1997

Types.

Charles Fried

TYPES

*Charles Fried**

The doctrines elaborating the many provisions of the Constitution and its amendments show certain similarities. For instance, government action must submit to three levels of scrutiny: strict, intermediate, and rational basis; its goals are categorized as compelling, important, or merely legitimate; and the connection between these goals and the means of their attainment may be more or less tight—"narrowly tailored" is a term frequently used. These elements are combined and recombined, modified, and elaborated in doctrines about subjects as different as the separation of powers, the impingement of local regulation on the national economy, the treatment of racial minorities, freedom of expression, and the taking of property for public use. The tripartite terminology of scrutiny is only one of the most obviously recurring features in our doctrinal formulations. In this article I consider another recurring feature of constitutional doctrine: that designated by the dichotomy between an effects test and an intents test. I discuss why there is such a dichotomy, what its terms mean, and the difficulties in giving it analytic and operational force, and suggest that a third term, what I call an acts test, should be added to it. Having adverted to the levels of scrutiny throughout my account and related it to them, I then briefly suggest how this trichotomy relates to some other recurring features of constitutional doctrine: the distinction between constitutional

 Associate Justice, Supreme Judicial Court of Massachusetts, Carter Professor of General Jurisprudence, emeritus and Distinguished Lecturer, Harvard Law School. This article is a chapter of a larger work on constitutional law, as is my article *Constitutional Doctrine*, 107 Harv. L. Rev. 1140 (1994). I have benefited greatly in coming to the current draft of this article from encouragement and suggestions by Bruce Ackerman, Akhil Amar, Scott Brewer, David Strauss, Cass Sunstein, Laurence Tribe, the participants in the legal theory workshops at Columbia Law School and Duke Law School, and the members of the Society for Ethical and Legal Philosophy, to whom earlier drafts of this article were presented in 1994 and 1995. Yellow Light Breen, David Marglin, and Ted Cruz provided research assistance. I have also learned from and been encouraged by the convergence of some of the ideas in this article and Tribe's essay *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 Sup. Ct. Rev. 1 (1994). While I have benefited greatly from their suggestions, the views expressed herein are my own. Research for the paper was assisted by the Henry J. Friendly Fund at the Harvard Law School.

doctrines that state general aspirations, those that set up institutions and those that limit—either by prohibition or positive requirements—the exercises of power by the institutions and persons designated by the constitution to fulfill certain roles; unconstitutional condition; and the role of analogy in the statements and development of doctrine. Although at the outset it may seem that I am offering no more than a scheme of classification, by the end of this essay I hope it will be clear that there is more to it than that. The brief discussion of analogy, unconstitutional conditions, and aspirational, institutional, and limiting provisions is intended to indicate the kind of influence the trichotomy I elaborate exerts on the substance of constitutional doctrine. Only at the conclusion do I make this point explicit. The dichotomy (which becomes a trichotomy in my analysis) applies most naturally to limiting provisions, and I shall show why that should be. At this point I state only that limiting provisions seem to be at the heart of lawyers', and perhaps even the public's, conception of what constitutional law is really about, and move directly into mapping the dichotomy/trichotomy onto this type of constitutional provision.

I. INTENTS, EFFECTS, ACTS

Provisions limiting official exercises of authority are positive or negative, that is, they require either that one do, aim at, or achieve what is mandated, or avoid doing, aiming at, or achieving the thing forbidden. The great divide in this domain of constitutional limits, whether positive or negative, is said to be between provisions that doctrine elaborates as speaking to forbidden or required purposes or *goals* of official action (*intents tests*) and forbidden or required *results* of those actions (*effects tests*). So, for instance, it is said that the Fourteenth Amendment forbids only those governmental actions that are *intended* to deprive persons of equal protection of the laws on some forbidden basis.[1] By contrast, from the 1963 decision in *Sherbert v. Verner*[2] until *Oregon v. Smith*[3] in 1990, the Free Exercise clause of the First Amendment was generally interpreted to forbid governmental action that had the *effect* of making religious practice more burdensome for the individual. But as we shall see there is something unsatisfactory about both of these analytical categories, at least if they are taken to exhaust the field. On the one hand, a

1. *Washington v. Davis*, 426 U.S. 229 (1976).
2. 374 U.S. 398 (1963).
3. 494 U.S. 872 (1990).

focus on intent produces considerable complications in divining and assigning purposes to corporate entities. On the other hand, a focus on effects threatens to introduce a virtually unbounded judicial inquiry that is unconcerned with notions of moral agency.

A. Effects

Effects tests may seem to have a certain natural primacy: the law is a practical instrument, and effects designate the states of the world with which the law is concerned. But this is a mistake. Giving effects primacy commits constitutional law to a disputed vision of the state's function and of its proper form of intervention in human affairs. In many circumstances and for many reasons how an effect is produced may be of such significance that it overcomes any argument stated in terms of the effect alone. This is true in our personal morality and it is true for governments as well. There is another reason of a more practical order why the law generally, and constitutional doctrine in particular, often avoids effects tests: laws and doctrines stated in terms of effects risk asking too much, and so introduce an indeterminacy that invites a kind of balancing that itself has serious disadvantages.

Balancing is entailed by effects tests because as a logical matter most courses of action have *some* tendency to contribute to a forbidden effect—or to undermine the pursuit of a required effect. The case in which the Supreme Court first emphasized this inconvenience, *Jefferson v. Hackney*,[4] illustrates the problem. The state chose to pay more generous welfare benefits to blind and other physically disabled persons than to families in need of financial assistance because of poverty (AFDC), a category which contained a far higher proportion of African-Americans. This choice thus had the effect of disadvantaging an identifiable racial group. But the same might be said about a large range of social programs, particularly when such programs are viewed together. Similarly, if the reasoning of *Sherbert v. Verner*,[5] subjecting to strict scrutiny (and thus imposing a very heavy burden of justification) a particular government program that had the effect of making the exercise of some individual's religion more difficult, were extended and generalized, any government program—whether an income tax (say, on the salary of a minister), a sales tax, or compulsory military service—that made religious practice even slightly more burdensome would fall under the Constitution's ban. So, even when the limit is important enough to attract

4. 406 U.S. 535 (1972).
5. 374 U.S. 398 (1963).

heightened scrutiny, whether strict or intermediate (rational basis scrutiny assumes balancing and allows almost any outcome to stand[6]), an effects test must be cabined or qualified somehow: either by some categorical rule that puts certain effects out of consideration or makes others determinative, or by a balancing test that allows the forbidden effect to be outweighed by the good that the questioned measure accomplishes. For this reason, effects tests intersect importantly with doctrines assigning levels of scrutiny to be applied to questioned actions. If a norm is stated in terms of a forbidden effect and that effect may only be justified by a compelling governmental interest, then such a norm will harshly limit governmental behavior in surprising and indeterminate ways. As I shall argue, that is why effects tests are more likely encountered in conjunction with lower levels of scrutiny, where the balancing is more permissive; strict scrutiny is more usually associated with intents tests.

