny at all.²⁴³ Further, perhaps Jed Rubenfeld is correct that the same principle should apply (*contra* current doctrine²⁴⁴) to freedom of association²⁴⁵—though, of

501 U.S. 560, 577 (1991) (Scalia, J., concurring) (“Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. . . . [W]here suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons . . . we have allowed the regulation to stand.”).

240. *Weinberg v. City of Chicago*, 320 F.3d 682, 684 (7th Cir. 2003) (Easterbrook, J., dissenting) (“Whether laws regulating conduct must except expressive activities is an old question, with an established answer: no.”).

241. Under current doctrine, a speech-neutral regulation that incidentally burdens speech does receive First Amendment scrutiny, but “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). Strikingly, though, it appears that the Court has rarely if ever used the *O’Brien* test to strike down a speech-neutral law. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 n.23 (1987); see also Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 (1996) (“Given that the *O’Brien* test asks so little in principle, it should not be surprising that it means so little in practice. . . . [I]f *O’Brien* scrutiny is to remain toothless, it hardly seems worth retaining as a discrete First Amendment test.”); cf. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (“Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (“[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”).

242. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

243. See *R.A.V.*, 505 U.S. at 390 (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”).

244. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that a state public accommodations statute prohibiting discrimination on the basis of sexual orientation was unconstitutional as applied to the Boy Scouts of America because it infringed the organization’s right of expressive association, even though the statute did not discriminate on its face either against expression or among viewpoints).

245. See Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 811 (2001) (“[T]he ‘freedom of expressive association’ is implicated precisely when the state targets an association or its members because of the expression in which they seek to engage. It is not violated by a conduct law of general applicability that happens adversely to affect individuals’ ability to express their views through their associational choices.”); *id.* at 817 (“[The Court should] have seen the Boy Scouts case for what it was: a claim that people are constitutionally entitled to violate a conduct law of general applicability because they have important expressive reasons for doing so. There is no such First Amendment immunity.”).

course, this inference is less clear since the word “association” does not appear in the First Amendment.²⁴⁶ And perhaps the proper remedy in all such cases is a declaration that the law itself—not made in pursuance of the Constitution—is void.

All this is implicit in Thomas Jefferson’s explanation for pardoning those convicted under the Sedition Act: “I discharged *every person* under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a *nullity*, as absolute and as palpable as if *Congress* had ordered us *to fall down and worship a golden image . . .*.”²⁴⁷ Note, first, that Jefferson pardoned every person—regardless of what any particular person wrote, or whether any of them could have been convicted under a more narrowly tailored statute.²⁴⁸ His constitutional review was “facial” in the sense that he found the constitutional violation to be evident on the face of the statute, and so his inquiry did not turn on any subsequent facts. Second, and closely related, consider Jefferson’s remedy: since the Sedition Act was invalid on its face, he declared it “a nullity” and used his pardon power to restore, as much as possible, the state of the world before it was enacted. Third, consider the analogy that he chooses: it is “as if Congress had ordered us *to fall down and*

(emphasis omitted)).

246. See U.S. CONST. amend. I; *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The association of people is not mentioned in the Constitution nor in the Bill of Rights.”); *Piscottano v. Murphy*, 511 F.3d 247, 273-74 (2d Cir. 2007) (“[F]reedom of speech is expressly protected by the First Amendment and . . . freedom of expressive association is not . . .”); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) (“The First Amendment, while not expressly containing a ‘right of association,’ does protect ‘certain intimate human relationships,’ as well as the right to associate for the purpose of engaging in those expressive activities otherwise protected by the Constitution.”); *Republican Party v. Faulkner County, Ark.*, 49 F.3d 1289, 1292 (8th Cir. 1995) (“The right to associate is a penumbral right not expressly granted by the Constitution, but implied through the First Amendment rights to speech, petition and assembly.”); *DKT Mem’l Fund, Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 292 (D.C. Cir. 1989) (“[W]e note that freedom of association, while not expressly mentioned in the Constitution, is protected as a First Amendment right . . .”).

247. Letter from Thomas Jefferson to Mrs. Adams, *supra* note 93, at 555-56 (emphasis added).

248. See also *R.A.V.*, 505 U.S. at 391, 379-80 & n.1 (holding a hate-speech ordinance “facially unconstitutional” under the First Amendment, and reversing a conviction thereunder even though the defendant’s “conduct could have been punished under any of a number of laws,” including laws banning “terroristic threats,” and even though defendant’s expression constituted fighting words); *id.* at 385 (“The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.” (citing *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989))).

worship a golden image.”²⁴⁹ To his mind, the violation of the Speech and Press Clauses is like a violation of the Free Exercise and Establishment Clauses. The analogy is apt, since all four clauses appear in the First Amendment. And, most tellingly, Jefferson’s formulation makes clear that he understands why. His analogy—like the First Amendment itself—is written in the active voice, with a clear and explicit subject: *Congress* violated the Constitution by enacting the Sedition Act, just “as if *Congress*” had established a religion.

All of these doctrinal implications will be examined at length in a forthcoming book.²⁵⁰ For the present, it suffices to note that the subject of the First Amendment does more than resolve fundamental jurisdictional and substantive questions about each of its six clauses. It also serves as the textual hub that links all six of them. The first word of the First Amendment—“Congress”—is the subject of all six clauses. Professor Amar is no doubt correct that they all concern subjects over which, the Framers believed, Congress had no enumerated power. But perhaps, too, they are all rights against which a legislature (rather than an executive or a court²⁵¹) poses a distinctive threat.²⁵² Perhaps they are all rights that are vulnerable, somehow, to the mere “appearance” of legislative manipulation and thus to “the very existence” of an infringing law. (Executive action may pose a distinctly different sort of threat to these rights—a threat that is countered by an entirely different constitutional provision.²⁵³) To understand all six of these clauses—and the relationships

249. Letter from Thomas Jefferson to Mrs. Adams, *supra* note , at 555-56 (emphasis added).

250. NICHOLAS QUINN ROSENKRANZ, *THE SUBJECTS OF THE CONSTITUTION* (forthcoming Oxford Univ. Press 2011).

251. See *THE FEDERALIST* NO. 78 (Alexander Hamilton), *supra* note 10, at 464 (“[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter”); cf. *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812).

