

CONSTITUTIONAL CALCIFICATION: HOW THE LAW
BECOMES WHAT THE COURT DOES

*Kermit Roosevelt III**

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What, then, is truth? A mobile army of metaphors, metonyms, and anthro-pomorphisms—in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.

Friedrich Wilhelm Nietzsche¹

INTRODUCTION

POPULAR thought divides constitutional adjudication into two categories. Either judges are faithfully and directly enforcing the Constitution as written, or they basically are making it up as they go along, creating rules with no roots in the Constitution and imposing them on the rest of society.² People can be excused for subscribing to this dichotomous vision; Supreme Court Justices have pressed it on them. In his eloquent dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Scalia lamented that the Court had strayed from its proper role, the “essentially lawyers’ work” of “ascertaining an objective law.”³ Half a century before him, Justice Owen Roberts described the judicial task as similarly straightforward: The Court’s function, he wrote,

¹ Friedrich Nietzsche, *On Truth and Lie in an Extra-Moral Sense*, in *The Portable Nietzsche* 42, 46–47 (Walter Kaufmann trans., Penguin Books 1976) (1954).

² Like many other concepts, the dichotomy between legitimate enforcement and illegitimate judicial legislation finds its most strident articulation in political rhetoric and the popular press. Statements by elected officials excoriating so-called “activist judges” are a dime a dozen. For a notable one, see the statement of President Bush endorsing the Federal Marriage Amendment. Press Release, George W. Bush, Statement by the President (May 17, 2004), www.whitehouse.gov/news/releases/2004/05/print/20040517-2.html (“The sacred institution of marriage should not be redefined by a few activist judges.”). In the popular press, the most striking recent example is Mark R. Levin, *Men in Black: How the Supreme Court Is Destroying America* (2005). Academic commentary tends to recognize that “activist” is an epithet with no substantive content. See, e.g., Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 *U. Colo. L. Rev.* 1401, 1401 (2002).

³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in part and dissenting in part).

was merely “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.”⁴

Academics are less tempted by what I will call the fallacy of direct enforcement. They understand that courts deciding constitutional cases apply a vast body of doctrine that contains complexities and distinctions well beyond those of the constitutional text. But scholars and Justices alike frequently fall prey to a related and more insidious lure, which I will call the fallacy of perfect enforcement. The fallacy of perfect enforcement assumes that doctrinal rules are simply a way of getting the right answers in constitutional cases. The meaning of the Constitution, on this understanding, is precisely and exhaustively specified by actual or hypothetical adjudicative outcomes: A governmental action is constitutionally sound if and only if a court would uphold it, and unconstitutional if and only if a court would strike it down.⁵

My purpose in this Article is twofold. First, in Part I, I will show that both direct enforcement and perfect enforcement are illusory. Judges never have done either of them, and for good reason. In place of these two spurious alternatives, Parts II and III will present a model that describes what judges actually do in constitutional cases: create and apply rules that do not simply articulate the demands of the Constitution but are shaped by a wide variety of factors and, in some cases, direct outcomes inconsistent with constitutional requirements. The debunking of the enforcement fallacies and the development of the alternative model will be fairly straightforward; indeed, in one form or another, the model is widely accepted. But this model often is forgotten, and the second and more novel thing this Article will do is to put the descriptive account to normative work. Part IV will analyze the rules created

⁴ United States v. Butler, 297 U.S. 1, 62 (1936).

⁵ The idea that statements about law are a shorthand for the predicted outcomes of adjudication is associated with a form of legal realism—the predictive theory of law. See Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 173 (1920) (asserting that statements about law are “prophecies of what the courts will do in fact”). That theory has, of course, been criticized on philosophical grounds. See, e.g., H.L.A. Hart, *The Concept of Law* 1–3 (2d ed. 1994). This Article will offer a criticism of the theory as it applies to constitutional law, but my method is not jurisprudential. Rather, my basic claim is that an unthinking equation of constitutional meaning with the outcome of adjudication warps doctrine in certain predictable ways.

in a number of doctrinal areas, and Part V will discuss some of the difficulties that the Court faces in creating and maintaining its doctrinal rules. Part VI will demonstrate a mistake that has not yet been systematically studied: the mistake of succumbing to the fallacy of perfect enforcement. In a striking number of cases the Court has forgotten the reasons behind particular rules and has come to treat them as nothing more than statements of constitutional requirements. This mistaken equation of judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values; it also distorts the relationship the Court has to other governmental actors and to the American people.

I. THE ENFORCEMENT FALLACIES

The fallacy of direct enforcement requires little discussion; judges and scholars have frequently noted that there is a distinction between the Constitution itself and the rules that courts apply in deciding cases. Justice Frankfurter, concurring in *Graves v. New York ex rel. O'Keefe*, noted the tendency to “encrust” the Constitution with doctrine and “thereafter to consider merely what has been judicially said.”⁶ Likewise, then-Professor Hans Linde observed “It is natural that judge-made formulas, once pronounced, take on a life independent of their supposed sources in the Constitution, and that the application of these judicial formulas should become the daily rule in constitutional litigation and their reexamination the exception.”⁷

In these formulations, however, the implicit assumption is the fallacy of perfect enforcement: that doctrine is and should be a means to the end of reaching correct decisions—and, more significantly, that judicial decisions are correct according to the court’s interpretation of the Constitution.⁸ In contrast to the eminently resistible siren of direct enforcement, perfect enforcement probably will not strike most readers as immediately problematic. After all,

⁶ 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring).

⁷ Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 197–98 (1976).

⁸ I add the qualifying phrase to make clear that the perfect enforcement fallacy does not require the assumption that courts are in fact correct in their interpretation of the Constitution. The point is simply about the relationship between the outcome of a case and what the court believes the Constitution requires or prohibits.

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courts uphold constitutional laws and strike down unconstitutional ones—don't they?

Indeed they do—in much the same way, and to much the same extent, as they acquit innocent people and convict guilty ones. Which is to say, with something considerably less than perfect accuracy, and deliberately so. In the criminal context, it is commonplace to distinguish between legal and factual guilt. Acquittal does not mean that the defendant did not commit the offense; it means that the prosecution failed to prove its case beyond a reasonable doubt. The possibility remains that the defendant is in fact guilty. Legal rulings may not track the underlying facts perfectly.

A similar divergence between ruling and reality can occur even with issues that seem purely legal, for constitutional questions “frequently turn in the last analysis on questions of fact.”⁹ Consider the substantial effects test of Commerce Clause jurisprudence: Congress may regulate activities—at least commercial activities—that in the aggregate substantially affect interstate commerce.¹⁰ But the primary responsibility for deciding whether a substantial effect exists lies not with the courts but with Congress. Judicial review of a congressional determination that such an effect exists is deferential: Courts ask not whether the substantial effect exists, but whether Congress rationally could have believed it to. In consequence, much like a court applying the “beyond a reasonable doubt” standard in a criminal case, a court reviewing Commerce Clause legislation under the rational basis “substantial effects” test will regularly and predictably uphold regulation of activities that do not, in fact, have a substantial effect on interstate commerce. The rational basis standard of review underenforces the underlying constitutional rule (what I will call, following Professor Mitchell Berman, the “constitutional operative proposition”¹¹). Unconstitutional laws will be upheld, and the outcome of adjudication will not reflect the true meaning of the Constitution.

An objection presents itself: Perhaps this simply shows that ra-

⁹ *Oregon v. Mitchell*, 400 U.S. 112, 246 (1970) (Brennan, J., dissenting in part and concurring in the judgment in part).

¹⁰ *United States v. Morrison*, 529 U.S. 598, 609–10 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 558–60 (1995)).

¹¹ See Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 9 (2004) [hereinafter Berman, *Decision Rules*].

tional basis is part of the meaning of the Constitution. From our current Court-centered perspective, the claim might seem plausible. Adopting the perspective of Congress demonstrates that it is not. A conscientious legislator, aware of judicial doctrine, will know that the Court will uphold regulation of any commercial activity that might rationally be believed, in the aggregate, to substantially affect interstate commerce. But in deciding whether a vote in favor of a proposed law is consistent with her oath to uphold the Constitution, should she ask herself whether she might rationally believe the aggregated activity has such a substantial effect? Surely she should ask instead whether she *does* believe this. That is, it would not be an act of good constitutional faith to vote in favor of a law regulating an activity she did not believe substantially affected interstate commerce on the grounds that the contrary view would be rational.¹²

The matter becomes even clearer if we return to the criminal context. There, a person contemplating murder will know he will not be convicted unless he commits the crime in such a manner as to allow proof beyond a reasonable doubt. Yet not even the most hardened realist would suggest that the criminal law forbids only those crimes that leave sufficient evidence to convict. The law prohibits murder *tout court*; the perfect crime is still a crime. Thus, the rules that courts apply (convict if all elements are proven beyond a reasonable doubt; strike down if Congress could not rationally have found a substantial effect on interstate commerce) are not the same as the rules that actors seeking to comply with the law should consider. They are not the true law.

¹² Thus, as James Bradley Thayer put it, citing Cooley:

[O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 68 (6th ed. Little, Brown 1890) (1868)). “[T]he ultimate question,” Thayer asserted, “is not what is the true meaning of the constitution, but whether legislation is sustainable or not.” *Id.* at 150 (emphasis omitted). For a modern statement, see Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975).

In the context of the Commerce Clause, the constitutional operative proposition might be (and I shall assume here that it is) the substantial effects test.¹³ The rational basis standard of review, like a burden of proof, is designed to guide judicial decisionmaking. “Strike down if Congress could not rationally have found a substantial effect on interstate commerce” is what I will call (again following Professor Mitchell Berman) a “constitutional decision rule.”¹⁴

This Article seeks to demonstrate just how many doctrinal areas profitably may be understood from the perspective that separates decision rules from constitutional operative propositions. Not all of the demonstrations will be as clear-cut as the analysis of rational basis review in the context of the Commerce Clause.¹⁵ There is room for disagreement about the status of particular doctrinal formulations—whether they are constitutional operative propositions or decision rules—and about the content of the constitutional operative propositions themselves. But those are questions about the application of the model, not its basic validity. I will first develop the model in more detail, then use it to analyze and critique several areas of doctrine.

II. THE DECISION RULES MODEL

Thus far I have argued that the rules courts apply in deciding constitutional cases do not necessarily reflect the underlying meaning of the Constitution. To say that doctrine may diverge from the Constitution may not be to say anything more than that the Court gets some cases wrong.¹⁶ The insight of the decision rules model is different. It is that the Court intentionally crafts decision rules that depart, in some cases quite substantially, from its understanding of

¹³ I will discuss the operative proposition underlying the Commerce Clause in greater detail in Section IV.B.

¹⁴ See Berman, *Decision Rules*, *supra* note 11, at 9.

¹⁵ Indeed, I admit that even the operative proposition of the Commerce Clause may be hard to discern. My claim here is only that the rational basis standard of review is not part of it.

¹⁶ In his *Harvard Law Review* foreword, Professor Akhil Amar pursued essentially this claim, comparing the outcome of cases under the Court’s doctrine to the outcomes suggested by constitutional text and structure and finding the latter more appealing. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 26–27 (2000).

constitutional operative propositions. The Court prescribes doctrinal rules that predictably lead to adjudicative outcomes that are erroneous in terms of its understanding of the actual meaning of the Constitution.

This is not necessarily a criticism of the Court. As I will explain in Part III, there are good reasons to do so. Nor is it a novel insight. Professor James Bradley Thayer, arguing for judicial restraint in 1893, well understood that he was advocating a “rule of administration” under which some unconstitutional laws would be upheld.¹⁷ The Court should strike down only manifest violations of the Constitution, he argued, because Congress has “primary authority to interpret.”¹⁸ In modern times, the germinal moment of the idea is Professor Lawrence Sager’s article *Fair Measure: The Legal Status of Underenforced Constitutional Norms*.¹⁹ Professor Sager argued that the Court underenforced some constitutional operative propositions—in particular, equal protection—but that other actors should understand themselves as bound to the full extent of the operative proposition.²⁰

The distinction between the perspective of courts deciding cases and other actors attempting to understand their constitutional obligations bears an obvious relation to Professor Meir Dan-Cohen’s account of a similar divergence in criminal law, between what he called “conduct rules” and “decision rules.”²¹ The connection to the

¹⁷ Thayer, *supra* note 12, at 139–44.

¹⁸ *Id.* at 136. The idea is ancient, according to Thayer, who did not see himself as articulating anything new. *Id.* at 140. In *Fletcher v. Peck*, for example, Chief Justice Marshall noted that a Court that believed a law was unconstitutional should nonetheless strike it down only if “[t]he opposition between the constitution and the law [were] such that the judge [felt] a clear and strong conviction of their incompatibility with each other.” 10 U.S. (6 Cranch) 87, 128 (1810).

¹⁹ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213–15 (1978); see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 107–08 (1976).

²⁰ Sager, *supra* note 19, at 1221.