The balancing approach entails the inconvenience that the judges doing the balancing must assume a large and amorphous power to scan and evaluate all the decisions of government.[7] Unless the balancing is a sham and almost any plausible invocation of a government interest is found sufficient, a court that balances assumes, in effect, the quintessential exercise of public judgment. And so doctrines elaborating these limits on government generally seek more categorical boundaries for such provisions. The most eligible has seemed to be to move from effects to purpose as the focus of doctrine, and this is what the Supreme Court did in *Jefferson*[8] and *Washington v. Davis*.[9] In this way, though government produces a variety of effects, only those that are a part of its purpose in acting are relevant to the question whether a limit has been transgressed. This distinction corresponds to the distinction in tort law between harms negligently and intentionally produced. Negligence requires a judgment that an effect not only was brought about, but that it was brought about unreasonably—that is, that the burden of avoidance was not too great relative to the harm to be avoided. And this is a conclusion that

6. In its purest form rational basis balancing simply accepts the determination of the other organs of government, unless they are so anomalous and unreasonable as not to be within the realm of institutional functioning at all. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

7. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 711-12 (1988) (Scalia, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) (disapproving of the Court engaging in a sweeping case-by-case analysis to determine "how much is too much" in the commingling of functions among the branches).

8. *Jefferson v. Hackney*, 406 U.S. 535 (1972).

9. 426 U.S. 229 (1976).

requires a judgment not only on the badness of the harm to be avoided, but implicitly on the value of all the ends that intersect with that harm and the pursuit of which may to a greater or lesser degree increase the risk of the harm coming about.[10] An intents test, such as the designation of wrongful purpose in serious crimes, requires no such global judgment, only the discrete judgment that of all ends an actor might pursue, this is one (e.g., to assault another) that is ineligible and disallowed. Doctrinal elaboration then takes the form of specified exceptions to such rules: for instance, self-defense or punishment as justifying what would otherwise be an assault. So also in constitutional law otherwise prohibited purposes may be pursued in specified circumstances.[11]

Positive limits—i.e. requirements—have a different logic. It makes sense to direct that government may not pursue a certain end, or that a certain purpose may not be invoked to justify bad consequences, but to *require* either the pursuit of a certain end or the production a certain result, without explaining how large an effort must be made or at what sacrifice of competing goals, is always unsatisfactory.

Despite the general tendency of doctrines, positive and negative, to make excessive claims when stated in terms of effects, there are many occasions on which laws and constitutional doctrine are quite naturally and appropriately stated in terms of effects: whenever the ensuing balancing will not tend to be too open-ended and all-encompassing, because surrounding doctrines will discipline and confine, explicitly or implicitly, its range. Examples are the prohibition against unreasonable searches and seizure and excessive bail and the requirement that a person accused of crime be tried speedily. Because of the focused and limited nature of what is at stake there is little danger that the balancing these provisions invite will draw the whole universe of concerns into account. Similarly, as we shall see, balancing tests as concomitants of effects tests appear at the margins of other, harder-edged doctrines to soften them and make them more accommodating to circumstances.

B. INTENTS

Intents tests are the principal competitor to effects tests. It is to intents tests that the law has turned to avoid the inconveniences in effects tests. The Supreme Court, in *Jefferson v. Hack-*

10. *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947) (L. Hand, J.).

11. As when there is a compelling governmental interest. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

ney[12] and *Washington v. Davis*,[13] laid down the doctrine that government action does not violate the Equal Protection clause of the Fourteenth Amendment unless the discrimination worked by that action comes about intentionally, thus avoiding the potentially open-ended balancing that an effects test invites. Similarly, a recent and controversial decision, *Oregon v. Smith*,[14] would tightly discipline the generalized balancing invited by *Sherbert v. Verner*[15] in Free Exercise cases. In *Smith* the Court said that a law of general applicability that had the effect of burdening a person's exercise of religion did not for that reason alone violate the Constitution. Rather, the Court emphasized that only laws that "prohibit" the free exercise of religion fall under the ban of the constitutional text.[16] Although the case is not explicit about this, the Court might very well be seen as insisting on the intentionality implicit in the constitutional term "prohibit"—one does not prohibit something by inadvertence.

An intents test applied to governmental action has inconveniences of its own. It has seemed to many commentators that there is something inapposite at worst, and metaphoric at best, about attributing intent to a collective body.[17] The individuals making up such a body often act from a variety of motives. Intent is a concept drawn from the domain of individual psychology, and no ready metric exists to quantify and combine such individual attributions and apply them to a collective body. Jones may have intended to kill Smith in shooting at his passing automobile, but did the legislature intend the death of tens of thousand of citizens when it chose to build highways rather than high speed rail links between major cities? A further shortcoming of the intents test lies, not in the divination of intent itself, but in the fact that serious damage may be done though no bad intent can be shown. Consider again *Jefferson v. Hackney*[18] and *Washington v. Davis*.[19] Although an effects test appears to give courts too much scope for judgment, does not an intents test virtually immunize government action from scrutiny altogether,[20]

12. 406 U.S. 535 (1972).
13. 426 U.S. 229 (1976).
14. 494 U.S. 872 (1990).
15. 374 U.S. 398 (1963).
16. *Smith*, 494 U.S. at 877.
17. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).
18. 406 U.S. 535 (1972).
19. 426 U.S. 229 (1976).
20. Cf. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989).

no matter how grievously disproportionate its effects on protected rights or on a protected category of citizens might be? Courts have shrunk from this extreme too, as an argument that proves too much. Intents tests, difficult though they may be, have not been made impossible to meet. Two criteria have been used to allow practical invocation of the test—both uncomfortable.

First, the difficulty in assigning intent to public actors and corporate entities has been countered with a widely accepted practice. What in respect to individuals are thought to be indicia of intent—confessions and avowals—are sought out among the statements of actual persons making up a corporate body and are attributed to it. Just as we take an individual's statement that he acted from a particular motive as indicative of his intent, so when we find such statements in, say, the legislative record we make the same attribution to the body as a whole.[21]

Second, the apparent excessive permissiveness of the intents test is mitigated by what might be called indirect evidences of intent, and these are less artificially extended to corporate entities, since they do not appear to posit an individual mind in the matter. For instance, if a course of action produces a particular forbidden effect as well as the effect which is urged to justify the conduct and to constitute its "true" intent, and this justifying effect might in fact have been produced as easily or almost as easily without the forbidden effect, this is taken to show that the forbidden result was what was aimed at after all. The actor appeared to go out of his way to produce the harm, while if the harm had occurred along a direct route to some other destination that judgment of condemnation would be much less eligible.