252. See *THE FEDERALIST* NO. 48 (James Madison), *supra* note 10, at 306 (“[I]n a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.”); James Madison, Report on the Virginia Resolutions (1800) (“[I]n the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also”), reprinted in 4 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 569-70 (Jonathan Elliott ed., 2d ed., Philadelphia, J.B. Lippincott 1876).

253. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be *faithfully* executed” (emphasis added)). The sequel to this Article will discuss the Take Care Clause at length and demonstrate that it reflects a principle of nondiscrimination (on the basis of speech and religion, among other things) in the *execution* of law.

among them—one must begin with the first word, the answer to the *who* question, the subject of the First Amendment.

V. THE SUBJECT OF THE COMMERCE CLAUSE

The conceptual confusion engendered by eliding the *who* question is on full display in the Court's modern Commerce Clause jurisprudence. Commerce Clause review was more or less moribund from 1937 to 1995, so the three cases of the modern era, which have breathed new life into the Clause, form a nice discrete set and a vivid illustration of the analytical problem.

A. “Facial” and “As-Applied” Commerce Clause Challenges

In 1990, Congress enacted the Gun-Free School Zones Act, which made it a federal offense “for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone.”²⁵⁴ Alfonso Lopez was charged with bringing a gun to a high school in San Antonio. He presented a constitutional defense, claiming that the Act “exceeded Congress’ power to legislate under the Commerce Clause.”²⁵⁵ The Court agreed and, for the first time in fifty-eight years, struck down a statute on Commerce Clause grounds. Likewise, that same year, Christy Brzonkala sued Antonio Morrison and others under the Violence Against Women Act.²⁵⁶ Morrison defended by arguing that the Act exceeded Congress’s power under the Commerce Clause. Again the Court agreed and struck down the Act.²⁵⁷

These two cases pose several puzzles. First, did the Court consider these constitutional challenges to be “facial” or “as-applied”? As discussed above, the Court is muddled about what these categories mean or why they matter, but it usually at least purports to put each constitutional challenge into one box or the other. Yet in neither *Lopez* nor *Morrison* does any opinion of any Justice describe the challenge as either “facial” or “as-applied.” Why is the Court reluctant to apply its categories in this context?

Though the Court does not say so, it is clear from the analysis that all the Justices treat both cases as “facial” challenges.²⁵⁸ In neither case does any

254. 18 U.S.C. § 922(q)(2)(A) (2006).

255. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

256. *United States v. Morrison*, 529 U.S. 598 (2000).

257. *Id.* at 627.

258. See *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (“[I]n both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress’ commerce power in its entirety.”); *id.* at 71 (2005) (Thomas, J., dissenting) (“In *Lopez* and *Morrison*, the parties asserted facial challenges, claiming ‘that a particular statute or provision fell outside Congress’ commerce power in its entirety.’” (citation omitted)); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (citing *Lopez* and *Morrison* for the proposition that “[w]hen . . . a federal statute is challenged as going beyond Congress’s enumerated powers, under our precedents the court first asks whether the statute is

Justice attach any importance to the specific way in which the act was applied. In *Lopez*, the Court scarcely pauses to consider whether Mr. Lopez or his gun had recently travelled in interstate commerce, and only by way of demonstrating that, *in general*, “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”²⁵⁹ Likewise, the Court does not stop to consider whether Mr. Morrison’s attack on Ms. Brzonkala would have an effect on interstate commerce. And it does not speculate about whether either statute could be applied constitutionally under some other circumstances, in which the specific facts bore a closer relationship to interstate commerce. Instead, the Court analyzed each of these statutes strictly “on its face.”

This solves one puzzle but poses another. If these were “facial” challenges, why were they permitted? And more to the point, why did they succeed? The Court has repeatedly expressed a strong preference for as-applied rather than facial challenges.²⁶⁰ Why did no one—not even Justice Scalia—protest that facial challenges are “disfavored”²⁶¹ and admonish that they are “most difficult . . . to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid”?²⁶² True, several members of the Court have derided this statement as dicta and selectively ignored it in other cases,²⁶³ but Justice Scalia, at least, has always been keen to imagine a single, constitutional “set of circumstances” that, in his view, dooms a facial challenge.²⁶⁴ Why, then, does he not conjure the image of a huge interstate gun sale happening in the corridor of a school? Would not such a

unconstitutional on its face” (emphasis omitted)).

259. *Lopez*, 514 U.S. at 567.

260. See cases cited *supra* note 72.

261. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008).

262. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

263. See cases cited *supra* notes -.

264. *City of Chicago v. Morales*, 527 U.S. 41, 81–82 (1999) (Scalia, J., dissenting) (“[P]etitioner . . . can defeat respondents’ facial challenge by conjuring up a *single valid application* of the law. My contribution would go something like this: Tony, a member of the Jets criminal street gang, is standing alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement—not entirely coherent, but evidently intended to be rude—‘Gee, Officer Krupke, krup you.’ A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents’ facial challenge to the ordinance’s vagueness.” (footnotes omitted)).

transaction “substantially affect” interstate commerce?²⁶⁵ Would not the statute be constitutional “as-applied” in such circumstances?²⁶⁶

No Justice has attempted to answer these questions, and only one dissent has even attempted to describe the current rule:

When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him*. When, on the other hand, a federal statute is challenged as going beyond Congress’s enumerated powers, . . . the court first asks whether the statute is unconstitutional *on its face*.²⁶⁷

This is true descriptively, but the question is why, and none of the Justices has ventured an answer.

Note the similarity to Free Speech overbreadth and Establishment Clause taxpayer standing, as discussed in Part IV. Here again is a purportedly important structural principle of judicial review, purportedly jurisdictional or quasi-jurisdictional, purportedly inspired by separation of powers: in this case, the Court’s purported preference for “as-applied” rather than “facial” challenges. And here again is an exception to the general rule, apparently applicable to one clause only, with no explanation why.

As usual, the riddle may be solved by focusing on the subject of the clause. The Commerce Clause says: “The Congress shall have power . . . To regulate commerce . . . among the several states”²⁶⁸ Like the First Amendment it is written in the active voice and it has a clear subject: Congress. (Unlike the First Amendment, the Commerce Clause is a grant of power rather than a restriction on power, so, strictly speaking, it cannot be “violated” at all; rather, Congress may *exceed its power* under the Commerce Clause and thus *violate* the Tenth Amendment.²⁶⁹) So, a Commerce Clause challenge, like a First Amendment challenge, is a challenge to an action of Congress. Congress is the subject of the claim and the answer to the *who* question. And the answer to the *when* question follows: if Congress makes a law in excess of its power under the Commerce Clause and thus violates the Tenth Amendment, the constitutional violation occurs *when Congress makes the law*.