²¹ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 627–28 (1984). Professor Dan-Cohen’s main suggestion was that it was desirable in many cases for actors to believe that they were bound by norms (conduct rules) different in material ways from those the courts would apply (decision rules). *Id.* My point in this Article is similar, though in some ways the converse: courts and other actors over time regularly come to confuse the decision rules with the conduct rules (what I call constitutional operative propositions). This is undesirable, for a number of reasons. See *infra* Section VI.

constitutional context was made explicitly by Professor Akhil Amar²² and emphatically by Professor Mitchell Berman, whose *Constitutional Decision Rules* offers the decision rules model as a general account of constitutional law.²³ Professor Berman's article in many ways constitutes the starting point for this one, which attempts to use the model to offer a more broad-ranging normative critique of existing doctrine, and in particular to highlight the characteristic error that occurs when the Court loses sight of the distinction.

The model can be simply stated. The Constitution contains certain rules that empower or restrain actors—these are the constitutional operative propositions. In deciding constitutional cases, the Supreme Court is called upon to determine whether a power has been exceeded or a restraint violated. To do this, it first decides what the constitutional operative proposition is. In some cases this will be easy—for instance, the requirement that Senators be at least thirty years old. In others, it will be harder—enforcing the demand that no state deny any person the equal protection of the laws requires the Court to decide what “equal protection” means. In the difficult cases, the constitutional operative proposition will not be identical to the text; it will be a more general principle such as “the government may not treat some people worse than others without adequate justification.”²⁴

Second, the Court adopts a decision rule to implement the operative proposition. One possibility would be a decision rule that

²² Amar, *supra* note 16, at 48 n.67 (citing Dan-Cohen, *supra* note 21, at 625).

²³ Berman, *Decision Rules*, *supra* note 11, at 8–10. For another notable contribution in a similar vein, see generally Richard H. Fallon, Jr., *Implementing the Constitution* (2001). Professor Fallon notes that the Court does not, as it has sometimes claimed to do, simply lay a statute next to the Constitution to see whether the statute is sound. Rather, it “devises and then implicates strategies for enforcing constitutional values,” which “do not (and should not) always reflect the Court’s direct assessment of constitutional meaning.” *Id.* at 5–6. Professors Fallon, Berman, and Sager deserve credit for offering the model as a fairly general account of constitutional adjudication. Fallon, *supra*, at 5–6; Berman, *Decision Rules*, *supra* note 11, at 8–10; Sager, *supra* note 19, at 1213–14. I attempt here to extend their insight by offering a more wide-ranging normative critique of doctrine and an explicit consideration of the problem of time.

²⁴ Similar phrasings abound. Professor Berman offers the proposition that “government may not classify individuals in ways not reasonably designed to promote a legitimate state interest.” Berman, *Decision Rules*, *supra* note 11, at 9. Sager suggests the formulation that “[a] state may treat persons differently only when it is fair to do so.” Sager, *supra* note 19, at 1215.

closely tracks the operative proposition. Such a decision rule would not amount to direct enforcement, for the Court still would have to select and assign a burden of proof. A decision rule modeled on the operative proposition and containing a more-likely-than-not burden of proof is perhaps the closest the Court could come to perfect enforcement. Applying that decision rule to particular cases will produce precedents that flesh out the underlying operative proposition, specifying, for instance, what does or does not constitute an adequate justification for a particular classification. A substantial amount of constitutional adjudication consists of this sort of common law-style development. But the Court also might choose decision rules that differ substantially from the operative propositions they are intended to implement.²⁵ In such circumstances, the outcomes of adjudication under the decision rule will differ from outcomes under the operative proposition. Why the Court might choose such a rule is the subject of the next Part.

III. CONSTRUCTING DECISION RULES: THE FACTORS IN PLAY

Adopting a rule that predictably produces erroneous results might seem odd at first blush. Surely, one might think, the Court's first (and perhaps only) obligation is to enforce the Constitution's operative propositions. Why should it try to do anything else?

One answer is that decision rules are unavoidable—and not just because general propositions do not decide concrete cases. A court must give structure to the adjudicatory process; it must determine and assign burdens of proof, production, and persuasion.²⁶ Still, the necessities of adjudication alone do not explain why the Court might choose a decision rule that departs substantially from the operative proposition.

The answer here is more complex. A number of factors might make the Court decide to adopt a decision rule that varies significantly from the constitutional operative proposition. In what fol-

²⁵ As Berman puts it, “[n]onstandard decision rules are standard fare.” Mitchell N. Berman, *Managing Gerrymandering*, 83 *Tex. L. Rev.* 781, 833 (2005) [hereinafter Berman, *Managing Gerrymandering*].

²⁶ See Berman, *Decision Rules*, *supra* note 11, at 93–99 (discussing different burdens of proof and when they should be used).

laws, I set out a non-exhaustive list.²⁷ None of the factors is likely by itself to provide a complete explanation of a particular decision rule, and they may point in different directions. The value of an explicit analysis of the factors is that by articulating what considerations drive the creation of a particular decision rule, we get a better sense of its purpose and therefore a greater ability to analyze its wisdom and efficacy. The factors on which I focus are those I see at work in the doctrinal areas discussed in subsequent Parts.

A. Institutional Competence

Institutional competence could be a general answer, subsuming many of the other factors I will consider below. Here I use it in a narrow sense—getting the right answer to a particular question. Judges are good at answering some questions, and legislatures are good at answering others. What questions fall within the respective competences of the judiciary and the legislature is a matter on which there is far less agreement. Judges might be particularly good at interpreting legal documents or at construing constitutional provisions relating to the judiciary.²⁸ Classical legal thought took them as experts in classification—in determining whether an activity was commerce or manufacture, for instance, or whether a business was affected with a public interest.²⁹ It has been suggested that they have some advantage in determining America’s fundamental values,³⁰ though this proposition also has been attacked

²⁷ For a different analysis of factors guiding the creation of decision rules, see Berman, *Decision Rules*, supra note 11, at 92–96.

²⁸ This latter point is one element of a weak reading of *Marbury v. Madison*. 5 U.S. (1 Cranch) 137, 179 (1803). See Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 Va. L. Rev. 1111, 1120–21 (2001).

²⁹ See, e.g., Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 27–30 (1992); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937*, at 4–6, 90 (1998); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 *Res. L. & Soc.* 3, 3–9 (Rita J. Simon ed., 1980).

³⁰ See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 24–27 (2d ed. 1986) (“[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. . . . This is crucial in sorting out the enduring values of a society . . .”).

forcefully³¹ and seems to have fallen from favor. They may be poorly suited to gauge the necessities of administration in unusual environments such as prisons.³² It also is generally conceded that they are less able to resolve complicated factual questions, such as the economic effects of a particular law.³³

If a constitutional operative proposition sets up a question that is within the peculiar competence of courts, then the Court might decide to adopt a decision rule that closely tracks the operative proposition and grants no deference to other actors. If the question falls within the legislative competence, the Court may respond in one of several ways. It might nonetheless mold its decision rule closely to the operative proposition and refuse to defer. This could be simple obstinacy—if the legislature is substantially more capable of discerning the right answer, then correct outcomes will likely be maximized by simply accepting the legislative judgment—but there might be reasons to do so. Such reasons will typically be one or more of the factors discussed in the following subsections, which on their own or in combination might outweigh a lack of superior institutional competence.

Alternatively, a court confronting a question within the legislative competence might craft a deferential rule—such as the rational basis test—that will tend to uphold almost all legislative acts, even those that the judges would deem unconstitutional if not defer-

³¹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring in part and dissenting in part) (“The people know that their value judgments are quite as good as those taught in any law school—maybe better.”).

³² See *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (“Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”).

³³ As Justice Jackson wrote in a letter to then-Circuit Judge Sherman Minton, “in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. . . . When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.” Letter from Robert H. Jackson to Sherman Minton (Dec. 21, 1942), 1–2, *quoted in* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 *U. Chi. L. Rev.* 1089, 1146 (2000); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 *Harv. L. Rev.* 153, 156 (1997) (“[A] rigorous judicial examination of effects on commerce would entail making economic judgments of a kind ill-suited to courts.”).

ring.³⁴ This is not, I hasten to add, equivalent to deferring to the legislature's interpretation of the Constitution. A deferential decision rule defers not to the legislature's determination as to what the relevant operative proposition is, but to its determination that a law complies with that operative proposition.

Last, the court might adopt a decision rule that departs from the operative proposition by substituting a question within the judicial competence. This technique preserves judicial authority at some cost to the underlying operative proposition. It will appeal to courts enamored of judicial supremacy—the court may not be deciding the right question, but at least it is the *court* that is deciding.

B. Costs of Error

No court will get the right answer every time, even the Supreme Court, which as Justice Jackson famously commented is not final because it is infallible, but rather infallible only because it is final.³⁵ Mistakes are inevitable, and they generally will come in one of two forms: erroneously permitting an unconstitutional government action, and erroneously forbidding an action that is constitutionally sound. The relative costs assigned to these different kinds of errors will suggest deferential, non-deferential, or even anti-deferential decision rules. That is, a court might underenforce an operative proposition by adopting a rule that predictably upholds violations but strikes down almost no valid acts. It might attempt simply to enforce the proposition by adopting a rule that attempts to minimize the total number of errors without reference to kind. Or it might overenforce by adopting a rule that predictably strikes down valid laws but upholds almost no violations. Rational basis review, I have suggested, is frequently an example of the first; strict scrutiny, I will argue, is frequently an example of the last.

One might attempt to do this cost-benefit analysis at the wholesale level. When a court erroneously upholds unconstitutional governmental action, some individual's constitutional rights have probably been violated—though frequently in a manner that the

³⁴ This is precisely Thayer's point: Judges should uphold laws they would have opposed on constitutional grounds as conscientious legislators. Thayer, *supra* note 12, at 144.

³⁵ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

political process can correct.³⁶ When it erroneously strikes down a valid governmental act, the American people (for a federal act) or some subgroup thereof (for a state act)³⁷ have been denied the ability to govern themselves—and in a manner that will take a constitutional amendment, or a changed Court, to reverse. Both these things are bad, of course, but those who find the latter worse than the former will tend to support across-the-board calls for judicial restraint.³⁸ Conversely, those who feel the opposite will tend to call for aggressive judicial supervision of the elected branches.

It makes a good deal more sense, however, to consider the matter at the retail level. Here one would proceed by identifying a class of cases—usually those related to a particular constitutional right, or a subset thereof. One would then assess the costs of error—things such as the harm to the individual, the importance of the governmental interest likely to be thwarted, the ability of the government to achieve its legitimate aims by other means—and adopt a decision rule reflecting the relative costs of each kind of error. Cost-benefit analysis thus offers one explanation for strict scrutiny: Judges look more closely at laws that inflict greater

³⁶ That is, an unconstitutional law can always be repealed, and compensation paid (though this is less likely) to those affected by it. “[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). An improvident decision might not seem unconstitutional, of course. Indeed, one might think that is the very reason that the Court does not strike it down. But if the Constitution contains some utility-maximizing rules—and I will argue it does—then improvident decisions indeed may violate the Constitution. The only question is whether courts should enforce these rules, and the modern answer is that they should not.

³⁷ The analysis might differ depending on whether the act under review is that of the federal government or of a state. Professor Thayer argued that erroneously upholding state legislation is more costly than erroneously upholding federal legislation, on the grounds that the latter expands the authority of a co-ordinate branch, while the former expands the power of a subordinate state government at the cost of its federal superior. Consequently, he urged less deferential review of state laws. Thayer, *supra* note 12, at 154–55. Thus, this form of cost-benefit analysis was at least implicit in the literature as far back as 1893.

³⁸ They also might stay up late at night worrying about the countermajoritarian difficulty, which has always struck me as a little silly. If the Constitution contains judicially enforceable restraints on legislative action, which everyone agrees it does, then the majority sometimes will not get its way. But if the judicial decision is correct, observations about the countermajoritarian difficulty are really just complaints about the relevant constitutional provision, rather than judicial review. Most invocations of the difficulty are probably intended as something else; they are a shorthand expression—but not an especially helpful one—of doubt that current judicial decisions are correct.

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harms.³⁹*C. Frequency of Unconstitutional Action*

Strict scrutiny also can be understood as serving quite a different purpose, one that relates not so much to the cost of error as to the likelihood of a constitutional violation. Some sorts of governmental action may be identified by objective factors as highly likely to violate constitutional strictures, and courts are justified in applying non-deferential, or even anti-deferential, decision rules to them. That is, a court might justifiably overenforce a constitutional operative proposition on the grounds that certain kinds of governmental action may safely be presumed unconstitutional.

The obvious example comes from equal protection jurisprudence. Suppose that the Fourteenth Amendment simply means more or less what it says: States cannot treat people differently without an adequate justification. Almost all laws classify, and many do so with little more justification than rewarding rent-seeking on the part of various interest groups—something that might well be deemed unconstitutional in terms of violating the demand that legislators treat citizens with equal concern and respect. The question for courts is how to distinguish the classifications that require judicial intervention from those that may be left to the political process. A court that attempted to police all rent-seeking legislation would be overwhelmed; perhaps more seriously, it would inevitably intrude deeply upon the prerogative of the legislature to make policy choices. Heuristics are needed, and an awareness of history can drive the construction of decision rules.