The law has a variety of devices that may be seen as elaborating this notion in the context of institutional action. One of these was most dramatically deployed in 1960 in *Gomillion v. Lightfoot*,[22] in which a city's purpose to disenfranchise its black citizens was inferred from the bizarrely redrawn city boundaries, which corresponded to no geographical, topological, historical, or social fact other than that they had the effect of excluding almost all black voters. What this case illustrates is a process of reasoning that first posits that government must be taken to have some purpose for its actions, that what it has done must be assumed to

21. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

22. 364 U.S. 339 (1960).

be at least approximately an attempt to achieve that purpose, and that sometimes it is simply not possible to propose a proper purpose to which the questioned action bears any remote relation, while at the same time it fits the improper purpose like a glove. The *Gomillion* example serves to illustrate, in part, that effects come back into the intents test when the effects involved are extreme in their salience. If one effect is very substantial, and the other effect is a peppercorn, the two tests more or less collapse into one another. It is in this fashion that effects become a critical piece of evidence in the determination of intent, particularly in those contexts in which those whose actions are constrained are unlikely to acknowledge candidly their illicit motivation.

Where doctrine forbids strongly but not absolutely—as with racial classifications and regulations impinging on freedom of speech or burdening the exercise of religion—and government offers an appropriate justification, it is sometimes said that the regulation must be narrowly tailored to the justifying purpose,[23] or that the means chosen must be the least restrictive way to get to the justifying goal.[24]

FIGURE 1

	ACTS	PURPOSES	EFFECTS
POSITIVE	1	2	3
NEGATIVE	4	5	6

By these tests if government action has an impact on protected liberties—in my terminology, if it falls in cell 6 of figure 1 by having the effect of transgressing a limit—as for instance in the case of *Sherbert v. Verner*[25] or any of a number of time, place and manner restrictions on speech—then a court will ask of the asserted justification (say, to prevent littering,[26] to preserve quiet in residential neighborhoods,[27] to compensate victims of crime[28]): could this goal have been achieved without the effect on the protected interest, whether it be speech, religious exercise, or the economic interests of competitors from beyond the borders

23. *City of Richmond v. Croson*, 488 U.S. 469 (1989).

24. *Elrod v. Burns*, 427 U.S. 347 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973).

25. 374 U.S. 398 (1963).

26. *Schneider v. State*, 308 U.S. 147 (1939).

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

28. *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Board*, 502 U.S. 105 (1992).

of the regulating state? This inquiry corresponds to a common sense inquiry used to tease out what an individual's real intention might have been. When we do not know whether a person is sincere in claiming that he "did not mean" to cause a particular harm, that he was only trying to do some other, quite innocent thing, we test that sincerity by asking whether he could have achieved his asserted goal without doing harm along the way. There is some controversy in the cases about whether to pass muster the questioned government action has to be the least restrictive alternative (whether the *only* way the government can attain its stated goal is by running over the complainant's rights), or whether it is good enough for government to show that its chosen route was a reasonable way to get to where it says it was going.[29]

Legal doctrine also reflects another common sense judgment: the greater the harm one causes, the more burdensome the steps it is reasonable to expect a person who did not want that harm would take to avoid it. So if I fail to swerve to avoid a toad in the roadway, I might be believed when I say that I did not intend to kill but didn't want to run the slight risk of an accident by swerving, or even that I just did not want to jostle my passengers. A greater effort is required to avoid hitting a dog, and, if the possible victim is a person, a supreme effort, before the actor will be believed that he really did not mean to do the running over, but just was trying to get from one place to another. Though it may seem that this analysis reintroduces an effects test with its concomitant balancing as the principal doctrinal form, this would be a mistake. What we do here is use the balance of consequences as evidence of intent, but not as conclusive evidence, not as the equivalent of intent.

Content neutrality in speech cases also corresponds to a natural strategy for determining an individual's true intention. If the Constitution forbids the purpose (cells 2 and 5 of figure 1) of suppressing speech, then the claim that government's purpose (intent) in, say, banning picketing, was not to suppress speech (which is an incidental effect of the ban) but to preserve the amenity of residential neighborhoods, the explanation is less plausible if the ban is directed only at some picketing, and that type of picketing is no more disruptive than what is permitted. This is because the principle of exclusion seems to depend on the speech content of the picketing, while the justification offered for

29. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), reh'g denied, 492 U.S. 937 (1989).

the ban does not and may not.[30] In short, the justification seems a pretext. Such devices are modes of attributing intent while taking into account in a limited and structured way, the effects—actual and hypothetical—of an item of behavior.

Why do we ever care—whether in constitutional, ordinary legal, or even in moral contexts—what an actor's intent might be? One reason, mentioned by Bentham to explain the importance of intent in criminal law, notes that you may achieve a more narrowly targeted, less costly restraint if you focus on intent. If a particular effect is likely to be produced in the larger proportion of cases only by those who want to produce that effect, and if it is an effect that people not seeking to produce it are likely to avoid—as in the case of killing—then the prohibition directed at intentional killing reaches much of what is needed and does so without sweeping in presumably neutral or useful conduct that only produces this result accidentally.[31]

But there is a moral dimension to this focus on intention as well. Though a person's values and therefore his character are judged by what he is willing to risk to get what he wants, still there is a primacy about a person's actual ends.[32] There is a difference between a man who is willing to see others suffer harm as the price of his achieving his own ends, and one who seeks that harm for its own sake; and it is not just that in the latter instance he is more likely to produce the harm.[33] Our actions and our goals are what define us and what determine our character, and if bad things are part of what we are invested in, the corruption is more intense and complete. And so it may be with institutions, as well. The limits the Constitution places on government may be understood not just in terms of minimizing certain sorts of harms, but in ruling certain goals out of bounds for government altogether. The furtherance or suppression of religion, for instance, are simply not part of what government may aim at all.[34] Viewed in this light, some prohibitions on government (the limits I have assigned to cell 5 of figure 1) speak most naturally to intentions, were it not for the inconvenience that intention is a concept so anthropomorphic that its application to artificial, corporate, plurally constituted bodies seems at once inapposite

30. Compare *Frisby v. Schultz*, 487 U.S. 474 (1988) with *Boos v. Barry*, 485 U.S. 312 (1988) and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

31. See Charles Fried, *Right and Wrong - Preliminary Considerations*, 5 J. Legal Stud. 165 (1976).

32. See Charles Fried, *Right and Wrong* 7-29 (Harvard U. Press, 1978).

33. See Fried, 5 J. Legal Stud. 165 (cited in note 31).

34. See Tribe, 1993 Sup. Ct. Rev. 1 (cited in note *).

and inevitable. Might not this inconvenience be avoided by acknowledging that just as with an individual so with a corporate body, its actions, if they are rational, serve a purpose? When a controversy arises about whether the action is proper the corporate body, like an individual, may seek to justify itself in terms of its purpose, and then the action is judged according to whether that now-stated purpose might not have been achieved otherwise, at lesser cost to competing values.