And, as explained in Part III.A, *a claim that Congress violated the Constitution by making a law, when it made the law, is inherently a “facial”*

265. Cf. *Scarborough v. United States*, 431 U.S. 563, 575-77 (1977).

266. Cf. *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (attempting to reconcile *Lopez* and *Morrison* with *Salerno*).

267. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (citation omitted).

268. U.S. CONST. art. I, § 8, cl. 3.

269. See, e.g., *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (characterizing the Gun-Free School Zones Act of 1990 as an “intrusion on state sovereignty” that “contradicts the federal balance the Framers designed” and therefore offends the Tenth Amendment).

challenge. The specific facts of enforcement cannot matter here, for the simple reason that the constitutional violation is complete before those facts arise. It cannot matter whether Mr. Lopez's gun travelled in interstate commerce, or whether he came to school to sell it to an international cartel, because Congress violated the Constitution long before.

"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, —to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."²⁷⁰

In other words, in a Commerce Clause case, *lex ipsa loquitur*: the law speaks for itself.

In *Lopez* and *Morrison*, the Court seemed to intuit the basic point. It examined the statutes on their faces, seeming to sense, somehow, that the specific facts of execution are irrelevant to a Commerce Clause challenge. But it was unable to square this intuition with its purported preference for "as-applied" challenges or its purported standard for "facial" ones. So it adopted the correct "facial" perspective while declining to use the term or explain why.

But the point could not be finessed forever. The lower courts were baffled by this dimension of *Lopez*, with several courts continuing to entertain "as-applied" Commerce Clause challenges,²⁷¹ but at least one dissent inferring that "the Supreme Court appears . . . to have ruled out 'as applied' challenges in Commerce Clause cases."²⁷²

And just a few years later, this question was squarely before the Supreme Court when Angel Raich claimed that "enforcing the [Controlled Substances Act] against [her] would violate the Commerce Clause."²⁷³ By now it should be obvious just how analytically muddled is such a claim. Again, the Commerce Clause is a grant of power, not a restriction, so no one can "violate" it. But more importantly, consider how Ms. Raich's formulation obfuscates the *who* question. The Court's first question to her should have been: *who do you allege "violated" the Commerce Clause?*

270. *United States v. Butler*, 297 U.S. 1, 62 (1936) (emphasis added).

271. See, e.g., *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003); *United States v. Stewart*, 348 F.3d 1132, 1141 (9th Cir. 2003) (the Supreme Court has "always entertained as-applied challenges under the Commerce Clause"); *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002).

272. *McCoy*, 323 F.3d at 1133 (Trott, J., dissenting); see also John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 201 (1998) ("Most constitutional litigation is divided into facial challenges to an entire statute and individual challenges to particular applications of the statute, with the failure of the facial challenge in no way precluding a subsequent as-applied challenge. Not so in Commerce Clause cases."); Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161 (2004).

273. *Gonzales v. Raich*, 545 U.S. 1, 8 (2005).

At first, Raich's answer seems clear: "Respondents . . . do not dispute that passage of the [Controlled Substances Act] . . . was well within Congress's commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority."²⁷⁴ These sentences appear to rule out Congress as the constitutional culprit.

But next comes the all-important, incoherent hedge: "Rather, respondents' challenge is actually quite limited; they argue that *the CSA's categorical prohibition* of the manufacture and possession of marijuana *as applied* to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law *exceeds Congress' authority* under the Commerce Clause."²⁷⁵ What can this possibly mean? "[P]assage of the [Act] . . . was well within Congress's commerce power . . . [but] the [Act's] prohibition . . . as applied [by the President?] . . . exceeds Congress' authority."²⁷⁶ *Who has violated the Constitution?*

If pressed to give an answer, Ms. Raich would presumably want to say the President. Again, she claimed that "enforcing the [Controlled Substances Act] against [her] would violate the Commerce Clause." It is the President and his agents who "enforce" the Controlled Substances Act, so if such enforcement could violate the Constitution, then presumably the President would be the culprit. And of course, Ms. Raich had good reason to want to focus the Court's attention on the *enforcement* of the Act against her. A challenge to *executive* action necessarily focuses on the facts of enforcement, and Ms. Raich had extraordinarily sympathetic facts. She used marijuana for desperate medical reasons, and enforcing the Act against her seems exceptionally cruel.²⁷⁷ More to the point, it is impossible to see how *Ms. Raich's* use of marijuana could have any effect at all on interstate commerce. Just as the peyote defendant would like to focus on his enforcement facts to make out a Free Exercise claim,²⁷⁸ Ms. Raich would likewise prefer to focus on her enforcement facts to make out her Commerce Clause claim.

So, if pressed about *who* and required to state her claim in the active voice, Ms. Raich would understandably like to say: "*The President* violated the Commerce Clause." But, when stated that way, with a clear and express subject, it should be clear that the claim is doubly incoherent. First, again, the Commerce Clause is a grant of power, so no one can "violate" it. But second, and more important, it is a grant of power in the active voice, with a clear subject: "*The Congress* shall have power . . . to regulate commerce . . . among the several states" The President cannot exceed the power granted by the

274. *Id.* at 15 (citation omitted).

275. *Id.* (emphasis added).

276. *Id.*

277. *Id.* at 7 ("Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.").

278. See *supra* Part IV.C.

Commerce Clause (let alone “violate” the Commerce Clause), *because he is not the subject of the Clause*. The President cannot be the answer to the *who* question.

The answer to the *who* question must be Congress. An action (or “Act”) of Congress, like the Controlled Substances Act, may be “in pursuance”²⁷⁹ of its power to regulate interstate commerce (as Ms. Raich seems to concede²⁸⁰). Or it may be beyond this grant of power, and thus not a valid action or “Act” (as Ms. Raich contradictorily seems to insist²⁸¹). But it cannot be both. The claim must be that Congress exceeded its Commerce Clause power. Congress must be the culprit. Congress must be the answer to the *who* question.

And the answer to the *when* question follows: if Congress violated the Constitution by making the Controlled Substances Act, it did so in 1970, at the moment when it made the Act.