The knowledge that certain kinds of classification frequently have been used for illegitimate reasons, and seldom for legitimate ones, would justify overenforcement of equal protection. The

³⁹ See Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 438–39 (1997) (describing cost-benefit and smoking-out understandings of strict scrutiny). The question remains, of course, of why courts are better positioned than legislatures to engage in this balancing. A pure cost-benefit answer might be that the cost of allowing an unconstitutional exercise of power exceeds the cost of striking down a valid one, and therefore the use of judicial review as a second screen for unconstitutional laws provides net benefits. See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 *Cornell L. Rev.* 1529, 1577 (2000) (describing the value of “multiple vetoes” to the protection of rights). Alternatively, one of the other factors discussed in this Part might be at work.

greater the ratio of illegitimate uses of a classification to valid ones, the more efficient heightened scrutiny becomes. Laws that burden the interests of racial minorities are the obvious example. Because such laws have been used so frequently for improper purposes, a decision rule that strikes down almost all such laws will invalidate many unconstitutional laws and very few legitimate ones. For just such reasons, the Court has reacted to the history and persistence of racial discrimination by strictly scrutinizing such laws.⁴⁰ Likewise, in announcing heightened scrutiny for gender-based classifications in *Frontiero v. Richardson*, the Court referred explicitly to the “long and unfortunate history of sex discrimination.”⁴¹

D. Legislative Pathologies

Another justification for an anti-deferential decision rule arises when there is reason to doubt the good faith of the legislature. In a well-functioning democracy, the legislature generally can be trusted to balance the costs of a law against its benefits and to do so more accurately than judges can. In an identifiable range of circumstances, however, the political process will fall victim to predictable malfunctions; the legislature’s incentives will not align with the public interest. Laws that entrench legislators are the most obvious example. More generally, courts may identify cases in which the benefits of a law accrue to a constituency to which the legislature is responsive while its burdens fall on a group with less voice.

A law that benefits locals while burdening out-of-staters is the paradigm example, but one that benefits a politically powerful group while burdening a weaker group presents essentially the same problem. In such cases, there is reason to doubt the soundness of legislative decisionmaking. Even if the subject matter of the decision falls within the legislative competence, courts may craft non-deferential decision rules to deal with situations in which it

⁴⁰ See *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Our jurisprudence ranks race a ‘suspect’ category, ‘not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.’” (alteration in original) (citation omitted)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting “history of purposeful unequal treatment” as one criterion for suspect class status).

⁴¹ 411 U.S. 677, 684 (1973) (plurality opinion).

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appears the legislature may be engaged in self-dealing, or in distributing benefits to its powerful constituents. Deference is inappropriate where the legislature cannot offer an unbiased assessment of the situation.

This sort of justification for non-deferential decision rules is essentially the one championed by Professor John Hart Ely.⁴² It also crops up in Supreme Court jurisprudence, such as the *San Antonio Independent School District v. Rodriguez*⁴³ criteria for suspect class status and in the famous footnote four of *United States v. Carolene Products*.⁴⁴ More recently, it has been urged by Judge Guido Calabresi and Professor Rebecca Brown.⁴⁵

E. Enforcement Costs

Some constitutional operative propositions may require courts to decide questions that they simply cannot, or that they cannot without burdensome or intrusive evidence-gathering. That governmental acts cannot be based on personal hostility is a plausible constitutional operative proposition, but plumbing the mind of the governmental actor is costly and intrusive at the least, and perhaps impossible, especially in the case of multi-member legislative bodies. Thus, a court may substitute a decision rule that turns on objective and easily ascertainable factors. As Professor Berman writes:

[W]henever the Court has rejected an invitation to directly inquire into a governmental actor's purposes or reasons for action,

⁴² Combating legislative entrenchment is what Professor Ely refers to as “[c]learing the [c]hannels of [p]olitical [c]hange.” John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 105 (1980). Giving more searching review to laws that benefit the politically powerful at the expense of the powerless is part of what he refers to as “[f]acilitating the [r]epresentation of [m]inorities.” *Id.* at 135. In this latter context, Professor Ely distinguished between “‘first degree’ prejudice,” which leads legislatures to discount the interests of powerless or unpopular minorities, and “misapprehension” prejudice, which leads legislatures to err in their assessments of the impact or efficacy of laws. *Id.* at 153, 157. First degree prejudice relates to institutional incentives; second degree “misapprehension” prejudice is an issue of institutional competence in the narrow sense I have employed it.

⁴³ 411 U.S. at 28.

⁴⁴ 304 U.S. 144, 152 n.4 (1938).

⁴⁵ Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 *Harv. L. Rev.* 80, 90–93 (1991); Rebecca L. Brown, *Liberty, the New Equality*, 77 *N.Y.U. L. Rev.* 1491, 1497 (2002).

there is a chance that the resulting doctrine in fact reflects compound judgments: first, that the true constitutional meaning does turn upon the actor's purposes, and second, that such meaning is best administered via a decision rule that conclusively presumes the absence (or presence) of such purposes under specified circumstances.⁴⁶

Constitutional criminal procedure offers another example. Indigent defendants are entitled to appellate representation roughly equivalent to that of those who can afford lawyers. But no one is entitled to a frivolous appeal, and thus courts regularly find themselves reviewing requests by appointed appellate counsel to withdraw on the grounds that no arguable issues exist. Here the constitutional requirement is that counsel review the record as an advocate in attempting to identify arguable trial errors before seeking to withdraw; the question is what rule will allow courts to determine whether such review has occurred.⁴⁷ Attempts to do so directly would prove quite difficult, and the Court has responded by adopting rules that are crafted to facilitate detection of violations rather than attempting to track constitutional meaning precisely. What its decision rule requires of advocates is not the invisible process of advocacy-oriented review but a tangible work product that requires a review of the record and an assessment of issues—not quite what the Constitution demands, but something whose existence a court can easily verify.⁴⁸

F. Guidance for Other Governmental Actors

One of the hazards of attempting to model decision rules closely on operative propositions is that general principles do not decide concrete cases. That is, agreeing that the government may not treat people differently without an adequate justification is not agreeing on very much.

The uncertainty created by agreement only on such a high level of generality is undesirable for a number of reasons. Divergent

⁴⁶ Berman, *Decision Rules*, supra note 11, at 67 (emphasis omitted).

⁴⁷ As Justice Souter put it, “[a] judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution.” *Smith v. Robbins*, 528 U.S. 259, 295 (2000) (Souter, J., dissenting).

⁴⁸ See infra notes 66–70 and accompanying text (discussing *Smith v. Robbins*).

lower court opinions detract from the uniformity of federal law and increase the Supreme Court's workload. Uncertainty on the part of governmental actors may lead either to excessive timidity or to wasted resources when a good faith attempt to comply with constitutional demands is later held invalid. For both of these reasons, a court may substitute a bright-line decision rule for the more standard-like operative proposition.⁴⁹

IV. DOCTRINAL APPLICATIONS

The next question is what the use of the model is: What is the value of looking at things from this perspective? This Part considers a broad range of existing doctrine from the decision rules perspective. Its breadth comes at some cost in depth. More elaborate and sustained analyses of particular constitutional provisions and their associated doctrine would certainly be valuable,⁵⁰ but the purpose of this Part is to demonstrate the methodology of the decision rules analysis—the way in which this perspective can illuminate doctrine.

Briefly put, the methodology is to start with the constitutional operative proposition and consider its relation to the decision rules that the Court has crafted.⁵¹ Examining this relation suggests which of the factors set out in Part III are at work in a particular line of doctrine. Understanding which factors are at work gives us a better

⁴⁹ At the same time, of course, the Court may be tempted itself to enforce the operative proposition rather than the decision rule it has articulated for lower courts. Professor Frederick Schauer adverted to this possibility. See Frederick Schauer, *The Second-Best First Amendment*, 31 *Wm. & Mary L. Rev.* 1, 19 (1989). I will suggest that we have seen it in a variety of contexts. See *infra* Section V.B.

⁵⁰ Professor Berman already has provided a more narrowly focused investigation of the Commerce Clause. See Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 *Iowa L. Rev.* 1487 (2004) [hereinafter Berman, *Piercing the Surface*]. I rely in part on his insights in my discussion of that clause. I believe that the decision rules perspective also reveals both what has gone wrong with modern substantive due process and how to improve it. Considerations of space and focus prevent the inclusion of that analysis here, which must be the subject of another article.

⁵¹ The Court does not necessarily work this way. Frequently, modern cases will focus entirely on doctrine (which generally speaking comprises decision rules) rather than operative propositions. See Amar, *supra* note 16, at 74–78. I, however, will suggest the historical development of doctrine generally follows a similar pattern: Early cases announce the operative proposition and adopt decision rules that track it closely, while later cases mediate its application through progressively more refined decision rules.

sense of the source of particular decision rules and thus makes them easier to evaluate. Frequently, I will claim, it makes doctrine appear more reasonable than standard accounts, and it offers a clearer analysis of what motivates particular doctrinal shifts. Additionally, it lets us see how the doctrine might plausibly evolve in the future, and how it might not.

A. Criminal Procedure

Criminal procedure offers a neat example of the surprising fact that the decision rules model is both a fully accepted part of modern Supreme Court jurisprudence and, at the same time, subject to strategic or inadvertent disregard. Two cases from the same Term demonstrate the divergence.

One of the most hotly anticipated decisions of the Supreme Court's 1999 Term was *Dickerson v. United States*.⁵² In response to the Court's 1968 decision in *Miranda v. Arizona*,⁵³ Congress enacted Section 3501, which purported to restore the pre-*Miranda* "totality of the circumstances" test to determine the voluntariness and admissibility of confessions in federal court.⁵⁴ Deemed unconstitutional by most, Section 3501 lay dormant until the United States Court of Appeals for the Fourth Circuit applied it, without the government's urging, to uphold admission of an unwarned confession.⁵⁵

Dickerson seemed to present the Court with a difficult decision. The idea that *Miranda* was constitutionally required seemed implausible on its face: Could the precise wording of the *Miranda* warnings be drawn directly from the Fifth Amendment? (To put the matter in the terms used earlier, it is hard to see *Miranda* as either direct enforcement or an attempt at perfect enforcement of the Self-Incrimination Clause.) If not, however, the conclusion that followed was not simply that Section 3501 was a permissible replacement but that *Miranda* itself should be overruled. If *Miranda*

⁵² 530 U.S. 428 (2000).

⁵³ 384 U.S. 436 (1966).

⁵⁴ 18 U.S.C. § 3501(b) (2000).

⁵⁵ *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999). As the United States continued to maintain that § 3501 was unconstitutional, the Fourth Circuit allowed Paul Cassell, a *Miranda* critic, to share oral argument time for the purpose of defending its constitutionality. *Id.* at 680 n.14.

was not constitutionally required, how could the Court ever have imposed it on the states?

Chief Justice Rehnquist's opinion for the Court in fact relied on *Miranda*'s application to state court proceedings to reach the conclusion that the decision was "constitutionally based."⁵⁶ He did not consider the legitimacy of *Miranda* ab initio; he was willing to accept its status as precedent without asserting its correctness as an original matter. Justice Scalia's dissent attacked that position forcefully, arguing that as *Miranda* was clearly not compelled by the Constitution, it could claim constitutional roots only if the Court had the ability "not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."⁵⁷ "That is an immense and frightening anti-democratic power," Justice Scalia concluded, "and it does not exist."⁵⁸

The majority did not respond to Justice Scalia's argument that the Court had no power to adopt prophylactic rules. Why it remained silent is unclear, but the appropriate response, made most forcefully by David Strauss, is that such rules are ubiquitous.⁵⁹ A prophylactic rule is simply an overenforcing decision rule, and overenforcement is commonplace. Professor Strauss points to the content-based/content-neutral distinction in First Amendment law,⁶⁰ and I have argued that strict scrutiny under the Equal Protection Clause is another example.

Justice Scalia appears to believe that strict scrutiny is in fact part of the meaning of the Constitution—that is, an operative proposition—because he demands strict scrutiny for affirmative action but denies the Court's ability to adopt prophylactic rules. This is a consistent position, though a surprising one for either a textualist or an originalist.⁶¹ Moreover, *Miranda* might seem different, for it does not merely adjust the level of deference employed by the Court; it

⁵⁶ *Dickerson*, 530 U.S. at 440.

⁵⁷ *Id.* at 446 (Scalia, J., dissenting).

⁵⁸ *Id.*

⁵⁹ See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1998).

⁶⁰ *Id.* at 198–201.

⁶¹ The text of the Equal Protection Clause does not identify any particular classifications as suspect, and the Reconstruction Congress seemed to find some racial classifications unproblematic. See *infra* notes 185–87.

prescribes a particular procedure that governmental actors must follow. Of course, strict scrutiny itself goes beyond any ordinary understanding of nondeferential review. By demanding a compelling state interest and narrow tailoring, it sets out rules nearly as specific as *Miranda's*, a good deal more constraining, and equally difficult to find in the Constitution itself.

A more telling rebuttal to Justice Scalia's argument, however, is that earlier in the same Term as *Dickerson*, the Court decided a case in which it confronted essentially the same question. In a line of cases beginning with *Griffin v. Illinois*, the Court had held that, while the States were not obliged to provide for appellate review of criminal convictions, the Constitution placed some constraints on the form such review could take if they did so.⁶² In particular, if appellate review with assistance of counsel was available to those who retained paid lawyers, counsel must be provided for indigents.⁶³ Questions then arose about the duties of appointed counsel who concluded that an appeal was frivolous and sought to withdraw. In *Anders v. California*, the Court set out a procedure for such lawyers to follow. In order to assure that indigent appellants were receiving the substantial equality of treatment that the Constitution guaranteed, appointed lawyers seeking to end their representation should submit "a brief referring to anything in the record that might arguably support the appeal."⁶⁴ The requirement that the brief be submitted was not part of the duty of advocacy (the operative proposition); it was a device by which a court could determine that the duty of advocacy had been fulfilled—that is, it was a decision rule.