The difficulty about attributing intention to a governmental entity appears in a different light when we take into account that such entities are fundamentally and inescapably constituted. Any proposition appropriately attributing a statement, an action, an intention or other mental state, quality or condition to such an entity must be mediated by the rules that relate to its make-up and way of proceeding. These rules are what constitute such bodies as distinct entities and appropriate subjects of any proposition at all. So unless we take an extreme stance by which Congress or the Presidency or a court are simply short-hand terms which in a fully accurate proposition would be unpacked in terms only of natural persons and their doings, we should not be especially reluctant to attribute intention to these constituted entities. Consider the members of Congress assembled for a picnic on a very hot Fourth of July. We would hesitate a long time before saying that the Congress perspired heavily—as we would not about saying that the House resolved to adjourn or to proclaim its appreciation of some act of heroism. That is because sweating is not the kind of thing parliamentary bodies do: the rules constituting them do not provide for this mode of action and offer no criteria for such attributions. What constitutes a quorum for sweating; would a simple majority suffice?

The doctrines about intention that the courts have elaborated—least restrictive alternatives, content-neutrality, the relevance of certain statements by certain persons—are just such rules of attribution. Indeed this is shown even in the case of the actions of a unitary official actor—a judge, the head of a department, or the President. Even then the attribution of intention to such an actor, as when we speak of the intention of the official's regulation, or the intention of his directive, or of the intention of whatever other official action is in issue, depends on certain rules having been complied with, procedures followed. Indeed subjective intention comes most clearly to the fore only in anomalous and degenerate cases—as when there is an issue about whether the official acted for corrupt or illicit motives outside the scope of

his official function altogether. The powers of institutions, even institutions headed by a single individual, derive not from the persons who inhabit them but from the legal and constitutional provisions that create them, and so it is this constituted, institutional efficacy that concerns us in a "government of laws and not of men".[35] (Compare the situation in a despotism or in a criminal gang, where the subjective disposition of the potent individual looms very large indeed.)

We attribute acts, purposes, statements, and sentiments to such constituted bodies, because constituted though they are, they are nonetheless constituted by human beings and of human beings. And so constitutional doctrine, which judges the conduct of government, quite appropriately speaks in terms of such attributions—indeed much of constitutional doctrine is precisely about when a particular attribution is appropriate. I have already indicated the slide towards global balancing by the judiciary that a focus just on the effects of government action entails. In addition, however, we can now see that such an exclusive concern for results makes official action more like a natural event (a hurricane or epidemic) and less like a purposive human act. So the danger is that intention tends to make our concerns personal in a way that is inappropriate to a constituted republic of laws, while an exclusive concern for results turns us too far away from the fact that the institutions we obey are, after all, human institutions designed to further human ends. An appropriate doctrinal response must somehow, and in spite of the difficulties, take into account the purposive (intentional) nature of official conduct: the Supreme Court is not devising responses to floods, disease, or tigers.

C. Acts

If constitutional doctrine could be interrogated and we were to ask of it what in general are the kinds of things that the Constitution requires or prohibits, the standard answer implicit in most doctrinal expositions would be outcomes (effects) or purposes (intents). But if we step away from standard statements of doctrines and consider what the Constitution does, then a third object of limiting doctrines becomes apparent. Many limiting provisions speak neither to effects nor to intents but quite simply and directly require or prohibit particular acts. (Cells 1 and 4 of figure 1). It seems truer to the facts not only to recognize this third category of limiting provisions, but indeed to recognize that

35. Mass. Const., Art. XXX.

in their simplicity and directness such limitations have a certain primacy.

I suggest that sometimes the best way to see what the Constitution tells us is as a direction Do or Don't Do This. The distinctiveness of the act category is clearest in respect to mandatory acts (cell 1). When the Constitution directs the President to deliver an annual address to the Congress on the state of the union,[36] the norm is not complied with merely by his intending to do so, and of course since it is not his address unless he does so intentionally, the idea of achieving the result inadvertently cannot arise. The same is true of the oath required of all officers of government to support the Constitution.[37] Numerous provisions enjoin, as a condition of exercising a power, particular acts—and can only be satisfied by the doing of just those acts, not be a mere intention to do them, and not by some other act that may have a similar effect. These are among some of the most potent and constraining limits on government power for just that reason. If a person is to be tried, then there must be a certain kind of trial—not just a good faith intent to have such a trial, nor even something that may have the same effect, whatever that may be—but a trial by jury,[38] following a grand jury indictment in the case of a felony,[39] and with confrontation of prosecution witnesses and assistance of counsel.[40]

As an example of a purely prohibitory limit expressed in terms of acts (cell 4), consider the injunction against religious tests in Article VI, clause 3 of the Constitution. A statute requiring official attendance at an annual religious ceremony might have as its purpose to embarrass and thus discourage officeholding by those who do not share that religious observance. It might have been intended only to honor some national hero but yet have this discouraging effect. I would suggest that rather than asking whether the statute belongs in column I or column E, the question might best be put: what did Congress *do*? The statute would then be seen as a text which the country is asked to interpret. So the question is: Did Congress enact a religious test? What did Congress *do*, not what is the effect of what Congress did? As we shall see, this category of forbidden acts fits one understanding of the First Amendment's Establishment clause, where the test proposes: has government endorsed religion by its

36. U.S. Const., Art. II, § 3.
37. U.S. Const., Art. VI, cl. 3.
38. U.S. Const., Art. III, § 2, cl. 3.
39. U.S. Const., Amend. V.
40. U.S. Const., Amend. VI.

action? So also it has been proposed to solve the conundrum posed by such assertedly even-handed statutes as those forbidding interracial marriage or integrated public facilities. Are they not best understood as a racial insult?

I return now to the subject of norms imposing constitutional limits. My suggestion after this detour is that there is a third alternative, along with effects and intents: required or forbidden *acts* (cells 1 and 4). I do not mean to suggest that cells 2, 5, 3, and 6 (intentions and effects) represent empty sets. My suggestion, rather, is that the category of Acts (cells 1 and 4) has a certain primacy, the category of acts being more primitive, more basic, while the other two are more sophisticated and therefore perhaps more derivative and problematic. Action is a primitive conception of human efficacy, representing the union of intention and effect. By contrast, we tend to speak of intention alone when the outward manifestation may have departed from the intention, or the intention has not manifested itself at all. With effects the abstraction runs in the other direction. We have prised outward events off of the paradigmatic form of human agency that brings them about, so that it is not surprising that we are left with far too broad, too unfocused, too inhuman an array of natural circumstances, and it is necessary to fashion devices to limit and make manageable this array.