But notice how the proper answers to the *who* and *when* questions profoundly alter the focus of the constitutional inquiry. If Congress allegedly violated the Constitution, then the proper focus is on Congress’s action in *making* the Controlled Substances Act, not on the President’s action in enforcing it. Ms. Raich’s particular facts—her illness, her use of marijuana—may be relevant to her *standing*, but they cannot be relevant to the *merits*, because they arose long after what must be the alleged constitutional violation. Her particular plight—sympathetic as it is—cannot matter to whether Congress violated the Constitution decades before.

To see this point another way, consider the current doctrinal test: “Congress has the power to regulate activities that substantially affect interstate commerce.”²⁸² This test does not and could not mean that *any given instance* of the regulated activity must substantially affect interstate commerce; the test is whether the regulated activity *as a whole* substantially affects interstate commerce.²⁸³ In other words, the test must take the perspective of the *subject* of the Clause. The question is whether—from the *ex ante* perspective of Congress making the law—the activity to be regulated, as a whole, substantially affects interstate commerce. If congressmen are to be accused of

279. U.S. CONST. art. VI.

280. *Raich*, 545 U.S. at 15 (“Respondents . . . do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress’s commerce power Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority.”).

281. *Id.* (“[T]he CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.”).

282. *Id.* at 17.

283. See *Perez v. United States*, 402 U.S. 146, 154 (1971) (“Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise as trivial, individual instances of the class.” (internal quotation marks omitted)) (emphasis omitted)).

violating their oaths and Congress is to be accused of violating the Constitution, the doctrinal test must be one that they could have applied when making the law.

There is only one sentence in *Raich* (and none in *Lopez* and *Morrison*) that even hints at a proper grasp of the *who* and the *when*. For the respondents and for the dissent, it is crucially important that California has recently legalized and regulated the use of marijuana for medical purposes. But consider the Court's response, which it buries in footnote 38: "California's decision (*made 34 years after the [Controlled Substances Act] was enacted*) to impose strict controls on the cultivation and possession of marijuana for medical purposes cannot *retroactively* divest Congress of its authority under the Commerce Clause."²⁸⁴

This is the only sentence that gives a clear answer to the *who* question; if the Constitution was violated here, it must be Congress that violated it. And it is the only sentence that hints at the significance of the *when* question; if Congress did violate the Constitution, then it did so decades ago, when it made the law. And so *subsequent* changes in state law cannot *retroactively* create a constitutional violation.

The sentence is exactly right, but it does not belong in footnote 38. It belongs at the beginning, answering the foundational *who* and *when* questions. And the opinion that follows should have been brief indeed, because the implications of that one sentence are enough to end the case: The *who* is Congress. The *when* must be the moment that Congress made the law. The current state of state law cannot matter, because it cannot have "retroactive" effect. Indeed, for the same reason, no facts that arise after the enactment of the statute can matter to the merits of the claim.

In other words, a *Commerce Clause challenge cannot be "as-applied."* A Commerce Clause challenge must be a challenge to an action of Congress. In a Commerce Clause challenge, it must be that the violation is visible on the "face" of the statute—*lex ipsa loquitur*. One cannot concede that passage of the Act in question was "well within Congress's commerce power,"²⁸⁵ and yet somehow continue to press a Commerce Clause challenge based on subsequent facts. The concession is the end of the case.

B. *The Scope of the Commerce Clause*

Here, again, the implications of this model do not stop with the structure of judicial review. The subject of the Commerce Clause (Congress) implies the structure of judicial review ("facial"). But the structure of judicial review, in turn, has powerful implications for the underlying substantive doctrine. Under current doctrine, "Congress has the power to regulate activities that

284. *Raich*, 545 U.S. at 29 n.38 (emphasis added) (citation omitted).

285. *Id.* at 15.

substantially affect interstate commerce.”²⁸⁶ But that test is difficult to square with the notion that a Commerce Clause violation must be visible on the face of the statute. Again, if the Commerce Clause is a grant of power to Congress, then it should be possible for a conscientious congressman to know—by examining the text of the statute—whether it is within Congress’s power to enact. It will often be difficult or impossible for a congressman to know by reading a statute whether the activity regulated substantially affects interstate commerce. And so, perhaps that is not quite the right doctrinal test.

Perhaps, an Act of Congress must include a “jurisdictional element”—words like “in interstate commerce” or “affecting interstate commerce”—in order to ensure that it does not exceed the grant of power in the Commerce Clause. Perhaps if such words do not appear in the Act, then the Act presumptively exceeds the grant of power.

This rule would hardly be a radical shift in Commerce Clause doctrine. On current doctrine, a “jurisdictional element” already seems to be a sort of safe harbor.²⁸⁷ The proposed rule would simply *require* such an element, rather than merely *encouraging* it. If a jurisdictional element were required, then, to be sure, difficult questions would still arise about whether any given jurisdictional element established the “requisite nexus” to interstate commerce.²⁸⁸ (Could Congress ban guns near schools if the guns had recently traveled in interstate commerce? Had ever traveled in interstate commerce? Might someday travel in interstate commerce?²⁸⁹) But at least the inputs of the doctrinal test would all be ones that are available to a conscientious congressman on the day that he votes for the law. If Congress is the subject, then the doctrinal test should be *lex ipsa loquitur*. The law should speak for itself.

And this doctrinal point brings forth a parallel between the Commerce Clause and the First Amendment. As Akhil Amar has pointed out, the First

286. *Id.* at 17.

287. See *United States v. Morrison*, 529 U.S. 598, 612 (2000) (“[A] jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”); *id.* at 613 (“Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (“Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

288. See *Lopez*, 514 U.S. at 562.

289. After *Lopez*, Congress re-enacted the Gun Free School Zones Act, adding just such a jurisdictional element. See Gun-Free School Zones Act of 1996 (within Omnibus Consolidated Appropriations Act, 1997), Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369-3009-71 (codified at 18 U.S.C. § 922(q)) (“It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone.” (emphasis added)); cf. *Scarborough v. United States*, 431 U.S. 563, 575-77 (1977).

Amendment precisely tracks and inverts the language of the Necessary and Proper Clause.²⁹⁰ Article I, Section 8 provides that “[t]he *Congress* shall have *Power . . . To make all Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers,”²⁹¹ including the power “To regulate Commerce . . . among the several States”²⁹² The First Amendment’s echo is unmistakable: “*Congress shall make no law . . .*.”²⁹³

But while Amar noted the textual parallel, no one has considered the possible doctrinal parallel. The First Amendment and the Commerce Clause both answer the *who* question explicitly. Legislative power is the subject of both, and the subject of both is “Congress.” Only Congress can exceed the power granted by the Commerce Clause, and only Congress can violate the First Amendment. A challenge under either clause must be “facial” in the sense that the constitutional problem cannot turn on subsequent enforcement facts but must be visible on the face of the statute: *lex ipsa loquitur*.