In *People v. Wende*, the California Supreme Court endorsed an alternative procedure, whereby an appointed attorney would simply summarize the factual and procedural history of the case, without identifying any issues she had considered.⁶⁵ *Smith v. Robbins* presented the question of whether the *Wende* procedure was acceptable, or whether *Anders* had set out the exclusive means of

⁶² 351 U.S. 12, 18 (1956). *Griffin's* progeny include *Douglas v. California*, 372 U.S. 353, 355 (1963), *Anders v. California*, 386 U.S. 738, 741–42 (1967), and *Penson v. Ohio*, 488 U.S. 75, 79–81 (1988).

⁶³ *Douglas*, 372 U.S. at 357–58.

⁶⁴ *Anders*, 386 U.S. at 744.

⁶⁵ 600 P.2d 1071, 1074–75 (Cal. 1979).

constitutional compliance.⁶⁶ Thus, just as *Dickerson* would, *Smith* asked the Court to determine whether the procedure set out in a previous case was constitutionally required (an operative proposition), or whether it was merely a judicially-crafted device to protect an underlying constitutional right (a decision rule), for which an equally effective alternative might be substituted.⁶⁷

Justice Thomas's majority opinion in *Smith* explicitly described the *Anders* procedure as "a prophylactic one" and noted that "the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel."⁶⁸ Justice Scalia joined Justice Thomas's opinion without comment, placing him on record as at least implicitly endorsing the idea that the Court has the power to overenforce constitutional rights.⁶⁹

Justice Souter's dissent took issue with Justice Thomas's assessment of the *Wende* procedure, but not with the initial proposition that the *Anders* procedure was judicially crafted and nonexclusive.⁷⁰ Every member of the current Supreme Court, then, is on record supporting the decision rules perspective. From that perspective, *Dickerson* seems to be much ado about nothing. Obviously, *Miranda* created a decision rule. The Fifth Amendment's Self-Incrimination Clause bars the introduction of compelled confessions; that is the constitutional operative proposition. But a decision rule that simply tracked the operative proposition would have been undesirable. It would have given little guidance to law en-

⁶⁶ 528 U.S. 259, 265 (2000).

⁶⁷ For a similar analysis of *Smith*, see Susan R. Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1042-43 (2001).

⁶⁸ *Smith*, 528 U.S. at 265.

⁶⁹ Id. at 263. Interestingly, he seems to have endorsed underenforcement as well, this time explicitly. In *Troxel v. Granville*, 530 U.S. 57 (2000), a case dealing with the unenumerated fundamental right of parents to control the upbringing of their children, Justice Scalia dissented from the Court's conclusion that a Washington state law, which allowed grandparents to obtain visitation rights upon a showing that visitation was in the best interests of the child, violated the Constitution. Id. at 67, 91. Justice Scalia argued that unenumerated rights were simply not judicially enforceable, rather than that they did not exist. "I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." Id. at 92 (Scalia, J., dissenting).

⁷⁰ *Smith*, 528 U.S. at 292, 297 (Souter, J., dissenting).

forcement officials, who would be left uncertain about how far they could go in eliciting statements from suspects. Likewise, development on a case-by-case basis would have taken a long time and a substantial investment of Supreme Court resources to produce a uniform and consistent body of law. Lastly, the voluntariness determination was difficult for courts to make on the basis of a paper record that might reveal very little about the actual tone and tenor of an interrogation.

For all these reasons, a different decision rule was desirable, and *Miranda* provided one. The question *Dickerson* presented was the extent to which Congress could override the Court's decision rules. The answer is that judicially-crafted decision rules should not necessarily be understood as exclusive, and equally effective alternatives for enforcing the operative proposition may be acceptable. In *Smith*, the Court had said just that. The problem in *Dickerson* was that Congress had offered not an equally effective alternative, but rather one that simply erased the Court's rule and thereby reintroduced the problems that had necessitated *Miranda* in the first place. That was clearly an insufficient substitute, and rejection was the appropriate reaction.

What is significant about *Dickerson* from the perspective of the broader aims of this Article is the fact that the Court failed to give the easy answer to Justice Scalia's attack. While every Justice in *Smith* appeared to understand that Supreme Court doctrine may depart substantially from the operative propositions of the Constitution, this understanding was not brought up when the practice was challenged. What this suggests is that while the Justices have internalized the decision rules model to some degree, they do not necessarily accept it on a conscious level. In other cases, where the issue has been explicitly debated, one finds only a minority endorsing the decision rules perspective.⁷¹

⁷¹ In *Board of Trustees of the University of Alabama v. Garrett*, for instance, a majority of the Justices appeared to endorse Chief Justice Rehnquist's assertion that judicial pronouncements necessarily track (and establish) the meaning of the Constitution. 531 U.S. 356, 374 (2001). Indeed, the analysis in *Garrett* goes further. It identifies the Constitution rather explicitly with what the Court does, down to its allocation of the burden of proof, rather than with what the Court says. Justice Breyer, writing for the four dissenting Justices, protested that the Court was mistaking its decision rules for operative propositions. *Id.* at 377 (Breyer, J., dissenting); see *infra* notes 204–12 and accompanying text.

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B. The Commerce Clause

If the Commerce Clause means what it says—and if we consider the clause in isolation—the operative proposition might seem fairly easy to derive from the text: Congress has the power to regulate interstate commerce, and nothing else. From this perspective, a court reviewing the exercise of the commerce power might well choose a decision rule that tracks the operative proposition fairly closely. The question would be simply whether the activity Congress has attempted to regulate is commerce, or something else. That question is one of categorization, a type of question that usually falls within the judicial competence, and we might thus expect that courts would answer it with little or no deference to legislative judgment. The decision rule suggested by this analysis was employed in the early twentieth-century cases: Uphold the law if Congress seeks to regulate commerce and strike it down if Congress seeks to regulate something else, such as manufacture or labor practices.⁷²

Things are not quite that simple, however, for the Constitution also gives Congress the power to pass all laws “necessary and proper for carrying into execution” its enumerated powers. Adding the Necessary and Proper Clause to the analysis complicates the construction of the operative proposition. Assuming a fairly straightforward textualism, the question then becomes: If Congress has sought to regulate something other than commerce, is the regulation a necessary and proper means to the regulation of commerce?

Answering this question requires us to settle the meaning of “necessary and proper,” a task that divided the Framers in their consideration of the First Bank of the United States.⁷³ In *McCulloch v. Maryland*, Chief Justice John Marshall famously announced that “necessary” “frequently imports no more than that

⁷² See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 269, 271–74 (1918) (striking down regulation of interstate shipment of goods produced by child labor as an impermissible attempt to regulate manufacture).

⁷³ See Paul Brest et al., *Processes of Constitutional Decisionmaking* 11–13 (4th ed. 2000) (describing Jefferson’s and Randolph’s responses to the bank controversy); id. at 13–16 (quoting Hamilton’s argument); James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in *James Madison: Writings* 480, 484 (Jack N. Rakove ed., 1999) (describing Madison’s position against the Bank).

one thing is convenient, or useful, or essential to another.”⁷⁴

The operative proposition according to *McCulloch* is that Congress has the power to regulate interstate commerce—and also to pass legislation useful or convenient to such regulation—if the legislative intent is in fact to regulate commerce.⁷⁵ The relation between this proposition and the substantial effects test on which the doctrine settled in the late 1930s is not hard to see: If an activity substantially affects interstate commerce, then its regulation might well be necessary (in even the strongest sense) to the regulation of commerce. The substantial effects test, then, seems a relatively straightforward translation of the operative proposition into doctrine. To this extent, it could be argued that the New Deal Court, in loosening the strictures on Congress’s commerce power, was simply rediscovering the Necessary and Proper Clause. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court consciously echoed the clause, holding that Congress had the power to regulate intrastate activities “if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”⁷⁶

Settling on substantial effects as a doctrinal rule had further consequences. *McCulloch* had gone on to note that the degree of necessity was a question for the legislature, thereby suggesting that some deference was appropriate.⁷⁷ Translating necessity into sub-

⁷⁴ 17 U.S. (4 Wheat.) 316, 413 (1819). See generally Randy Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183 (2003).

⁷⁵ *McCulloch* had suggested that an improper motive might invalidate otherwise constitutionally sound legislation: “[S]hould 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 . . . to say that such an act was not the law of the land.” 17 U.S. (4 Wheat.) at 423. One might think that this restriction was limited to legislation resting on the Necessary and Proper Clause, via the principle that pretextual legislation is not “proper.” In *Hammer*, the Court extended it even to direct regulation of commerce, disapproving of a ban on interstate shipment of goods manufactured using child labor on the grounds that “[t]he act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.” 247 U.S. at 271–72.

⁷⁶ 301 U.S. 1, 37 (1937).

⁷⁷ *McCulloch*, 17 U.S. at 423 (stating that for the Court “to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground”). The factor on which Chief Justice Marshall relied here is institutional competence, based on the nineteenth-century understanding

stantial effects made the suggestion emphatic. Whether a given activity substantially affects interstate commerce is no longer a categorical question within the judicial competence. It is an empirical one, and as the Court has recognized, it is the sort that Congress may be better able to answer. In the absence of any particular reason to suspect that Congress is not answering the question in good faith, superior legislative competence suggests deference. In *Katzenbach v. McClung*, the Court explained that its review demanded only “a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce.”⁷⁸

For similar institutional reasons, the New Deal Court abandoned the inquiry into motive. In *Sonzinsky v. United States*, the Court refused to consider whether a tax on firearm dealers had been enacted for a regulatory purpose, stating that “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”⁷⁹

The decision rules perspective thus gives us the following story of the evolution of Commerce Clause jurisprudence up to approximately 1995: After some initial attempts to enforce the operative proposition directly, the Court adopted a decision rule (the substantial effects test) that granted Congress the considerable latitude *McCulloch* had promised. Because the Court had settled on a factual issue as dispositive, it was led to defer even further, reasoning that its test fell within the competency of the legislature. This deference seemed to take the Court out of the business of evaluating Commerce Clause legislation entirely.⁸⁰ This progression—early

of judging as categorization: Categorical issues are for the courts; questions of degree are for the legislature. See William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937*, at 4–7 (1998).

⁷⁸ 379 U.S. 294, 304 (1964).

⁷⁹ 300 U.S. 506, 513–14 (1937). As the reference to the competency of courts makes clear, *Sonzinsky* did not assert that motive was irrelevant, making it consistent with the pretext passage from *McCulloch*. Quite swiftly, however, the decision rule that courts would not inquire into subjective motive came to be understood as an operative proposition that motive was irrelevant. See *United States v. Darby*, 312 U.S. 100, 115 (1941) (“The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”).

⁸⁰ In response, Judge Kozinski suggested that the Commerce Clause could more properly be called the “Hey, you-can-do-whatever-you-feel-like Clause.” Alex Kozin-

attempts to hew close to the operative proposition, explicit consideration of one or more of the relevant factors, and adoption of a decision rule notably distinct from the operative proposition—is the classic course of doctrinal evolution, and we shall encounter it more than once in the following Sections.

In 1995, however, things changed, as the Court demanded judicially-enforceable limits and began constructing them.⁸¹ I postpone discussion of these cases, for they are not part of the classic progression. Instead, they illustrate what I will argue is the characteristic mistake that occurs when the Court begins to treat its decision rules as though they were operative propositions.

C. Equal Protection

The story of equal protection jurisprudence is in some ways similar to that of the Commerce Clause. I have suggested that a plausible statement of the constitutional operative proposition underlying the Equal Protection Clause is simply that the government must have some legitimate justification for treating some people worse than others.⁸² The question then is how to translate this operative proposition into decision rules.

The Court's early decisions characteristically hewed close to the underlying constitutional proposition: They announced a prohibition on invidious discrimination and applied it on a case-by-case basis. In *Strauder v. West Virginia*,⁸³ for instance, the Court described the evils at which the Equal Protection Clause was aimed as, variously, discrimination motivated by "jealousy and positive dislike,"⁸⁴ "unfriendly action,"⁸⁵ or discrimination "implying inferi-

ski, Introduction, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995). The quip reflects a fundamental misunderstanding, a conflation of decision rules and operative propositions. While the Court's rational basis jurisprudence did suggest that Congress could do whatever it wanted as a practical matter (that is, the Court would not restrain it), it did not suggest this as a constitutional matter. The Court simply gave Congress primary responsibility for observing constitutional limits.

⁸¹ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

⁸² See *supra* note 24 and accompanying text.

⁸³ 100 U.S. 303 (1879).

⁸⁴ *Id.* at 306.

⁸⁵ *Id.*

ority in civil society.”⁸⁶ Applying these standards, *Strauder* found that exclusion of blacks from jury service was “practically a brand upon them, affixed by the law, an assertion of their inferiority,”⁸⁷ and therefore unconstitutional. In *Yick Wo v. Hopkins*, the Court struck down an ordinance that, though facially neutral, was applied “with an evil eye and an unequal hand,” embodying “hostility to the race and nationality to which the petitioners belong.”⁸⁸ But such a rule offers little guidance to lower courts and governmental actors, and its administration consumes substantial judicial resources. Thus, over time, the Court developed decision rules that allowed for a more cost-effective and consistent enforcement of the operative proposition.