An analogy to textual meaning may make this clearer. When we recognize a constitutional norm as directed to an act, this is analogous to our attending not to what a legislature might have meant (intended) by a certain statute, nor yet how some addressees of it might understand it (its effect), but simply to what the text says. When a person produces a text, it is also possible to focus on some private mental element of that (utterance) act, or on how that text is understood by those whom it reaches. The first focus corresponds to an intents test of meaning, the second to an effects test. Both approaches may be appropriate, but they must take their place beside an emphasis which asks simply: what has the man said; what has he done?[41]

II. EXAMPLES

The actual doctrines that fill the pages of the reports—with their three- and four-part tests, parts which sometimes ramify into two or more "prongs"—combine and recombine the ele-

41. See Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intent*, 100 Harv. L. Rev. 751 (1987).

ments of acts, intents, and effects in more or less complexly structured ways. Here is an example:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[42]

And another simpler one:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Chaplinsky v. New Hampshire.*[43]

What these instances show are various combinations of the argument types I have schematized. Justice Murphy in *Chaplinsky* points to types of actions: the lewd and obscene, and "fighting words" whose utterance government may prevent and punish. The act is the act of punishment, but it is a nested act: the act of punishing the act of speaking insulting or lewd words. There is a picture about a picture. All this fits, though intricately, into cell 4. But notice the next step Justice Murphy takes—a perfectly easy and natural one. He identifies these words in terms of their further qualities: they insult, they tend to incite trouble. So Justice Murphy at first identifies an act (lewd speaking), but the description requires interpretation and elaboration, and he supplies that first of all in terms of another picture, another act, one person insulting another. So we have doctrine which moves from

42. 447 U.S. 557, 566 (1980).
43. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

one description (lewd words) to another (insults). Nor is it clear which description is the more general; it is not as if Murphy in this move were going from a less to a more abstract description of the proscribable act. Rather he is giving us two intersecting general descriptions, and the area of concern is at the overlap. But in the latter part of the same sentence he specifies his meaning (his doctrine) in terms of effects: a tendency to incite immediate breaches of the peace. Now the abstractness of this effects language makes doctrines in column E appear somehow ultimate, so that we are tempted to think that the best formulated doctrine is one formulated in this way. So all speech is proscribable that has this effect. But this is a mistake. The proscribability of the speech in terms of the effect (a breach of the peace) depends in part on the ways the effect is thought to be brought about (by insults), for if a breach of the peace is brought about in some other way—say, by the measured, respectful preaching of a doctrine that provokes a hostile audience—the doctrine (or doctrine fragment) would not apply, and the speech could not on that account be punished.[44] This is particularly evident in the interpretive phrase "by their very utterance inflict injury." The injury is indeed an effect of the words, but the doctrine requires a proximity of cause to effect that interprets both.

The four part *Central Hudson* test also shows how a doctrine can be compounded of elements from all three columns: acts, intents, and effects. The first part has two prongs: an act prong (speaking about a lawful activity), and an effects prong (not having the effect of being misleading—whatever the speaker's intent, one would suppose). The second part again describes a kind of act—the assertion of a governmental interest that can be taken as substantial. This assertion, however, is only an element in the complex tests stated in the third and fourth parts. The asserted interest in the third part becomes an end-point or effect, which the regulation must directly advance. Here the effect in an effects test is not stated by the Constitution (as in the case of the effect of burdening the exercise of religion) but is proposed by the government and judged by the Constitution in part two. The requirement, moreover, that the effect be advanced directly calls to mind not just a means-end relationship, but one having a particular character (directness), which is more a descriptive than an analytic term and as such belongs more to the description of kinds of acts: those that produce their effects directly. And di-

44. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

rectness in producing a result is a sign of an intent to produce it; unintended effects are rarely produced directly. The fourth part of the *Central Hudson* test combines these elements yet more intricately: the whole universe of possible means-ends relations of the kind posited in part three must be scanned to determine if there may be among them one in which the effect of restricting speech is less than in the subject regulation. But as I have suggested, this least restrictive alternative test is a way of testing the intention with which government acts. (Any complete account of these particular doctrines would show how they may have begun life as displaying one or another of these doctrine types, but picked up accretions drawn from the other types as the pressure of new applications required either qualification or limited expansion.)[45]

A final set of related examples: The *ex post facto* clauses,[46] the double jeopardy clause[47] and the due process clause[48] prohibit retroactive punishment, a second prosecution or punishment for the same act, and the imposition of punishment except by the process set out in the Bill of Rights (specifically the Fifth, Sixth and Eighth Amendments). Yet retroactive laws with harsh consequences and the imposition of fresh consequences on transactions already completed are not in general prohibited.[49] And specific procedural protections, such as indictment by grand jury and trial by petit jury or the requirement of proof beyond a reasonable doubt,[50] are not generally accorded even to persons who may suffer dire consequences—e.g., deportation, loss of property, even loss of liberty—as a result of a law or proceeding. Whether these stringent, constitutionally mandated protections and prohibitions obtain depends on whether the law or proceeding is designated on the one hand as penal, punitive or involving the imposition of punishment, or on the other as (merely) regulatory or remedial. Laws imposing civil forfeitures of property implicated in drug offenses have been challenged as imposing double punishment,[51] as have laws imposing disqualifications (e.g., from driving a motor vehicle,[52] from practicing medicine,[53]

45. See generally Charles Fried, *Constitutional Doctrine*, 108 Harv. L. Rev. 1140 (1994).
46. U.S. Const., Art. I, §§ 9, 10.
47. U.S. Const., Amend. V.
48. Id.
49. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).
50. *In re Winship*, 397 U.S. 358 (1970).
51. See, e.g., *United States v. Ursery*, 116 S. Ct. 2135 (1996).
52. *Luk v. Commonwealth*, 658 N.E.2d 664 (Mass. 1995).
53. *Hawker v. New York*, 170 U.S. 189 (1898).

from holding office in a labor union[54]) following conviction of offenses related to those qualifications. Laws retroactively altering procedures relating to parole have been challenged as violating the *ex post facto* clause.[55] Laws revoking citizenship for remaining outside the United States to avoid military service or for desertion have been challenged because they did not provide for the protections required for criminal proceedings,[56] or imposed cruel and unusual punishment in violation of the Eighth Amendment.[57] And laws now being enacted all over the country requiring registration of certain duly released sex offenders, with the possibility of notification to the public of their presence in the community, have been challenged on all of these grounds.[58] In each of these cases the question has turned on whether the detriment imposed on the complaining person constitutes punishment.