In the First Amendment context, this principle explains *Employment Division v. Smith*: If a statute is religion-neutral on its face, then it does not violate the Free Exercise Clause; but if it uses words like “religion,” “church,” or “worship,” then it does call for scrutiny, because it may be targeting religion “as such.”²⁹⁴ And just as the First Amendment text is a sort of converse of Article I, Section 8, perhaps Commerce Clause doctrine should be a sort of converse of *Employment Division v. Smith*. Just as Congress *cannot* target religion “as such” under the Free Exercise Clause, maybe it *must* target commerce “as such” under the Commerce Clause. And so, just as words like “worship” or “religion” are necessary to *trigger* scrutiny under the Free Exercise Clause, perhaps words like “affecting commerce” are necessary to *foreclose* scrutiny under the Commerce Clause. Under either clause, the rule should be *lex ipsa loquitur*: the law should speak for itself.

VI. THE SUBJECT OF SECTION FIVE

The Commerce Clause analysis applies equally to all of Congress’s enumerated powers. After all, the whole of Article I, Section 8, has just one, distributed subject: “*Congress shall have Power . . .*.”²⁹⁵

So, in all Article I, Section 8, enumerated powers cases: (1) The *who* is Congress. (2) The *when* is the moment when Congress makes the law. (3) Judicial review cannot be “as-applied,” because the application, or

290. AMAR, *supra* note 209, at 39.

291. U.S. CONST. art. I, § 8, cls. 1, 18 (emphasis added).

292. *Id.* art. I, § 8, cl. 3.

293. *Id.* amend. I (emphasis added).

294. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

295. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

execution, comes long after any constitutional violation. (4) Judicial review must be “facial,” in the sense that any constitutional violation should be visible on the face of the statute. And so (5) the substantive doctrinal test must be *lex ipsa loquitur*—that is, it must be a test with inputs that are available on the day that Congress makes the law, in the text of the statute.

It is not necessary to track these logical steps through each clause of Article I, Section 8; the entire section shares a distributed subject, and so the analysis is essentially the same. But it is worthwhile to track these steps through Section 5 of the Fourteenth Amendment, where they can cast light on another important doctrinal riddle.

Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].”²⁹⁶ The central interpretive problem posed by this provision has always been the required closeness of fit—that is, the “appropriate” relationship between the underlying substantive Fourteenth Amendment provisions and the legislation with which Congress enforces them. The Court has said that the proper test of fit is the same as the test under the Necessary and Proper Clause.²⁹⁷ More recently, the Court has held that, under Section 5, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²⁹⁸ The debate on this point has generally centered on the *degree* of fit required.

But there is a more subtle question here, as well, about the *type* of fit required. To see the problem, consider that fit might be measured *statically* or *dynamically*. For example, on current doctrine, the measure of “the injury to be prevented or remedied” by Section 5 legislation is apparently to be taken by examining state law.²⁹⁹ But state law *when*? Does the doctrinal test turn on the content of state law at the moment when the Section 5 statute was enacted, or at the moment of the constitutional challenge?

This question amounts to a two-pronged paradox. If *current* state law is an important input in the doctrinal test, then it seems that results of the test might change over time with changes in state law. If the inputs of the test are to be viewed dynamically, then the results of the test will also be dynamic. The odd implication is that a statute might be congruent and proportional when enacted, but it might *become* unconstitutional as facts—and particularly state law—change on the ground. The *result* of judicial review would be largely dependent

296. *Id.* amend. XIV, § 5.

297. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“[T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

298. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

299. See *id.* at 534-35.

on the *date* of judicial review.

Worse yet, on this dynamic approach, state legislatures would, in effect, have the power to *render* federal statutes unconstitutional, by changing state law. And this result would run afoul of a deep principle recently reaffirmed in *Raich* but identified as early as *McCulloch*. Recall, in the Commerce Clause context, the Court's crucial insight, buried in *Raich*'s footnote 38: "California's decision (made 34 years after the [Controlled Substances Act] was enacted) to impose 'stric[t] controls' on the 'cultivation and possession of marijuana for medical purposes' cannot *retroactively* divest Congress of its authority under the Commerce Clause."³⁰⁰ Chief Justice Marshall had made essentially the same point centuries before, explaining why Maryland could not, by creating a state bank, thereby divest Congress of the power to create a national bank.³⁰¹ "[The American people] did not design to make their government dependent on the States."³⁰² And the reason is fundamental:

To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.³⁰³

Indeed, Marshall's point may be generalized. Congress cannot change the scope of congressional power (by purporting to entrench its enactments³⁰⁴ or bootstrapping on prior statutes³⁰⁵); the President cannot change the scope of congressional power (by making treaties³⁰⁶ or otherwise consenting³⁰⁷); states cannot change the scope of congressional power (by creating a state bank³⁰⁸ or legalizing marijuana³⁰⁹ or violating Fourteenth Amendment rights³¹⁰ or

300. *Gonzales v. Raich*, 545 U.S. 1, 29 n.38 (2005) (emphasis added) (second alteration in original) (citations omitted).

301. *McCulloch*, 17 U.S. at 424.

302. *Id.* at 432.

303. *Id.* at 424.

304. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 125-26 (7th ed. 1903); John O. McGinnis & Michael B. Rappaport, Essay, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 503-07 (1995); Bruce Ackerman et al., Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995).

305. See Rosenkranz, *supra* note 99, at 1887 & n.91.

306. See *id.* at 1886. But see *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that treaties can increase the legislative power of Congress).

307. See *New York v. United States*, 505 U.S. 144, 182 (1992) ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.").

308. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

309. *Gonzales v. Raich*, 545 U.S. 1 (2005).

310. See *infra* note 319.

otherwise consenting³¹¹); foreign governments cannot change the scope of congressional power (by abolishing the death penalty³¹²); and individuals cannot change the scope of congressional power (by using peyote religiously³¹³ or marijuana medicinally³¹⁴). The Constitution provides that “All legislative Powers herein granted shall be vested in a Congress”³¹⁵—no more and no less. The scope of Congress’s power is the fixed star in the constitutional firmament.³¹⁶ Changes in state law cannot change the scope of Congress’s power or retroactively render federal statutes unconstitutional. As the Office of Legal Counsel says, “[i]f [a] statute is unconstitutional, it is unconstitutional from the start.”³¹⁷ And so, the “congruence and proportionality” test cannot be dynamic; its results cannot change with changing state law.