These are the tiers of scrutiny, and the cases introducing them make clear that they are offered as shortcuts to the detection of invidious discrimination. *Skinner v. Oklahoma*, the first case to use the phrase “strict scrutiny” in the equal protection context, explained explicitly that “strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made.”⁸⁹

The question then becomes, when should the anti-deferential rule of strict scrutiny be employed? It is at this point that the factors enter the picture. Start with the operative proposition that the government may not treat some people worse than others without a legitimate reason. Animus is an obviously illegitimate reason, and

⁸⁶ Id. at 308.

⁸⁷ Id.

⁸⁸ 118 U.S. 356, 373–74 (1886). Other early cases specifically invoking invidiousness include *Barbier v. Connolly*, 113 U.S. 27, 30 (1885) (upholding legislation after finding “no invidious discrimination”) and *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (finding a constitutional violation because “[d]elegates of the State’s power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black”). Even after the Court began to develop the tiers of scrutiny, it continued to refer to invidiousness as the operative proposition. See *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.”); *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (finding factual basis for congressional judgment that a state literacy requirement “constituted an invidious discrimination in violation of the Equal Protection Clause”); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (“Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.”).

⁸⁹ 316 U.S. 535, 541 (1942).

detection and suppression of animus must therefore be a central concern of the decision rules.

A legitimate reason might be that the benefits the classification offers society as a whole exceed the burdens imposed on the disfavored group. Assessment of benefits and burdens ordinarily falls within legislative competence, so anti-deferential review of classifications not bearing the marks of animus must therefore rely on some reason to doubt the legislature's good faith or ability. Inadequately justified classifications might fall into several categories: first, those that impose excessive burdens on the interests of one group because the legislature is, though not hostile, indifferent to their welfare; second, those that impose excessive burdens on a group because the legislature does not understand their interests or holds factually false beliefs about them; and third, those that are cost-justified individually but repeatedly burden the same group because that group lacks the political power to win benefits through the legislative process.⁹⁰

The indicia of suspect classifications that the Court has announced track these concerns quite well. Classifications are suspect, the Court has stated, if they have historically been used for improper purposes and show little potential for legitimate use.⁹¹ They are suspect if they burden groups that are the targets of discrimination or that are denied access to the political process.⁹² And they are suspect if they embody attitudes that society, or Congress, has deemed illegitimate.⁹³

Heightened scrutiny, in short, is a method of allocating judicial scrutiny to those classifications most likely to be invidious.⁹⁴ It does

⁹⁰ See generally Ely, *supra* note 42, at 152–61.

⁹¹ Certain characteristics “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); see also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (justifying heightened scrutiny for gender classifications by reference to a “long and unfortunate history of sex discrimination”).

⁹² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁹³ *Frontiero*, 411 U.S. at 687–88 (noting Congress’s conclusion “that classifications based upon sex are inherently invidious”).

⁹⁴ As Ely put it, “the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members.” Ely, *supra* note 42, at 153.

not reflect a judgment that these classifications inherently inflict great harm on those classified. That is, its justification is not that suspect classifications are high-cost laws.⁹⁵ In Professor Jed Rubenfeld's phrasing, heightened scrutiny in the equal protection context is more about smoking-out than about balancing.⁹⁶

As is generally the case, the decision rules that the Court has chosen will produce results that differ from those the Constitution prescribes. Rational basis review underprotects the operative proposition. It is easy to imagine a non-suspect governmental classification that is in fact based on hostility towards its target but that nonetheless bears some rational relationship to a legitimate interest. Such a law will survive rational basis review, though it is a quintessential example of invidious discrimination.⁹⁷

Likewise, strict scrutiny overprotects. It is only somewhat harder to imagine laws that classify according to race in order to serve legitimate governmental interests. (It is very easy if we include within the suspect category classifications that benefit members of a racial minority.) These laws may not be invidious, but they will be struck down nonetheless. Strict scrutiny for racial classifications essentially embodies a rule that race may not be used as a proxy, which reflects the judgment that the aim of racial classifications is frequently illegitimate, and, if legitimate, can likely be served by drawing a different line.

This analysis of the factors driving the creation of decision rules does not, of course, fit perfectly with current doctrine. It suggests a somewhat different treatment of so-called benign discrimination: laws that benefit, rather than burden, a minority or politically weak group.⁹⁸ It also suggests that heightened scrutiny is probably appropriate for laws that have a disparate impact on politically weak groups, an approach the Court rejected in *Washington v. Davis*.⁹⁹

⁹⁵ The notable exception here is heightened scrutiny for discrimination with respect to fundamental rights, which is probably best understood as anti-deferential review of high-cost classifications. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (applying heightened scrutiny to state law interfering with the right to marry).

⁹⁶ See Rubenfeld, *supra* note 39, at 438.

⁹⁷ Cf. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (noting that the presence of "negative attitudes" alone does not create a constitutional violation under the rational basis test).

⁹⁸ See *infra* notes 206–10 and accompanying text.

⁹⁹ 426 U.S. 229, 239, 242 (1976).

Such laws may well be attempts to target disfavored groups by a legislature aware that overt classifications will be strictly reviewed. But even if not, a law whose burdens fall disproportionately on a politically weak group presents a clear example of a situation in which the legislature's assessment of benefits and burdens is not to be trusted. Such laws might well be passed even though their burdens exceed their benefits, and judges seeking to ensure that some individuals are not treated worse than others without adequate justification should examine them closely.

This account of equal protection is novel in its methodology and focus. I do not believe that anyone else has made a similar attempt to trace the evolution of the decision rules as progressively refined implementations of a constant operative proposition. Its conclusion, however, is quite familiar. That the tiers of scrutiny are not operative propositions but decision rules is well known.¹⁰⁰ In the 1980s, however, the Court's jurisprudence in this area began to shift. Those developments are of a piece with the modern Commerce Clause cases and are discussed below in Part VI.

D. Congressional Enforcement Powers

One way of highlighting the distinction between constitutional operative propositions and decision rules is to consider the question from the perspective of a non-judicial actor. Conscientious legislators, I have suggested, should consider themselves bound by the operative propositions rather than the decision rules. If the decision rules underenforce the operative propositions, a legislator should nonetheless attempt to comply with the more stringent operative proposition. (This was one of the main contentions of Professor Larry Sager's *Fair Measure*.¹⁰¹) If the decision rule overenforces, the matter is less clear; the legislature may propose alternatives (as it did in *Dickerson* and *Robbins*), but from a practical perspective it is likely to find itself unable to take some ac-

¹⁰⁰ One of the earliest and most penetrating statements of this point was made by Professor Owen Fiss. Fiss, *supra* note 19. Professor John Hart Ely's analysis was much the same. See Ely, *supra* note 42, at 145–46 (describing heightened scrutiny as a way of “flushing out” unconstitutional motivation”). For a more recent example, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 493 (2004) (“[S]uspect classification was first adopted as an analytic device . . .”).

¹⁰¹ Sager, *supra* note 19, at 1264.

tions that are in fact constitutional. That is the cost of overenforcement.

Generally speaking, then, underenforcing rules give non-judicial actors greater latitude (which they should in good conscience decline), and overenforcing rules give them lesser (which they must grudgingly accept). In the case of congressional enforcement powers, however, the relationship may be reversed. Section Five of the Fourteenth Amendment gives Congress the power “to enforce, by appropriate legislation,” the other provisions of the Amendment, notably the Equal Protection and Due Process Clauses. To be appropriate, enforcement legislation must be reasonably designed to prevent or remedy violations of the other provisions. That is the operative proposition.

In crafting decision rules to implement this proposition, the Court faced two questions. The first was simply what level of deference should be employed, the familiar choice between rational basis review and various forms of heightened scrutiny. Given no particular reason to distrust Congress, the Court settled on rational basis.¹⁰² The second, which arises less frequently, was whether congressional legislation should be measured against the operative propositions underlying the Equal Protection and Due Process Clauses or against the decision rules the Court had selected for those clauses.

In its early cases, the Court fairly clearly chose the former alternative. In reviewing congressional determinations that a given practice violated the Equal Protection Clause, for instance, the Court asked explicitly whether Congress might rationally have found the practice to constitute invidious discrimination—which is, I have suggested, what the constitutional operative proposition prohibits.¹⁰³ Moreover, the Court suggested, Congress was free to use its own institutional competency in making the determination. The Court generally eschews a pretext analysis that inquires into

¹⁰² *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (“It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”).

¹⁰³ See *id.* at 656 (“[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.”).

the subjective intent of legislatures, but it indicated that Congress might consider such a factor.¹⁰⁴ It even went so far as to suggest that Congress could second-guess a state legislature's balancing of interests—something the Court does only in highly unusual circumstances—and find an equal protection violation if the balance struck appeared to slight the interests of some group.¹⁰⁵

In short, the post-New Deal Section Five cases adopt the principle that when Congress is determining whether a constitutional violation exists or is threatened—the predicate for legitimate exercises of the Section Five enforcement power—it is entitled to ask whether States have complied with the constitutional operative propositions of Section One, not with the Court's decision rules. Those decision rules, as Justice Brennan explained in *Oregon v. Mitchell*, are created by consideration of factors including the institutional competence of the judiciary, and Congress is not bound to observe them.¹⁰⁶

From this perspective, the prospect that Congress might prohibit state practices that would be upheld if challenged in court is unproblematic—not because the prohibition is a means to remedy some other “real” violation,¹⁰⁷ but because Congress might well be correct in deciding that particular instances of discrimination are invidious and hence unconstitutional even if the Court's decision rules would uphold them. That is, Congress can legislate to enforce

¹⁰⁴ See *id.* at 654 (“Congress might well have questioned . . . whether [the reasons the state asserted] were actually the interests being served.”).

¹⁰⁵ See *id.* at 653 (“It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . .”).

¹⁰⁶ 400 U.S. 112, 246–48 (1970) (Brennan, J., dissenting in part and concurring in part) (“But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment.”).

¹⁰⁷ Of course, the Court also recognized that prohibition of some constitutionally permissible conduct might be an appropriate means to deter or remedy violations. In *South Carolina v. Katzenbach*, for example, a history of judicially-recognized violations of Fifteenth Amendment rights existed, and the Court allowed a blanket ban on literacy tests, even though such tests did not violate the Fifteenth Amendment unless employed in a discriminatory fashion. 383 U.S. 301, 327, 333–34 (1966).

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the full scope of Section One even if the relevant judicial doctrine underenforces it.

This is not, it should be clear, the same thing as asserting that Congress should have some power to determine the *meaning*, or operative proposition, of Section One.¹⁰⁸ It is simply the recognition that the Court has, for various reasons, decided to underenforce the operative proposition in certain contexts. Because those reasons relate to institutional factors such as fact-finding competence and electoral accountability, Congress, which has different institutional capacities, need not follow the underenforcing rules. As Professor Sager puts it, “congressional attempts pursuant to [S]ection [Five] to enlarge upon the judiciary’s limited construct do no violence to the general notion that the federal judiciary’s readings of the Constitution are dispositive within our system.”¹⁰⁹

Once again, this understanding did not persist. Again, the Court began to mistake its decision rules for operative propositions. Those modern cases (roughly, those following *City of Boerne v. Flores*¹¹⁰) are discussed in Part VI.

E. The Free Exercise Clause

The development of free exercise jurisprudence is well known. I believe that the decision rules perspective offers additional insights into the sources and significance of the Court’s different approaches. In *Sherbert v. Verner*, the Court seemed to have settled on a particular decision rule: Laws that significantly burdened the

¹⁰⁸ Indeed, it was the *Morgan* Court that decided *Cooper v. Aaron*, 358 U.S. 1 (1958), the canonical statement of judicial supremacy in constitutional interpretation. *Cooper* admittedly asserts supremacy vis-à-vis the states, but it does suggest that the Court was not inclined to grant nonjudicial actors an independent power of constitutional interpretation. *Id.* at 4.

¹⁰⁹ Sager, *supra* note 19, at 1239; see also Berman, *Decision Rules*, *supra* note 11, at 59 (noting that courts should “assess the fit between challenged legislation and the constitutional operative proposition, not between the statute and the decision rule”). Conversely, a point Professors Sager and Berman do not make, Congress should not be allowed to prohibit some practices that courts would strike down when applying an overenforcing decision rule such as strict scrutiny. Thus, for instance, I would maintain that even if courts continue to strike down some forms of affirmative action (as it appears they will), Congress could not create a liquidated damages remedy for the “victims” of such discrimination or impose a criminal sanction on its perpetrators in the exercise of its enforcement powers.

¹¹⁰ 521 U.S. 507 (1997).

free exercise of religion would be subject to strict scrutiny and upheld only if narrowly tailored to serve a compelling governmental interest.¹¹¹ Adoption of strict scrutiny, however, does not signal agreement on the operative proposition. Justices who believed in different operative propositions might believe that strict scrutiny was justified for different reasons.

In particular, as explained previously, strict scrutiny may be understood (and has been employed) to serve two quite different functions. One is smoking out: the detection of illegitimate motives, notably of a desire to target particular groups or activities.¹¹² On this view, the operative proposition forbids governmental attempts to suppress religious activity or belief. The factor supporting strict scrutiny is a distrust of the government, a belief that attempts to suppress religion might be camouflaged by innocent explanations. Smoking-out strict scrutiny overprotects. Because it is so intent on catching pretextual legislation, it will strike down some laws that are in fact perfectly innocent.