It is often said that the indicia of penal laws is that they are designed (have the purpose) to deter or to exact retribution[59]—and, I would add, to express moral condemnation. Some courts have focused on the stated purpose of the legislation. When they have done so they have invariably upheld the legislation since legislatures regularly state a plausible regulatory goal and can easily avoid language of deterrence and condemnation.[60] Other courts have spoken in terms of effects, and asked whether the legislation has the effect of deterring or condemning. Both tests have obvious defects. As the Supreme Judicial Court of Massachusetts put it in an opinion on the constitutionality of a proposed statute requiring registration and community notification in respect to certain released sex offenders,

> An exclusive focus on either purposes or effects would be unreasonable and impracticable. Thus the Justices cannot agree with the statement . . . that measures such as § 174B [community notification regarding released sex offenders] may only count as regulatory if they have *no* deterrent or retributive effect, for most regulatory measures will have such an effect. Depriving persons of a license to practice medicine or law because they have shown themselves to be incompetent or

54. *DeVeau v. Braisted*, 363 U.S. 144 (1960).
55. *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597 (1995).
56. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).
57. *Trop v. Dulles*, 356 U.S. 86 (1958).
58. See, e.g., Opinion of the Justices, 668 N.E.2d 738 (1996); *Doe v. Poritz*, 142 N.J. 1 (1995); *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (3d Cir. 1996).
59. See, e.g., *United States v. Halper*, 490 U.S. 435, 448 (1989); *Mendoza-Martinez*, 115 S. Ct. at 168.
60. See, e.g., *United States v. Ursery*, 116 S. Ct. at 2147-49.

unreliable has a deterrent effect on others, and yet such measures are routinely counted as regulatory.[61] Similarly, such measures may evoke retributive sentiments in the public and in victims of past depredations of persons to whom they are applied. But it would be equally extreme and impracticable to judge such measures solely by the avowed purposes of the Legislature, for it would then be too easy by the appropriate recitation of a regulatory or remedial purpose to undermine the distinctness of the criminal regime and of the constitutional safeguards that distinctly characterize it. Thus even in *Ursery*, where the [Supreme] Court—in the context of a civil forfeiture statute judged under the double jeopardy clause—seemed to go some distance in accepting the government's statement of a remedial purpose, the Court added the caveat that if "the statutory scheme [is] so punitive either in purpose or effect as to negate [the Legislature's] intention to establish a civil remedial mechanism," it is a punitive statute. *Ursery*, at 4568.

In approaching each of the constitutional safeguards . . ., the Justices are governed by the overriding concern that the distinctiveness of the criminal justice system not be elided, lest we move in the direction of a regime where persons, and not just particular activities and occupations, are seen as regulated by government, rather than a regime where persons are seen as personally responsible for conforming their conduct to the clearly promulgated standards of the criminal law. Accordingly, while respecting the needs of practical regulation and the concerns expressed by the Legislature, the Justices judge this bill . . . by looking not just to its stated regulatory purpose, but also its effect on those to whom it is to be applied and on others, and its resemblance to other measures that have firmly been established to count as either regulatory or criminal. The more harshly the measures bear on the individual and the more closely they resemble traditional criminal sanctions, the more urgent must be the regulatory concern, the more soundly rooted in fact rather than prejudice and conjecture must be the basis for that concern, and the more closely we must insist that the proffered regulation must hew to the well-grounded regulatory aim.[62]

---

61. The test must refer to general, not specific deterrence, since any successful regulatory measure, such as revoking a license to practice of an attorney who has shown himself to lack the appropriate judgment or character, will specifically prevent the person to whom the measure is applied from doing harm in the regime the measure regulates. (Footnote by the Justices to the Senate, 668 N.E.2d 738, 750 (Mass. 1996).

62. Opinion of the Justices to the Senate, 668 N.E.2d at 750.

There are illustrated here all three argument types: The measures in question are designated as regulatory, because that is how the legislature designated them—that is, an intents test. But because the measures have effects that resemble those that are punitive in nature, that designation must be plausible, and the plausibility of the designation is judged by the congruence between the stated purpose and the likely effects. This is true in free speech cases too, where the plausibility of an asserted purpose to regulate only conduct[63] or only the time, place, and manner of speaking,[64] depends on the congruence between the asserted purpose and the effects. As in a number of other substantive areas—e.g., the takings clause,[65] or the commerce clause,[66] or the spending clause[67]—the degree of congruence required (other locutions refer to the closeness of the fit) in order to validate the stated purpose in light of its effects will vary depending on the urgency accorded to the constitutional protection on which those effects are seen to impinge.

But in making these determinations the Supreme Court in *Ursery* has thrown in a caveat that might seem to invoke the third argument type, that of acts: if "the statutory scheme [is] so punitive either in purpose or effect as to negate [the Legislature's] intention to establish a civil remedial mechanism," it is a punitive statute.[68] Since the tests for which this caveat acts as a backstop are themselves supposed to identify when a statute imposes punishment—i.e., when it is punitive—there is here an apparent circularity: A statute is either remedial or punitive; it is remedial if it is intended to be remedial, unless it is so punitive that it is not. Punishment is defined in terms of deterrence or retribution, and so the caveat may just restate the requirement of congruence: the deterrent and retributory effect must not be widely disproportionate to the stated regulatory aim. But the caveat may also ask whether the measures imposed simply look so much like what has traditionally been considered punishment that there is a particularly large burden to overcome by showing that they are not the thing they seem to be—and that is more like the third category, that of acts, here an act of punishment.[69]

63. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).
64. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
65. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).
66. *United States v. Lopez*, 115 S. Ct. 1624 (1995).
67. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).
68. *Ursery*, 116 S. Ct. at 2142, quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980).
69. Perhaps the court in *Mendoza-Martinez*, 372 U.S. 144, considered the imposition of loss of citizenship for draft evasion in this way.

III. IMPLICATIONS AND CONNECTIONS

It should be apparent that the structural features of constitutional doctrine I have elaborated are not merely a grammar of constitutional doctrine, neither constraining nor even guiding the substance of what that doctrine might be. It is not—to make an extreme analogy—a typography in which any words, sentences, and thoughts might be set. These structural features rather make possible certain distinctions and modes of conceptualization without which constitutional doctrine would be far less nuanced, and far more limited in the constraints and permissions it would express. Constitutional law limited to effects tests, for instance, would require that all constitutional values be implemented by balancing tests and this in turn would make court supervision of the implementation of those values far less appropriate and therefore less acceptable. It is only because constitutional values can be elaborated in more determinative constitutional doctrines that the subject seems the proper work for courts. Balancing is primarily for legislatures, doctrinal elaboration for courts. The structural features I have identified are among those that allow constitutional values to be articulated in constitutional doctrines. There are other recurring structural features that perform similar functions. The levels of scrutiny are another example, and I have shown some of the ways in which the effects/intents/acts trichotomy intersects with that structural feature. In this concluding part I indicate briefly how the trichotomy relates to several other features of constitutional doctrine. I indicate only those relations, and do not intend here a systematic survey of these features of doctrine. The features I have chosen—the distinction between aspirational, institutional, and limiting norms; unconstitutional conditions; and analogy—operate in different ways and at different levels of generality. That is why I have chosen them to suggest the complex relations between forms of argument in the elaboration of constitutional doctrine.