On the other hand, if the test is static rather than dynamic, the results are equally paradoxical. On the static view, the doctrinal test turns on a snapshot of state law at the moment when Congress enacts its Section 5 legislation. If so, then if an Act of Congress is congruent and proportional when enacted, it is thus, necessarily, constitutional *forever*—long after its justification has disappeared, even once it has become patently *incongruent and disproportionate* to the current state of the world. Moreover, on this theory, the very same statute might be constitutional or unconstitutional depending on its date of enactment. Indeed, a statute on the books might be constitutional, even though Congress would now lack the power to reenact it.³¹⁸

311. See *New York*, 505 U.S. at 182 (“The constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States. State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.”).

312. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1305 (2007).

313. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

314. *Raich*, 545 U.S. at 323-33.

315. U.S. CONST. art. I, § 1.

316. See generally Rosenkranz, *supra* note 99, at 1892-1912.

317. The Attorney General’s Duty, *supra* note 43, at 59.

318. This is not as farfetched as it sounds. Indeed, the litigation over the 2006 reenactment of the Voting Rights Act raised precisely this issue, *Brief of Petitioner-Appellant at 2*, *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009) (No. 08–322) (“Congress had the opportunity, and obligation, in 2006 to *reexamine* § 5’s continued appropriateness, or at least *update* the coverage formula. It made no serious effort to do so.”) (emphasis added), but the Court managed to dodge the problem in its opinion, *Northwest Austin*, 129 S. Ct. at 2512-15 (noting the constitutional issue, but deciding to avoid it by providing relief on statutory grounds); see also *id.* at 2519-20 (Thomas, J., concurring in the judgment in part and dissenting in part) (concluding that Congress’s action in reauthorizing Section 5 of the Voting Rights Act in 2006 was unconstitutional, even though Congress’s action in enacting it originally in 1965 was constitutional) (“There is certainly no question that the VRA *initially* ‘was passed pursuant to Congress’[s] authority under the Fifteenth Amendment.”) (emphasis added) (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999))).

In short, the “congruence and proportionality” test poses a two-pronged temporal paradox. If the inquiry is dynamic, then the result will turn on the *date of judicial review*; but on the other hand, if the inquiry is *static*, then the result will turn on the *date of enactment*. Neither result is consistent with the Constitution’s fundamental premise of fixed legislative power.

A few scholars have noted one or both prongs of this paradox.³¹⁹ But they have not identified its root cause. To resolve the paradox, it is necessary to begin at the beginning, with the subject of Section 5: “*The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].*”³²⁰ The subject is “Congress.” Congress cannot “violate” Section 5, because it is a grant of power, not a prohibition. But Congress can exceed the grant of power in Section 5. By so doing, Congress would violate the Tenth Amendment, exercising power reserved to the states.³²¹ The *who* is Congress. And if so, then the *when* must be the moment that Congress enacts “[in]appropriate legislation.”³²²

If the constitutional violation happens at that moment, then subsequent facts cannot matter to the inquiry. A challenge under Section 5 cannot be “as applied” because the application happens after the alleged violation is complete. Subsequent changes in the facts on the ground or the content of state

319. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 730-31 (1998) (“[C]an an ‘enforcement’ statute *become* unconstitutional if circumstances change? . . . There is something at least disquieting about the idea of continuing federal intervention if the grounds on which congressional action rest ‘have vanished long since, and the rule simply persists from blind imitation of the past.’ At the same time, it may be quite difficult to judge whether a threat has receded because state actors no longer wish to engage in purposeful discrimination (if, for example, attitudes about the protected class or behavior have changed) or only because the congressional prohibition remains in place.” (citations omitted)); Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment’s Illogical Impact on Congress’s Power*, 37 IND. L. REV. 345, 367 (2004) (lamenting that the Court’s recent jurisprudence may indicate that “a statutory provision [passed pursuant of the Fourteenth Amendment’s remedial clause] which once was a valid abrogation of state sovereign immunity became invalid” with the passage of time); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1350 (2001) (“[W]hat happens if and when constitutional violations are no longer widespread? One possibility is that a statute like Section 1983, fully constitutional when enacted, would become unconstitutional—perhaps as the consequence of its own efficacy. The result—that a statute remains valid only for so long as it is regularly defied—is surely an odd one. (It brings to mind the story of the inhabitants of a mountain village removing a sign warning of a dangerous curve because no one had recently driven off the road.) Equally odd is a different possibility—that the statute remains constitutional because there were widespread and persistent problems in the past. On that view, had the identical statute been passed years later, after the constitutional problems were less widespread, the same measure would be unconstitutional—thus making a statute’s constitutionality at present depend on the date of its enactment.”).

320. U.S. CONST. amend. XIV, § 5 (emphasis added).

321. *Id.* amend. X.

322. *Id.* amend. XIV, § 5.

law cannot matter, because they cannot retroactively divest Congress of power. Either Congress exceeded its Section 5 power and thus violated the Tenth Amendment when it made the law, or it did not.

And thus, a Section 5 challenge must be “facial,” in the important sense that it must allege a violation that is visible on the face of the statute at issue. The Court sometimes seems to have intuited this much, which is perhaps why it has sustained (purportedly disfavored) facial challenges in the Section 5 context (like in the Commerce Clause context), though without explaining why or mentioning the *Salerno* “no set of circumstances” test.³²³

As a matter of logic, the inputs of the doctrinal test must be available at the moment of enactment, for conscientious congressmen to examine. As the Court seems to sense, any challenge must be “facial,” and so any doctrinal test must turn on inputs available on the face of the statute, inputs that can be found in the text.