The second role of strict scrutiny is balancing: ensuring that the government has not intruded on highly important interests needlessly or without adequate justification. Strict scrutiny as balancing does not necessarily overprotect. If the operative proposition is that religious exercise must be specially regarded, application of strict scrutiny may track that proposition quite neatly.

Strict scrutiny for laws burdening free exercise could be understood in either of these ways. The history of religious conflict and persecution might suggest that illicit motives are frequent, and that overprotection in the name of smoking-out was needed, even if the operative proposition protects only freedom from the targeting of religious exercise. Likewise, a belief that religious exercise is a preferred activity would support strict scrutiny as balancing.¹¹³

¹¹¹ 374 U.S. 398, 403, 406 (1963).

¹¹² This, I have argued, is the origin of strict scrutiny in the equal protection context. See *supra* Section IV.C.

¹¹³ I have suggested that strict scrutiny as balancing is hard to justify without some reason to suspect legislative motive or competence, since legislatures are typically considered better than courts at balancing costs and benefits. In the free exercise area, however, it is easy to imagine that a legislature would be relatively insensitive to the costs imposed on minority expressions of religious belief, which provides a reason to abandon the usual deference. For instance, a legislature considering a ban on wine would likely take into account its sacramental role in the exercise of the Christian re-

It might have been the case, then, that the Justices supporting *Sherbert's* adoption of strict scrutiny held different beliefs about the underlying operative proposition. Even if not, however, it was possible for subsequent Justices to interpret *Sherbert* in different ways and advocate or resist changes in the decision rule accordingly.

This is what happened in *Employment Division v. Smith*.¹¹⁴ There Justice Scalia, writing for the Court, announced that the free exercise right was really a right against targeting. *Sherbert's* strict scrutiny had been toothless; when the Court “purported to apply” the test to contexts other than unemployment benefits, it “always found the test satisfied.”¹¹⁵ The persistence of results inconsistent with the normal outcome of strict scrutiny suggested that the Court had been engaged in smoking-out and was unable to resist the temptation to uphold laws that it found innocent, even if conventional application of strict scrutiny would have condemned them. This frequent need to resort to what I will call subterfuge—getting a particular case “right” according to the operative proposition while purporting to apply a decision rule directing a contrary result—suggested that the overprotection of smoking-out strict scrutiny was unnecessary. In consequence, Justice Scalia announced, free exercise claims would henceforth be governed by an anti-targeting rule applied with conventional deference to the legislature: “if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”¹¹⁶

Other Justices understood *Sherbert's* strict scrutiny as balancing and *Smith's* neutrality rule as consequently underprotecting the fundamental right to free exercise. They thus objected that “[t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices,” but demands a compelling governmental interest to out-

ligion. A legislature considering a ban on peyote might be less attuned to the costs imposed on the minority that uses peyote in religious ritual.

¹¹⁴ 494 U.S. 872 (1990).

¹¹⁵ *Id.* at 883.

¹¹⁶ *Id.* at 878.

weigh religious liberty in either case.¹¹⁷

The value of the decision rules perspective here is that it offers a clear view of what drives the dispute between the Justices in *Smith*. Foregrounding the question of whether *Sherbert's* strict scrutiny was a smoking-out overprotection of an anti-targeting rule, or a balancing analysis reviewing high-cost governmental action, reveals conceptual stakes that will be important in other doctrinal areas as well. In particular, we shall see, this perspective offers a clearer understanding of congressional enforcement power in the recent Section Five cases, starting with *City of Boerne v. Flores*.¹¹⁸

V. THE MINOR PROBLEMS

I have argued thus far that the decision rules perspective helps resolve doctrinal problems. Distinguishing between operative propositions and decision rules and paying attention to the factors that drive the creation of a particular decision rule suggest some ways in which doctrine might be tailored to better track the underlying operative propositions.

With these virtues come new difficulties. A court aware that it is creating decision rules will encounter some minor problems. The Supreme Court has faced these and generally succeeded in surmounting them. A court that forgets it is creating decision rules will face a larger problem. The Supreme Court has encountered this one, too, and, especially in recent years, it has handled the problem poorly. This Part examines what I call the minor problems; the next considers the major problem of calcification.

A. Loss of Fit

Times change, and with them society and social understandings. Approaches that once appeared feasible and coherent may come to seem neither; practices that once seemed natural may start striking people as ideologically freighted, and later obviously invidious. For all of these reasons, decision rules that made sense when adopted

¹¹⁷ *Id.* at 894 (O'Connor, J., concurring in judgment); see also *id.* at 895 (asserting "that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests").

¹¹⁸ 521 U.S. 507 (1997).

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may lose their fit. In such cases, the Court will find it necessary to change the decision rules. It has done so repeatedly. Here I consider for illustrative purposes two examples drawn from equal protection jurisprudence.

1. Sex Discrimination

The story of sex discrimination jurisprudence is one of decision rules adapted to fit new societal understandings. At one point, legal distinctions between men and women were seen as a legitimate, if not inevitable, reflection of the nature of things. Of course, they were not seen that way by everyone, but the understanding that men and women were fundamentally different was sufficiently widespread that it could be counted as sufficient justification for laws that confined women to the domestic sphere. Some time later, due in large part to efforts of those who saw things differently, this understanding came to seem ideologically freighted, and, later still, illegitimate.¹¹⁹

In *Bradwell v. Illinois*, four years after the ratification of the Fourteenth Amendment, the Supreme Court upheld the exclusion of women from the practice of law.¹²⁰ Justice Bradley, concurring, observed that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,” and further stated that “[t]he paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”¹²¹ In 1948, the Court observed that a state “could, beyond question, forbid all women from working behind a bar.”¹²² The Court acknowledged that the view of women’s appropriate role embodied in such a law was contested, but it explicitly rejected the idea that changing understandings about women’s appropriate role could affect constitutional decisions: “The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific

¹¹⁹ See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395, 410–13 (1995) (discussing contestability and legitimacy).

¹²⁰ 83 U.S. (16 Wall.) 130 (1872).

¹²¹ *Id.* at 141 (Bradley, J., concurring).

¹²² *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

standards.”¹²³

But attitudes that were merely contestable in 1948 seemed illegitimate by 1973. As a result of the changed understanding, the Court’s decision rules lost their fit with the underlying operative proposition—discrimination against women had shifted from natural to invidious. In response, the Court changed its decision rules; in *Frontiero v. Richardson*, relying in part on the expressed judgment of Congress, the Court ratcheted up its level of scrutiny.¹²⁴ As Professors Robert Post and Reva Siegel put it, “a social movement seeking equal citizenship for women prompted sustained constitutional lawmaking by Congress in the early 1970s, which in turn influenced the development of the Court’s own sex discrimination jurisprudence.”¹²⁵

2. Sexual Orientation

Something similar is occurring with sexual orientation. In two high-profile cases, the Court struck down laws discriminating against gays and lesbians.¹²⁶ But it did not do so by announcing a higher level of scrutiny for such laws. Instead, purporting to adhere to the rational basis test, the Court found that neither a state constitutional amendment prohibiting local antidiscrimination ordinances from including sexual orientation as a protected category, nor a criminal prohibition of same-sex sodomy, was rationally con-

¹²³ Id. at 466.

¹²⁴ 411 U.S. 677, 687–88. *Frontiero* cites Justice Brennan’s opinion in *Mitchell* and his opinion for the Court in *Morgan*, affirming its understanding that Congress might find invidious things the Court would not necessarily strike down. Id. at 688 (citing *Oregon v. Mitchell*, 400 U.S. 112, 240, 248–49 (1970) (opinion of Brennan, White, and Marshall, JJ.) and *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966)).

¹²⁵ Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L.J.* 1943, 1950–51 (2003). Professors Post and Siegel further observe that this “legislative . . . constitutionalism . . . connects constitutional law to the changing constitutional understandings of the American people.” Id. at 1951; see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 26 (2003) (“Courts once ruled that sexual harassment did not amount to discrimination on the basis of sex . . . [but] [a]fter social movement protest and litigation, courts came to view harassing conduct of this sort as sex-based discrimination.”); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 *Cal. L. Rev.* 1, 30–40 (2000) (describing equality norms as rooted in evolving social practices).

¹²⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

nected to a legitimate state interest.

Again, what has happened here is that the old decision rule—rationality review of laws discriminating on the basis of sexual orientation—has lost fit. The Court has come to believe that such laws are not a legitimate expression of moral disapproval but rather invidious discrimination. It is too soon to tell whether application of heightened scrutiny to this new class is at the end of this path. The current Court seems hesitant to announce new “suspect classes”—perhaps because it believes that doing so amounts to changing the Constitution, and hence is of questionable legitimacy at best. Failing to change the decision rule, however, leaves the Court in an uncomfortable position. If it adheres to the view that discrimination on the basis of sexual orientation is frequently invidious, it will likely continue to strike down such discrimination while nominally applying the rational basis test, producing opinions that are confusing to lower courts and commentators alike.¹²⁷ I refer to this practice as subterfuge; I now turn to the challenge it presents for courts.

B. Subterfuge

One of the notable characteristics of decision rules, as I have described them, is that they get cases wrong. They direct courts to strike down laws that are constitutionally sound and to uphold laws that are unconstitutional. They may do so in the hopes of minimizing aggregate errors over time, or they may do so for other reasons, but they will at times produce results that strike judges as palpably incorrect.¹²⁸ A lower court judge in such cases has few options; she is bound to apply the doctrine the Supreme Court has given her. The Supreme Court, however, has no one to reverse it for misapplying doctrine, and few, if any, effectual critics. The Court there-

¹²⁷ In *Lawrence*, Justice O'Connor suggested that “[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” 539 U.S. at 580 (O'Connor, J., concurring). This is perhaps an apt description of some of the subterfuge cases, but it is not recognizable doctrine. It mingles the operative proposition (a prohibition on invidious discrimination) with the decision rule (rational basis) in a way that provides very little guidance for lower courts. It does, however, reveal the extent to which Justice O'Connor's analysis is driven by a desire to enforce the operative proposition rather than the decision rule.

¹²⁸ Suzanne Goldberg points out some of these problems and suggests abandoning the tiers of scrutiny entirely. Suzanne B. Goldberg, *supra* note 100.

fore may succumb to the temptation to get a particular case right according to the relevant operative proposition, rather than faithfully applying the decision rule it has announced.¹²⁹

Sometimes the practice is simply a harbinger of changes to the decision rules. As discussed in Section IV.E, strict scrutiny (announced in *Sherbert v. Verner*) of laws burdening the free exercise of religion was surprisingly mild. This foreshadowed the milder new decision rule announced in *Employment Division v. Smith*—a move from an overprotective rule to a rule more closely tracking the operative proposition, or from a balancing rule to an underprotective rule, depending on whom you ask. Likewise, the unusually forceful rational basis review of *Reed v. Reed*¹³⁰ prophesied the heightened scrutiny adopted in *Frontiero*.

Sometimes, however, the decision rule does not change. In *City of Cleburne v. Cleburne Living Center*, for instance, the Court struck down a law discriminating on the basis of mental disability, while at the same time reiterating that mental disability categorizations warranted no more than rational basis review.¹³¹ In its sexual orientation cases, the Court has continued to adhere to the rational basis test,¹³² and in its recent holding that the University of Michigan Law School's affirmative action program does not violate the Equal Protection Clause, it claimed to be applying strict scrutiny.¹³³ And in *Pierce County v. Guillen*,¹³⁴ discussed in Section VI.A.1 below, the Court announced continued adherence to the Commerce

¹²⁹ The unusual frequency with which statements of the operative proposition occur in the cases I identify as subterfuge suggests that the Court at least is partially aware that it is enforcing the operative proposition, and not the appropriate decision rule. See *supra* note 127 (discussing Justice O'Connor's *Lawrence* concurrence).

¹³⁰ 404 U.S. 71, 76–77 (1971) (holding that statute giving preference to males over females in estate administration violates Equal Protection Clause).

¹³¹ 473 U.S. 432, 442–44, 450 (1985).

¹³² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

¹³³ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). I believe the result in *Grutter* was certainly right, but the dissenters make a persuasive case that the Court's "strict scrutiny" is of the watered-down variety. See *id.* at 379–80 (Rehnquist, C.J., dissenting); see also Balkin & Siegel, *supra* note 125, at 25 ("[I]nconsistency in the decision rules used to implement the anticlassification principle arises as courts endeavor to apply the anticlassification principle in a manner that constrains practices that seem to judges to inflict racial injustice, while enabling practices that seem to judges innocent of discriminatory animus and that serve other important social ends.").

¹³⁴ 537 U.S. 129, 146–47 (2003).

Clause analysis set out in *United States v. Morrison* and *United States v. Lopez*, though as Professor Mitchell Berman has shown, those tests would more plausibly produce the opposite result.¹³⁵

Subterfuge has some undesirable consequences. It is confusing to lower court judges, who must puzzle out how to follow a Court whose words diverge from its practice.¹³⁶ It is a bounty to academics, who seize the opportunity to explain, but their efforts may not prove particularly helpful—indeed, noting the inconsistency between words and deeds may be the best a commentator can do.¹³⁷ Since a court engaged in subterfuge refuses to explain why it reaches a result at variance with its stated approach, others must speculate, and speculation does not justify a lower court's attempt to follow the Supreme Court's unstated rationale.