A. Aspirations, Institutions, Limits

It is an instinct of lawyers to treat as the central example of law those rules requiring or forbidding conduct, what I call limiting provisions. The most prominent legal positivists—a school of thought that attracts the reflexive allegiance of most lawyers—even argued that such rules were the only examples of law "properly so called," to use John Austin's locution.[70] That prejudice

70. John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 2 (The Noonday Press, 1954).

was elegantly and definitively exploded by H.L.A. Hart, himself the leading modern positivist. He pointed out that many legal rules and doctrines establish institutions and set out ways of doing things—making contracts or wills, transferring property, setting up a corporation—in accordance with the rules of these institutions.[71] Such rules are constitutive: they direct no particular action or forbearance; rather they establish frameworks for courses of conduct, and designate the offices and powers of various actors.

The Constitution, in its Preamble and perhaps in a few other places,[72] states aspirations for the new government it establishes and for its officers. But almost all of the text is given over to rules establishing and defining institutions and offices, and describing and limiting their powers. The aspirational provisions may then be seen as setting an interpretive context for these constitutive and limiting provisions: the aspirational provisions explain their ultimate goal and so suggest a trajectory for the elaboration of doctrine based on these rules. Accustomed as we are to thinking of our Constitution as a strongly operational document, we take for granted that aspirational provisions are relatively few in the Constitution, but most constitutions are loaded with such provisions. These constitutions also promise rights to education, housing, health care, and employment. I call such provisions aspirational, because they state goals for government, but neither require particular actions or the observation of certain limits, nor create institutions or forces that structure the conduct of government, officials, or citizens. The most austere and influential statement of such aspirations is found in the constitution of the Federal Republic of Germany, stating that the Republic is a democratic and social federal state.[73]

It is not surprising that the greatest part of our Constitution sets forth institutional rules of the constitutive sort. As I have argued elsewhere, the government of the United States that the Constitution proposes is a creation *ex nihilo*—not in the sense that it does not have antecedents, but rather in the strict juridical sense that those antecedents did not authorize the government

71. H.L.A. Hart, *The Concept of Law* (Oxford U. Press, 1961).

72. For example, Article I, section 8, clause 8 aims to "promote the progress of science and useful arts;" Article II, section 3 urges that the "[President] shall take care that the laws are faithfully executed;" Article VI, clause 3 requires federal officers to take an oath to support the Constitution; and the Second Amendment justifies its grant of right by reference to "[a] well regulated Militia, being necessary . . . ." I thank Akhil Amar for pointing this out to me.

73. Federal Republic of Germany Const., Art. 20 (1). See David P. Currie, *The Constitution of the Federal Republic of Germany* 20-24 (U. of Chicago Press, 1994).

that replaced them.[74] Many of the provisions limiting the powers of the offices and institutions of this newly established government may from this perspective be seen not as prohibitions or injunctions but as provisions establishing, and marking the boundaries between, the offices and institutions so constituted. The way such provisions function in constitutional doctrine depends on which perspective is taken. So for instance the Incompatibility clause, preventing legislators from being officers of the United States,[75] while certainly a prohibition, serves to specify a particular structure of government, where—in contrast to a parliamentary system—the task of making the laws is assigned to persons and institutions distinct from those charged with their application and enforcement. The Bill of Attainder clause,[76] while a limitation and protection of the individual from government, also distinguishes and defines the boundary between the legislative and the judicial powers, a distinction that did not obtain for the Parliament which was an historical though not juridical antecedent of the legislature established in Article I. Even such quintessentially limiting provisions as the speech and religion clauses of the First Amendment, the Third Amendment's prohibition on quartering of soldiers, and the Fifth Amendment's grand jury clause have been reconceptualized by Akhil Amar as structural features of the distinct federal and state spheres of competence.[77]

The choice between these competing conceptualizations is critical in determining whether and how constitutional provisions will be enforced by the courts. When provisions are viewed as establishing institutions and offices they tend not to call forth the same degree of supervision by the courts as when those same provisions are seen as limitations. Examples are everywhere. In the matter of the separation of powers between the branches, the Bicameralism and Presentment clauses[78] had traditionally been seen as setting up the way in which the Houses of Congress and the President are to go about their business, but in the *Legislative Veto* case (*INS v. Chadha*[79]) and the *Gramm-Rudman* case (*Bowsher v. Synar*[80]) these clauses took on the aspect of adjudicable

74. See Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 Harv. L. Rev. 13 (1995).
75. U.S. Const., Art. I, § 6, cl. 2.
76. U.S. Const., Art. I, § 9, cl. 3.
77. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991).
78. U.S. Const., Art. I, § 7, cl. 2.
79. 462 U.S. 919 (1983).
80. 478 U.S. 714 (1986).

limits on what Congress might accomplish by their means, limits that in one case protected an individual from deportation and in the other (it might be said) Congress from itself. In the dormant commerce clause cases, the grant of power to Congress to regulate commerce among the states[81] becomes a limit on the power of states to burden or discriminate against such commerce, even without any exercise by Congress of the grant.[82] The statement in Article I, section 1 that the legislative power granted to Congress is that which is granted "herein," which in appearance is an establishing and empowering provision, when taken together with the truism expressed by the Tenth Amendment that what is not granted to the national government is reserved to the states or the people (who else is there?), in *Lopez v. United States*[83] and *New York v. United States*[84] becomes, to an uncertain extent, an adjudicable and enforceable limit on national power to impinge on the prerogatives of state sovereignty.

Thus constitutional law, as opposed to constitutional politics, is primarily a matter of limits. Aspirations cannot be enforced, and institutional arrangements either need not be (because they enforce themselves) or, if they can and are to be enforced, appear as limits. When the provisions of the Constitution are seen in this way as limiting provisions, the doctrine types I have been considering—such as the tripartite division between levels of scrutiny (strict, intermediate, and rational basis)—become relevant. These levels of scrutiny assume the activity of the courts in enforcing these limits in a way that aspirational and institutional provisions do not require, and then go on to specify the degree of rigor with which a particular limit will be enforced. Indeed I would suggest that the greater the rigor of scrutiny (the more it approaches the strict) the more the limiting aspect of a provision is to the fore; conversely, a provision that attracts only rational basis scrutiny is seen as working largely in an institutional or aspirational way. And as I have also argued, this differentiation of levels of scrutiny in turn needs the act/intention/effects trichotomy to make it workable.