This is the solution to the paradox. If “congruence and proportionality” is

323. See Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026 (2003) (“The Court in [recent Section 5 cases] has departed from the traditional ‘as-applied’ method of adjudication in favor of a *facial overbreadth* approach. Instead of considering legislation in light of the particular facts and claims of a given case, the Court has examined the challenged statutes on their faces. Instead of asking whether any set of circumstances exists in which the challenged statutes might appropriately enforce the Fourteenth Amendment against unconstitutional state action, the Court has asked whether *many* of the state acts affected by these statutes have a significant likelihood of being unconstitutional.” (emphasis added)); *cf.* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 64 (2000) (“The Act, through its broad restriction on the use of age as a discriminating factor, prohibits *substantially more* state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.” (emphasis added)); *id.* at 87 (“Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes *substantially higher burdens* on state employers” (emphasis added)); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (sustaining an apparently “facial” challenge to the Violence Against Women Act without once considering the congruence and proportionality of the Act “as applied” to the facts of the case, or mentioning *Salerno*’s “no set of circumstances” test for facial challenges); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 646 (1999) (“Congress did nothing to *limit* the coverage of the Act to cases involving arguable constitutional violations” (emphasis added)); *id.* at 654 (Stevens, J., dissenting) (the Court’s opinion “has nothing to do with the facts of this case”); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (“Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that *many* of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” (emphasis added)); *id.* at 532 (“[RFRA] intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”); *id.* at 535 (“In *most* cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.” (emphasis added)). *But see* *United States v. Georgia*, 546 U.S. 151 (2006); *Civil Rights Cases*, 109 U.S. 3, 19 (1883) (“Whether the law would be a valid one *as applied* to the territories and the district is not a question for consideration in the cases before us; they all being cases arising within the limits of states.” (emphasis added)) (suggesting that the Court evaluated the challenged statute as applied).

required, it is *neither* dynamic “congruence and proportionality” *nor* static “congruence and proportionality.” What is required is *facial* “congruence and proportionality”—“congruence and proportionality” that can be measured and evaluated on the face of the text of the statute. In other words, *the statute itself must invoke the substantive provisions of the Fourteenth Amendment that it enforces*. A statute that does so is static in the sense that it provides a static *description* of covered conduct, which can be evaluated on its text by a congressman or a court and which will be valid or invalid regardless of past or present state law. But it is also dynamic in the sense that the *actual conduct covered by the description* may change with changes in state facts and state law.

This is hardly a radical suggestion. Indeed, early Section 5 legislation took exactly this form, expressly invoking or echoing the substantive terms or content of the Fourteenth Amendment.³²⁴ And recall that in the Commerce Clause context, current doctrine already favors a “jurisdictional hook”—words like “affecting interstate commerce” in the text of the statute.³²⁵ In this context, too, a “jurisdictional hook” should be preferred, if not required, “identifying” state action likely to violate the Fourteenth Amendment.³²⁶ Here, the

324. See, e.g., Civil Rights Act of 1871 (*Ku Klux Klan Act*), ch. 22, § 1, 17 Stat. 13 (“[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, *privileges, or immunities secured by the Constitution of the United States*, shall . . . be liable to the party injured in any action at law . . .” (invoking the language of the Fourteenth Amendment)); Enforcement Act of 1870, ch. 114, § 14, 16 Stat. 140 (“[W]henever any person shall hold office . . . contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States . . . to proceed against such person . . .” (expressly invoking the Fourteenth Amendment)); *id.* § 15 (“any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the United States . . . shall be deemed guilty of a misdemeanor . . .” (expressly invoking the Fourteenth Amendment)); see also Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335 (“[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude . . .” (describing an Equal Protection violation)); Enforcement Act of 1870, ch. 114, § 2, 16 Stat. 140 (“[I]f by or under the authority of the constitution or laws of any State . . . any act is or shall be required to be done as a prerequisite or qualification for voting . . . it shall be the duty of every such person and officer [voting officials] to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall . . . be deemed guilty of a misdemeanor . . .” (describing state actions likely unconstitutional under the 14th and 15th Amendments)).

325. See *supra* Part V.B.

326. Cf. *City of Boerne*, 521 U.S. at 535 (“Simply put, RFRA is not designed to *identify* and counteract state laws likely to be unconstitutional because of their treatment of religion.” (emphasis added)).

“jurisdictional hook” would be words like “due process,” “equal protection,” or “privileges or immunities.” If such a jurisdictional hook were required, then here too the inputs of the doctrinal test would be available on the face of the statute—and *lex ipsa loquitur*: the law would speak for itself.³²⁷

VII. THE SUBJECT OF LEGISLATIVE POWER

Each of the last three Parts proceeded in the same way, beginning with the *who* and *when*, deducing the structure of judicial review, and deriving from that structure an insight about the substantive scope of the provision. Most striking, though, are the parallels among all three. First, of course, are the important textual parallels. “By including [Section] 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause”³²⁸ of Article I, Section 8. Indeed, the word “appropriate” in Section 5 is a deliberate textual echo of the word “proper” in the Necessary and Proper Clause.³²⁹ Likewise, recall how the Necessary and Proper Clause finds a deliberate textual echo and inversion in the First Amendment: “*Congress shall have power . . . to make all laws which shall be necessary and proper . . .*” But “*Congress shall make no law . . .*”³³⁰ In short, these three sections—Article I, Section 8; the First Amendment; and Section 5 of the Fourteenth Amendment—have

327. The language of Section 5 of the Fourteenth Amendment recurs almost verbatim in several other amendments. U.S. CONST. amend. XIII, § 2; *id.* amend. XV, § 2; *id.* amend. XVIII, § 2; *id.* amend. XIX; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2. The structural and doctrinal logic of these provisions is probably the same, and they too should probably require appropriate “jurisdictional hooks” in their enforcing legislation. These parallels will be explored at greater length in NICHOLAS QUINN ROSENKRANZ, *THE SUBJECTS OF THE CONSTITUTION* (forthcoming Oxford University Press 2011).

328. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

329. Professor Akhil Amar has explained:

[T]he framers saw the Enforcement Clause phrase “appropriate legislation” as *equivalent* to the Article I, Section 8 phrase “proper laws.” Ordinary dictionaries confirm the obvious etymological link between “proper” and “appropriate.” And in one of *McCulloch*’s most famous passages, Marshall cemented this etymological linkage in words that the Thirty-Ninth Congress knew and relied on: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” Only a couple of years after the Fourteenth Amendment became part of our supreme law, the Supreme Court itself quoted this famous passage in full and then declared that “[i]t must be taken then as finally settled, so far as judicial decisions can settle anything, that the words” of the Necessary and Proper Clause were “equivalent” to the word “appropriate.”

Amar, *supra* note 230, at 825-26 (second alteration in original) (footnotes omitted) (citing 1 THE OXFORD ENGLISH DICTIONARY 586-87 (2d ed. 1989)) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870)).