Indeed, the desire not to authorize lower courts to apply the rule the Court refuses to announce is probably one of the more significant causes of subterfuge. It is not an adequate justification, however, and it makes the Court appear arrogant, unprincipled, or both. It suggests a lack of faith in either the lower courts or the unannounced rule, or perhaps a belief that society will not accept it. Popular acceptance, however, has at least something to do with constitutional legitimacy, and the need for doctrine to be susceptible to application by lower courts is a useful check on the Court's ability to engage in what Professors Balkin and Levinson call "low politics"—reaching a particular result because that result, rather than the rule that produces it, is seen as desirable.¹³⁸ It may be that some cases are significant enough that getting the right answer is

¹³⁵ See Berman, *Piercing the Surface*, supra note 50, at 1501–04.

¹³⁶ See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1223–24 (10th Cir. 2004) (noting debate over significance of *Cleburne* and difficulties for lower courts).

¹³⁷ See, e.g., Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 *Vill. L. Rev.* 1, 65 (1992) (suggesting that the Court uses two different forms of rational basis review in an unpredictable fashion); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 *U. Pa. J. Const. L.* 225, 236 (2002) (identifying seven forms of rational basis review); Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 *Ind. L.J.* 779, 801–03 (1987) (noting the confusion that heightened rational basis review causes lower courts and legislatures).

¹³⁸ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1061–63 (2002) (distinguishing between high and low politics).

more important than following existing doctrine, but a Court that engages in subterfuge rather than explaining itself denies the rest of us the opportunity to evaluate that judgment.¹³⁹

Perhaps the best that can be said for subterfuge is that it offers an implicit reminder that decision rules and operative propositions diverge. By deciding a particular case in accordance with the operative proposition, and not the decision rule, the Court offers an object lesson to lower courts and society—particular practices, it suggests, should not be deemed constitutionally unproblematic merely because they would survive a conventional doctrinal analysis. But the Court could achieve this goal more cleanly by explicitly announcing the distinction—by stating, for example, that it is upholding a practice the Justices believe is unconstitutional because it has chosen to leave primary responsibility for enforcing a particular operative proposition with nonjudicial actors. Additionally, it could distinguish operative propositions and decision rules consistently in its cases. As the next Part discusses, however, its recent tendency has been instead to deny the distinction entirely.

VI. THE MAJOR PROBLEM: CALCIFICATION

I have argued that a standard pattern replays itself in development of constitutional doctrine. In its early encounters with a particular constitutional provision, the Court tends to stay quite close to the constitutional operative proposition. As time passes, doctrine becomes more complex. Judicial experience with the sort of problems presented by adjudication under a particular provision leads to the development of decision rules that depart from the operative proposition. When initially articulating such decision rules, the Court frequently explains what it is doing, and why—that, for instance, it is deferring to congressional determinations about effects on commerce because of legislative competence, or that it is ratcheting up the level of scrutiny for gender-based discrimination because of pervasive prejudice and stereotyping. Decision rules

¹³⁹ *Cleburne* plainly is not such a case. *Bush v. Gore*, 531 U.S. 98 (2000), from one perspective, might have been, and there the Court was a little more candid—it articulated a new equal protection doctrine to be applied in that case alone. See *id.* at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

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may lose fit over time if facts or background understandings change. When this happens, the Court may—indeed, should—change the decision rule to fit the new circumstances. In doing so, the Court is simply employing a new method to implement an unchanging operative proposition.

But this account of the normal life cycle of decision rules does not offer a complete picture. Sometimes, when a stable jurisprudential regime has persisted for a period of time, decision rules can start to be mistaken for constitutional operative propositions.¹⁴⁰ When this happens, a number of undesirable consequences follow. These consequences include ill-advised doctrinal reform, attempts to bind nonjudicial actors to decision rules rather than operative propositions, and an undoing of the benefits of decision rules. I consider these problems in turn.

A. Doctrinal Deformation

Confusing decision rules and operative propositions warps doctrine in two related ways. A court may discard decision rules not because they have lost fit but because they do not make sense as operative propositions. Alternatively, it may accept them as operative propositions and make other doctrinal changes, in the same or related fields, in order to maintain consistency.

1. The Commerce Clause

Congressional power under the pre-*Lopez* Commerce Clause jurisprudence was famously unbounded.¹⁴¹ This is not to say that the Constitution imposed no limits; it did. According to the operative propositions I have drawn from *McCulloch v. Maryland*, Congress could pass only legislation that was a useful or convenient means of regulating commerce, and it could do so only in order to regulate

¹⁴⁰ Professor Sager noted the similar tendency “to equate the existence of a constitutional norm with the possibility of its enforcement against an offending official.” Sager, *supra* note 19, at 1221. Professor Sager was concerned that other decisionmakers not believe that the lack of enforcement indicated an absence of constitutional rules. This Article focuses on the problems that arise when *courts* equate the possibility of enforcement with the demands of the Constitution, and it deals with both underenforcing and overenforcing rules.

¹⁴¹ See Kozinski, *supra* note 80, at 5.

commerce.¹⁴² The limits set by these operative propositions, however, depend in one case on a factual issue and in the other on something like the subjective motive of the enacting Congress. Given that the post-New Deal Court neither claimed superior competence with respect to legislative facts nor ventured to assess subjective motivation, the decision rules it adopted regarding these limits were deferential to the point of committing the determination almost entirely to Congress.

*United States v. Lopez*¹⁴³ and *United States v. Morrison*¹⁴⁴ announced that this almost-complete deference was unacceptable, and set about imposing judicially enforceable limits. This subsection describes what happened in those cases from the decision rules perspective. A plausible first take might be that the Court in *Lopez* and *Morrison* recognized that the extant decision rules had lost fit. It was a commonplace observation that Congress seldom deployed its institutional expertise by actually making the factual determination upon which its power was supposed to rest.¹⁴⁵ The Gun-Free School Zones Act, struck down in *Lopez*, was not accompanied by any findings explaining the relation of guns near schools to interstate commerce.¹⁴⁶ Equally alarming, even when regulated activities clearly did substantially affect interstate commerce, Congress was frequently regulating them for other reasons—something that, if we take *McCulloch*'s pretext passage seriously, might be unconstitutional.¹⁴⁷

¹⁴² See *supra* Section IV.B.

¹⁴³ 514 U.S. 549 (1995).

¹⁴⁴ 529 U.S. 598 (2000).

¹⁴⁵ See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 98 (1986) (noting that "Congress has neither a strong tradition of constitutional decisionmaking nor trustworthy procedures for addressing constitutional questions"); cf. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 Case W. Res. L. Rev. 695, 711 (noting Congress's willingness to engage in "sustained and increasingly thoughtful" fact finding to justify Commerce Clause legislation during the New Deal era).

¹⁴⁶ See *Lopez*, 514 U.S. at 562 (noting lack of findings).

¹⁴⁷ In a 1963 letter to the Department of Justice, Professor Gerald Gunther objected to the use of the Commerce Clause to justify civil rights legislation, commenting that "[t]he proposed end run by way of the commerce clause seems to me ill-advised in every respect. . . . It would, I think, pervert the meaning and purpose of the commerce clause to invoke it as the basis for this legislation." Gerald Gunther, *Cases and Mate-*

Congress's refusal to exercise the competence to which the Court was supposed to defer, coupled with repeated pretextual uses of the commerce power, might well have suggested to the Court that it was confronting a pattern of constitutional violations. Just as it had adopted heightened equal protection scrutiny in response to the pervasiveness of invidious gender-based discrimination, the Court might have felt justified in adopting a less deferential decision rule for reviewing Commerce Clause legislation.

Frequency of constitutional violations is not the only factor that could be invoked to support a less deferential decision rule. The Court also might have believed that Congress could no longer be trusted to restrain itself within constitutional bounds. A plausible story can be told along the lines of the sort of process analysis that *Carolene Products Co. v. United States*¹⁴⁸ employs. One of the purposes of overlapping state and federal sovereignties is to make the two governments compete for the affection of the people.¹⁴⁹ They do so, in part, by providing legislation to solve particular problems. The people probably care little, if at all, which government is solving their problems, and they are consequently willing to accept federal solutions to problems that state and local governments are competent to handle. When U.S. senators were selected by state legislatures, a counterweight existed against excessive federal activity. State legislatures want to solve the problems that they can, and federal solutions prevent them from getting credit from their constituents. Thus, state legislatures were likely to select senators who would respect the appropriate sphere of state legislative power and reserve federal power for uniquely federal problems. With the Seventeenth Amendment providing for direct election of senators, this check on the exercise of federal power was eliminated. Excessive federal regulation was the natural consequence,¹⁵⁰ and concern that the Seventeenth Amendment had eliminated a structural pro-

rials on Constitutional Law 203 (10th ed. 1980), *quoted in* Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 471 (4th ed. 2000).

¹⁴⁸ 304 U.S. 144 (1938).

¹⁴⁹ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1428 (1987).

¹⁵⁰ Such concerns were voiced at the time of ratification. See Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 *San Diego L. Rev.* 671, 712–14 (1999) (noting federalism-based arguments against direct election).

tection of federalism might offer a reason to be less willing to trust the good faith of Congress.¹⁵¹

The problem with casting *Lopez* and *Morrison* as the reaction to a loss of fit is twofold. First, the rules the Court adopted make very little sense from that perspective. A pattern of congressional failure to make the determination that a regulated activity substantially affected interstate commerce supports a decision rule requiring explicit findings or some showing that Congress had considered the issue. Concern about pretextual legislation might have suggested similar demands—either evidence of congressional attention to effects on interstate commerce, or even a heightened means-end fit requirement.¹⁵² Even an inarticulate yearning for federalism of the sort that seems to be driving the Court's sovereign immunity cases (which, after *Alden v. Maine*¹⁵³ can no longer be called Eleventh Amendment jurisprudence) would have suggested something like the short-lived *National League of Cities v. Usery*¹⁵⁴ protection of integral state functions.

But the Court gave us none of the rules that would be justified by a loss of fit. Process-based federalism was suggested by a num-

¹⁵¹ Justice Souter's dissent in *Morrison* considered the relevance of the Seventeenth Amendment, making the point that it was not a "rip[] in the fabric of the Framers' Constitution, inviting judicial repairs." 529 U.S. 598, 652 (2000) (Souter, J., dissenting). This certainly is true in terms of operative propositions: if an amendment changes the Constitution, the Court is not justified in fighting its natural and intended consequences. Use of the federal commerce power that seems excessive in terms of the "appropriate" balance between state and federal regulation is one such consequence, and the Court has no business trying to check it. But increased *unconstitutional* use—notably, pretextual legislation—also is predictable, and the Seventeenth Amendment did not change the scope of the commerce power. To the extent that the Seventeenth Amendment undermined the reasons to believe that Congress could be trusted not to engage in pretextual legislation, it might justify a less deferential decision rule. Neither *Lopez* nor *Morrison*, however, relied on this point.

¹⁵² Changing the decision rules to focus on pretext would probably have seemed unappealing for two reasons. First, inquiries into legislative purpose are difficult, intrusive, and invite legislative dissembling in response. Second, adoption of such a rule would likely have suggested that broad swaths of civil rights legislation were unconstitutional, an almost unimaginable step for the Court to take.

¹⁵³ 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

¹⁵⁴ 426 U.S. 833, 849 (1976) (striking down Fair Labor Standards Act amendments as applied to state employers as interference with "traditional aspects of state sovereignty"), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

ber of academics in the wake of *Lopez*,¹⁵⁵ but it was rejected by *Morrison*, which disregarded a “mountain” of findings.¹⁵⁶ The limits the Court announced in *Morrison*, which give an incompletely defined significance to noncommercial activity, attenuated causal chains, and areas of traditional state concern, do not make sense as decision rules designed to better enforce the substantial effects operative proposition. Nor do they make much sense as operative propositions in their own right: The lines they draw track neither core exercises of the commerce power, such as protection of interstate commerce, nor areas of significance to states.¹⁵⁷ In fact, they are dredged from the cases as more or less the only things that the pre-*Lopez* Court had not gotten around to explicitly endorsing—though *Wickard v. Filburn* came perilously close.

This brings us to the second problem with viewing *Lopez* and *Morrison* as reactions to a loss of fit. The Court did not present its new federalism rules as responses to changed circumstances or even a sensible means of protecting some substantive value of federalism. It presented them as deductions from a structural argument: The federal government is one of enumerated powers, therefore some limits must exist, and these are the limits that precedent allows.¹⁵⁸

Structural argument is powerful, and the one deployed in *Lopez* and *Morrison* is unassailable, at least as far as its first two steps go. But it does not resolve the question presented by *Lopez* and *Morrison*, because it is an argument about operative propositions. It says nothing about what decision rules should be adopted to implement those operative propositions. To say that limits to the commerce power exist is not to say how courts should enforce

¹⁵⁵ See, e.g., Frickey, *supra* note 145, at 697 (concluding that “the approach taken in *Lopez* may be a plausible technique to encourage appropriate congressional procedures and consideration”); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 207 (1995).

¹⁵⁶ 529 U.S. at 628 (Souter, J., dissenting).