B. Unconstitutional Conditions

There are other argumentative elements that appear and reappear in a broad range of doctrines, and I do not intend to canvass them all here. One in particular, however—the

81. U.S. Const., Art. I, § 8, cl. 3.
82. See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949).
83. 115 S. Ct. 1624 (1995)
84. 112 S. Ct. 2408 (1992).

unconstitutional conditions problem—is so persistent and pervasive that I would like at least to suggest its relation to the analysis of doctrine I have offered. Oliver Wendell Holmes, as a state court judge, said that one may have a right to speak as he wishes but not as a policeman and not in a public park or public street.[85] Since the government, in his view and as most thought at the time, had the widest latitude in its choice of employees or the uses it allowed of public property, it could condition its grant of those privileges on any ground it chose—including that the prospective employee or soap box orator would not express views of which the government disapproved. The implications of this dictum became intolerable as the range and importance of governmentally provided benefits became more important, with the result that, if Holmes's doctrine stood, the enjoyment of constitutional rights would be largely at the sufferance of the government. And this conundrum exists not only at the level of individual right, but in the dealings of different branches and levels of government with each other. It appears wherever a unit of government would use a power to grant a benefit to another unit on the condition that that other unit exercise its governmental prerogatives in a way that the first has been granted no authority to control. So, for instance, the regulation of alcoholic beverages is thought to have been made an exclusively state matter by the Twenty-First Amendment (though the Amendment's text does not say so), while the national government has the broadest discretion to tax and distribute revenue. May it use that latter power to punish states that regulate the consumption of alcohol according to a different view of policy than that favored at the national level?[86] Before finding this technique fatally defective, recall that Congress regularly pressures the President to exercise his various prerogatives—in foreign affairs, as Commander-in-Chief, to make various appointments in the Executive branch—by threatening to withhold funds in more or less painful ways.

This doctrine is embarrassed by a conundrum. The benefit could itself be promoted to the status of a constitutional right to avoid the problem, but then government would be constitutionally compelled to provide it, and provide it universally, even

85. *McAuliffe v. Mayor and Board of Alderman of New Bedford*, 155 Mass. 216 (1892); *Commonwealth v. Davis*, 162 Mass. 510 (1895), aff'd sub nom, *Davis v. Massachusetts*, 167 U.S. 43 (1897).

86. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding statute conditioning receipt of highway funds on state's adoption of specified drinking age to be a valid use of Congress's spending power).

without the rights-pressuring (or any other) condition. As we have seen, there are not many instances of constitutionally mandated benefits (cells 1, 2, and 3): The government is obliged to provide a jury trial for those it wishes to prosecute for felonies, and so it may not condition that grant on the forfeiture of another constitutional right. That bit of reasoning (doctrine fragment) may be seen as a specification of the very act required: the provision of a jury trial to all, and if improperly conditioned it would not be provided to all, any more than if it were provided for a fee or only to every other defendant. The fact that the condition required the forfeiture of another constitutional right would make such an incomplete compliance with the mandate even less acceptable. But this cannot provide a general solution to the problem of unconstitutional conditions, since that solution only obtains where the benefit government conditions on the relinquishing of a constitutional right is itself another constitutional right. As a general solution it would only do its work if we were prepared to constitutionalize the entitlement to most of the benefits government provides.

If the guarantee of free speech is seen in terms of intentions—that suppressing a disfavored point of view cannot figure among the reasons government may offer to justify its actions—then the question will be whether the conditioning of a benefit on refraining from certain speech can be explained apart from this forbidden purpose. And that is an inquiry similar to the one meant to be assisted by such doctrine fragments as the least restrictive alternative test and content neutrality. By contrast, Congress pressuring the President—or the President pressuring Congress—by the exercise of their respective powers may be seen not under the category of limiting norms at all but of constitutive norms, establishing institutions and offices and defining their powers. In this perspective the purposes for which those powers are used does not come into issue, but only whether procedures have been observed and formal correctness complied with. Cast in these terms, the unconstitutional conditions doctrine fragment fits into a wide variety of more fully elaborated specific doctrines: about freedom of speech and access to a range of governmentally controlled forums, free exercise of religion, dormant commerce clause, regulatory takings of property, and even the interrelation between the power of the federal government to spend money and the right of the states to regulate matters relating to the consumption of alcohol.

C. ANALOGY

A conceptualization of limits that regards acts along with effects and intents may help to explain the prevalence—and establish the legitimacy—of analogical reasoning in legal/judicial argument. The constitutional norms that spell limits, I have suggested, sometimes best display their character as norms that designate kinds of acts as forbidden or mandatory. I have given the example of the Establishment Clause of the First Amendment: it designates an act the meaning (not intention, not effect) of which is an endorsement of religion. Other limiting provisions can be read this way without even a struggle. The various provisions of the Bill of Rights having to do with criminal procedure describe performances that must be enacted in certain ways and not in other ways. Such a conception of constitutional limits produces doctrines of a distinctive sort. They call to mind a paradigm or set of paradigms which represent the forbidden or required act and from which doctrine then builds outward by inclusion and analogy. The use of analogy is troubling and even scandalous to a certain kind of rationalism, which looks to abstractions and general principles and finds analogy unduly episodic, impressionistic, and unsystematic. Yet analogy is central to common law adjudication, and I suggest one reason is that many legal norms designate acts and types of acts, rather than categories of consequences or intentions, and the most natural way to operate with such norms without betraying their specific character is by the method of analogy.

Now analogy need not be wholly intuitive and conclusory. Acts can be identified as having certain characteristics, and these characteristics are what lead us to draw the analogy between an established instance and a new one to which the concept is applied.[87] And lurking behind this process of extension and limitation in analogy are indeed assumptions about purposes (I) and effects (E): two things seem similar (analogous) against the background of what they do for us and why we care about them. But it is a mistake to see analogy as just a shorthand way of analyzing instances in terms of their effects, and assigning them to one or another category on that basis. The process, rather, is similar to the one in which we decide whether to extend a name (lion, cat, comedian) to a new instance. We may do this by analogy—it looks more like a cat than it does anything else—or more rigorously by the slow development of necessary and sufficient condi-

87. See Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 923 (1996).

tions for inclusion and exclusion. But this latter method is only apparently more rigorous than the first. We may adjust the criteria as we apply them, and so it is the analogy that is doing the work and the designation of criteria only cleans up afterwards. If our background concerns about purposes and effects are implicated as we go about the work of analogy, it is as much to change our commitments as we acknowledge new analogies as it is to govern the analogies by fixed commitments about purposes and effects. This is another way of putting the point—which so embarrasses formal decision theory and economics—that there are processes of value-formation and value development and that these cannot, without circularity, be assimilated to analysis according to fixed norms of valuation. What we care about changes, and analogy is the best account of the processes of that change. Analogy works more like a narrative than a formal deduction from general principles or an induction to general principles.[88] And analogical reasoning may be seen as a kind of performance parallel to that process.

And more generally, to the extent that doctrine is constitutive of a way of doing things, rather than prescriptive of an end point to be attained or avoided, compliance with it is most aptly judged by looking to whether government's behavior comports with the model the doctrine constitutes: fair procedure becomes a complex performance and due process asks whether its steps have been followed. The force of many such constitutional norms is lost if they are looked at principally as stating abstract values (e.g., fairness) to be maximized—even if such a value stands, abstractly, in the background. Such performance norms are most aptly viewed as acts—extended acts, actions—in the typology I offer here, and they are elaborated by the method of analogy. The method of analogy is peculiarly apt to doctrines cast in terms of acts, because of the demonstrative or exemplary nature of such doctrines.

88. See Fried, 108 Harv. L. Rev. (cited in note 45).