330. AMAR, *supra* note 209, at 39.

interlocking words and textual resonances that echo through all three. Most importantly, legislative power is the subject of all three. And the subject of all three is Congress.

By focusing attention on the subjects and tracking their implications, this model reveals doctrinal harmony among the three that is just within reach. Since Congress is the subject of all three, the answer to the *who* question must be Congress and the answer to the *when* question must be when Congress makes the law. Thus, in all three contexts, challenges should be “facial,” in the sense that they should assert a constitutional flaw visible on the face of the law. Doctrinal tests should have inputs that are available to conscientious congressmen just by reading the bills.³³¹ They should not include other inputs, like state law, which would paradoxically imply that state legislatures can change the scope of congressional power. If Congress is the subject, then the test should be *lex ipsa loquitur*: the law should speak for itself.

Free Exercise doctrine already reflects this analysis: statutory words like “religion” and “worship” trigger scrutiny, while facially “religion-neutral” statutes do not.³³² The Press Clause follows the same model.³³³ Justice Scalia and Judge Easterbrook have suggested that Speech Clause doctrine should be the same.³³⁴ And Jed Rubenfeld has argued that the same principle should apply to freedom of association.³³⁵ This would bring doctrinal harmony to the First Amendment, all six clauses of which share a single distributed subject.

But there may also be doctrinal parallels to the other sections that share the same subject. The First Amendment is a restriction on legislative power, whereas Article I, Section 8, and Section 5 of the Fourteenth Amendment are

331. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution”); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 530-31 (1999) (“The Constitution places the textually unique duty on the President to ‘preserve, protect and defend the Constitution,’ and subordinate executive officers and members of Congress are under as solemn an obligation as judges ‘to support’ the Constitution. When the executive or legislative branch encounters constitutional issues in the course of its activities, as each invariably must, it acts within its own ‘province and duty’ in saying what the law of the Constitution is.” (footnote omitted)); Rosenkranz, *supra* note 98, at 2088 n.7.

332. See *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990) (“It would be true, we think (though no case of ours has involved the point), that a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for *religious* reasons, or only because of the *religious* belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for *worship* purposes,’ or to prohibit bowing down before a golden calf.” (alterations in original) (emphasis added)); *id.* at 886 n.3 (“[W]e strictly scrutinize governmental classifications based on religion [But] generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest” (citations omitted)).

333. See cases cited *supra* note 238.

334. See cases cited *supra* notes 239 & 240.

335. See articles cited *supra* note 245.

grants of legislative power. So perhaps the power grants call for a sort of inversion of this Free Exercise doctrine. And indeed, they both almost reflect such an inversion. Just as words like “religion” and “worship” *trigger* Free Exercise scrutiny,³³⁶ perhaps words like “affecting interstate commerce” should be required (rather than merely preferred)³³⁷ to *foreclose* Commerce Clause scrutiny, and perhaps words like “equal protection” or “privileges or immunities” should be required to *foreclose* Section 5 scrutiny. Just as Congress *cannot* target religion “as such” under the Free Exercise Clause,³³⁸ perhaps it *must* target commerce “as such” to exercise its Commerce Clause power, and perhaps it *must* target Fourteenth Amendment violations “as such” to exercise its Section 5 power. The doctrines are almost parallel already, though the parallel has escaped notice. And well they should be parallel. All three clauses have the same subject.

CONCLUSION

This Article has set forth a new model of judicial review. This model begins with a deceptively simple question: *who has allegedly violated the Constitution?* The question seems innocuous, but merely asking it upends the Court’s current practice, which has been to avoid casting constitutional blame. But the Court’s euphemistic pathetic fallacy—declaring that statutes, rather than governmental actors violate the Constitution—has not merely obscured constitutional accountability and abetted constitutional culprits; it has also led to deep analytical confusion about the constitutional structure of judicial review.

As the Court seems to sense, there are two basic types of judicial review—one broader, more abstract, and more unusual, and the other narrower, more concrete, and more common. But, building on its euphemistic formulation, the Court describes the two flavors of judicial review as “facial challenges to statutes” and “as-applied challenges to statutes.” These are malapropisms that willfully obscure the constitutional culprit. The distinction that the Court has been grasping for is a distinction based on who has violated the Constitution. What the Court calls a “facial” challenge is simply a challenge to *legislative* action, and what the Court calls an “as-applied” challenge is simply a challenge

336. See cases cited *supra* note 332.

337. See *United States v. Morrison*, 529 U.S. 598, 612 (2000) (“[A] jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”); *id.* at 613 (“Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.”); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (“Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

338. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

to *executive* action. This dichotomy is the proper organizing principle of judicial review.

And the structure of judicial review, in turn, has profound implications for the substantive scope of constitutional rights and powers. Tracking them all may be the work of a lifetime. But even tracking three—the First Amendment, the Commerce Clause, and Section 5 of the Fourteenth Amendment—suggests solutions to profound doctrinal riddles, and reveals deep doctrinal parallels among them. The parallels should not be a surprise, since legislative power is the subject of all three. And the subject of all three is Congress.

These three constitutional provisions are enormously important, of course, but they are also among the easiest for this new model, because they are written in the active voice with a single subject. Most clauses are much more difficult. The second sentence of the Fourteenth Amendment, for example, begins with the ringing words “[n]o state shall”³³⁹ It is written in the active voice with an explicit subject, “state,” but the subject does not specify a particular *branch* of state government. Trickier still, most clauses of the Bill of Rights are written in the passive voice. These clauses also have express subjects, but the distinctive feature of the passive voice is that “the subject of the clause doesn’t perform the action of the verb.”³⁴⁰ In the passive voice, the grammatical subject is not the “logical subject,”³⁴¹ the “doer,”³⁴² the “agent.”³⁴³ In other words, these clauses all elide the question: *by whom?*³⁴⁴ These clauses require particularly sensitive textual and structural analysis, because they elide the question of *object*.

And so it is these clauses that are the subjects of the sequel, *The Objects of the Constitution*.

339. U.S. CONST. amend. XIV, § 1.

340. BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 483 (1998); see also JOHN B. OPDYCKE, HARPER’S ENGLISH GRAMMAR 134 (Stewart Benedict ed., Harper & Row 1966) (1817) (“If the subject performs the action, the verb is in active voice If the subject is acted upon, the verb is in passive voice”).

341. CHALKER & WEINER, *supra* note 5.

342. *Id.*

343. *Id.*

344. See *supra* note 8.