¹⁵⁷ *Id.* at 659 (Breyer, J., dissenting) (noting that “any substantive limitation will apply randomly in terms of the interests the majority seeks to protect”).

¹⁵⁸ See Post & Siegel, *supra* note 125, at 2054 (arguing that “there is an indistinct but urgent apprehension that the Court must draw ‘real limits’ that have ‘substance’”); Louise Weinberg, *Fear and Federalism*, 23 *Ohio N.U. L. Rev.* 1295, 1323 (1997) (“The actual limiting principle, then, on which Chief Justice Rehnquist can be said to rely in *Lopez*, is the weirdly circular proposition that there must be a limiting principle.”).

them, or even that courts should enforce them at all. The Court in *Lopez* and *Morrison* assumed that its decision rules were operative propositions and rejected them because they seemed implausible as such.

That conclusion is a non-sequitur, as the dissenters observed.¹⁵⁹ Reasons for less deferential review of the congressional determination that a law was within the scope of the commerce power may well have existed—I have suggested some—but the *Lopez* and *Morrison* majorities did not offer them and did not articulate decision rules responsive to those reasons. Instead, the Court assumed that the existence of limits implied judicially enforceable limits.¹⁶⁰ Existing doctrine did not provide these—the substantial effects test, as Justice Breyer pointed out, suggested deference, “because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.”¹⁶¹ Thus, the Court transformed its decision rules to make the key questions ones more plausibly within the sphere of judicial competence.¹⁶² That, ultimately, seems the best explanation for the rules that *Morrison* and *Lopez* announced. Whether the regulated activity is commercial, the causal chain attenuated, or the area one of traditional state concern are not the relevant questions on any reasonable understanding of either federalism or the operative propo-

¹⁵⁹ Justice Souter’s dissent in *Morrison* and Justice Breyer’s in *Lopez* both make the point that the question of substantial effect is one for Congress in the first instance. See *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) (“The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress . . .” (citation omitted)); *Lopez*, 514 U.S. at 616 (Breyer, J., dissenting) (“[T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove.”).

¹⁶⁰ See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 226 (2004) (describing the Rehnquist Court as adopting “a jurisprudence that treats constitutional limits as synonymous with judicial enforcement and that, as a result, calls for the Court to adopt an aggressive stance vis-à-vis the political branches”).

¹⁶¹ *Lopez*, 514 U.S. at 616–17 (Breyer, J., dissenting).

¹⁶² The nature of the substantial effects question was debated in *Lopez* and *Morrison*. *Morrison*, 529 U.S. at 638 (Souter, J., dissenting) (describing the majority’s transformation of substantial effects question into one “dependent upon a uniquely judicial competence”); *Lopez*, 514 U.S. at 557 n.2 (asserting that whether an activity substantially affects interstate commerce “is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court” (quoting *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 273 (1964))).

sition underlying the Commerce Clause. But they are ones that the Court can claim for itself.

The failure to distinguish between decision rules and operative propositions has thus led the Court to reject its Commerce Clause decision rules for patently inadequate reasons. Worse, it has led the Court to replace them not with new decision rules crafted to better enforce the operative proposition in light of changed circumstances—something I have suggested would be at least partially defensible—but rather with a congeries of ad hoc quasi-categorical lines designed to preserve judicial supremacy. The Court suggests that these are operative propositions—that Congress’s Commerce Clause power truly does not extend to non-commercial activities within the historical scope of state regulation affecting interstate commerce only via an attenuated causal chain—but it does not seem to believe its own protestations. When confronted with a regulation of such activity that really was an attempt to protect interstate commerce, the Court upheld it with very little discussion.

That case was *Pierce County v. Guillen*, in which the Court upheld a federal law protecting from discovery information collected by states in connection with federal highway safety programs.¹⁶³ As Professor Mitchell Berman describes at greater length, this statute “regulated apparently non-commercial activity . . . and interfered with a traditional area of state sovereignty.”¹⁶⁴ Professor Berman suggests, and I agree, that the *Guillen* Court upheld the statute because the *Lopez* majority does in fact believe that the Commerce and Necessary and Proper Clauses, as a matter of operative propositions, grant Congress the power to regulate intrastate non-commercial activity traditionally within state sovereignty so long as it is doing so for interstate commercial ends.¹⁶⁵ That is, the Court seems to understand the operative proposition as something like substantial effects with a pretext carve-out—exactly what *McCulloch* suggested. The discomfort that gave rise to *Lopez* and *Morrison* was with the decision rules that earlier Courts had crafted to implement that operative proposition.

¹⁶³ 537 U.S. 129, 147 (2003).

¹⁶⁴ Berman, *Piercing the Surface*, supra note 50, at 1489.

¹⁶⁵ *Id.* at 1518; see also *Gonzales v. Raich*, 125 S. Ct. 2195, 2215–18 (2005) (Scalia, J., concurring) (discussing import of the Necessary and Proper Clause).

Understanding that these were decision rules might have allowed the Court to modify them in ways that would produce a better fit in the changed circumstances of a national economy and a popularly elected Senate. Because it treated the decision rules as operative propositions, however, the Court created a new doctrinal test that makes no sense as either a decision rule or an operative proposition. The willingness to engage in subterfuge in *Guillen* demonstrates the Court's own awareness of the inadequacy.

2. *Equal Protection*

Up until at least the late 1970s, equal protection jurisprudence followed the lines set out in footnote four of *Carolene Products*, and it did so self-consciously in terms of decision rules. That is, the Court repeatedly asserted that the operative proposition behind the Equal Protection Clause was essentially a prohibition on invidious discrimination or a requirement that the government have a legitimate reason for differential treatment.¹⁶⁶ It implemented this rule through a regime that deferred to the legislative judgment in the ordinary case, but adopted less deferential review or anti-deferential review of laws that burdened the interests of groups that were politically weak or that had been the targets of invidious discrimination in the past, especially if the attitudes producing such discrimination still persisted.

Focus on these factors makes perfect sense. As the *Carolene Products* Court saw, and Professor John Hart Ely emphasized, a legislature's cost-benefit calculus is less trustworthy if the burdens of a law fall on a group with little political voice, or if the legislature is likely to hold mistaken views about the attributes or preferences of members of the burdened group.¹⁶⁷ Things changed as the battle over affirmative action gained greater political prominence.¹⁶⁸ First in a case involving a city council, and then with the

¹⁶⁶ See *supra* Section IV.C.

¹⁶⁷ See Ely, *supra* note 42, at 103. Thus, in Ely's analysis, prejudice is relevant in two ways. First, it may prevent a group from forming coalitions and winning benefits through the normal process of interest group politics. Second, it may lead legislators to err in their cost-benefit analysis, even if they perform the analysis with proper concern for members of the burdened group. *Id.* at 157, 161.

¹⁶⁸ In *Regents of the University of California v. Bakke*, the Court fractured badly over an affirmative action program. 438 U.S. 265 (1978). Justice Powell, joined by Justice

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federal government, the Court announced that legislation discriminating in favor of racial minorities would also receive strict scrutiny.¹⁶⁹

For anyone with a sense of how the tiers of scrutiny had developed, this was a surprising result. Justice O'Connor's majority opinion in *Adarand Constructors v. Pena* explains it by invoking three themes: skepticism of racial classifications, consistency in application of equal protection, and congruence between the rules applied to the federal government and those applied to the states.¹⁷⁰ Taken together, she reasoned, the three principles established that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."¹⁷¹

The second of these principles has done most of the work in bringing the Court's equal protection jurisprudence to where it is today. Justice O'Connor traces the demand for consistency back to Justice Powell's opinion in *Regents of the University of California v. Bakke*.¹⁷² In fact, it can be found substantially earlier. In the *Civil Rights Cases*, Justice Bradley announced that at some point, blacks must cease to be "the special favorite of the laws," and their rights "protected in the ordinary modes by which other men's rights are protected."¹⁷³ As Professor Richard Primus has observed, Justice Bradley's criticism of antidiscrimination measures was misplaced; the Civil Rights Act of 1875, which Justice Bradley's opinion struck

White, rejected the petitioners' argument that heightened scrutiny should apply only to laws burdening "discrete and insular minorities," on the grounds that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289–90 (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938)). Justice Powell's reasoning, I will argue, is what has driven the progress to strict scrutiny for affirmative action, and it illustrates the fundamental problem of mistaking decision rules for operative propositions.

¹⁶⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

¹⁷⁰ *Adarand*, 515 U.S. at 223–24.

¹⁷¹ *Id.* at 224.

¹⁷² See *id.* (citing *Bakke*, 438 U.S. at 289–90). The concern about consistency also is featured in *City of Cleburne v. Cleburne Living Center*, where it was mentioned as one of the reasons not to count the mentally handicapped as a suspect class. 473 U.S. 432, 443–45 (1985).

¹⁷³ *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

down, granted no special privileges to blacks but simply forbade all racial discrimination.¹⁷⁴ “Today,” Professor Primus continues, “such criticism of facially neutral antidiscrimination laws seems tendentious and farfetched. . . . The issue today is the legitimacy of overt racial preferences”¹⁷⁵

Interestingly, however, the argument for heightened scrutiny of racial preferences turns out to be quite similar to Justice Bradley’s—that is, it attacks as special favoritism a regime that is in fact neutral. The argument is simple: if racial classifications burdening minorities are subject to strict scrutiny, so too must be *all* racial classifications. As Justice Powell put it in *Bakke*, in language echoing Justice Bradley’s, racial minorities cannot be “special wards entitled to a degree of protection greater than that accorded others”: they cannot be the special favorites of the Constitution.¹⁷⁶

As an argument about the substantive meaning of the Constitution, this makes good sense. An Equal Protection Clause that permitted discrimination against a particular group only for compelling reasons but allowed discrimination in their favor with a lesser justification would hardly deserve the name. But it is not an argument that makes much sense with respect to decision rules. Decision rules are adapted to particular cases and contexts; they are ad hoc responses to a changing landscape. They frequently will lack some of the attributes (such as symmetry) that we demand of constitutional operative propositions. Indeed, if understood as constitutional operative propositions, they will frequently seem obviously wrong.

An asymmetrical Equal Protection Clause is an absurdity: Equal protection is a shield against invidious discrimination, and of course it must shield all people equally. The tiers of scrutiny, however, are decision rules adopted in the equal protection context based not on how costly particular forms of discrimination were deemed to be, but rather on how likely they were to be invidious. The factors that make discrimination *against* a particular group

¹⁷⁴ Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 526 (2003).

¹⁷⁵ *Id.*

¹⁷⁶ *Bakke*, 438 U.S. at 295 (Powell, J., concurring); see also Alexander M. Bickel, The Morality of Consent 133 (1975) (arguing that affirmative action means that “[t]hose for whom racial equality was demanded are to be more equal than others”).

likely to be invidious—lack of political power, past and current prejudice, a history of discriminatory treatment—obviously do not convey similar information about discrimination *in favor* of that group. If anything, they suggest the contrary—such discrimination is especially likely *not* to be invidious.¹⁷⁷

The argument that consistency demands strict scrutiny for affirmative action, then, is mistaken in much the same way as Justice Bradley's opinion in the *Civil Rights Cases*. The operative proposition of equal protection is indeed symmetrical, protecting no person more than any other. But decision rules will have special favorites, as long as, and to the extent that, state actors have special victims.

The consistency argument in favor of strict scrutiny for affirmative action is driven by the confusion of decision rules and operative propositions. The decision rules perspective allows us to see that a demand for consistency in operative propositions does not support a similar demand with respect to decision rules. It also, I believe, gives us a useful vantage point from which to assess the Court's current approach to equal protection. Decision rules make sense, I have argued, to the extent that they can be derived from operative propositions by means of the application of certain factors that suggest greater or lesser deference to legislative judgments. What sort of factors support strict scrutiny of affirmative action?

Distrust of the legislature's ability to give equal weight to the interests of those it is burdening—the basic *Carolene Products* concern—cuts no ice here. Nor is there any history of invidious discrimination by majorities against themselves. Indeed, the constitutional argument against affirmative action is not that it is invidious in the sense of being inspired by animus.¹⁷⁸ Instead, *Ada-*

¹⁷⁷ See Ely, *supra* note 42, at 170 (“There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect.”).

¹⁷⁸ Justice O'Connor does come close to suggesting that affirmative action may be motivated by hostility towards its purported beneficiaries. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”). However, the alternative to benign here appears to be not “invidious” but rather “not cost-

rand's analysis suggests a different factor at work. "[A]ny individual," Justice O'Connor wrote, "suffers an injury when he or she is disadvantaged by the government because of his or her race"¹⁷⁹ The gravity of the injury is determined not by the magnitude of the disadvantage, but by the use of the racial classification.¹⁸⁰ Strict scrutiny is applied not to detect animus but to assess whether the government's interest is weighty enough to justify the infliction of this injury. This explanation can in fact be cast in terms of the factors I have discussed as driving the creation of particular decision rules. It boils down to the proposition that racial classifications are high-cost laws.

The high cost of a law can support non-deferential review, but as the sole factor, it tends to be inadequate. This is because the balancing of burdens and benefits, even large ones, is usually left to legislatures for reasons of both institutional competence and electoral accountability.¹⁸¹ There is no reason to suppose that the Court will be any better at deciding whether a particular high-cost law is cost-justified, and in a democracy, such balancing plausibly belongs primarily with the legislature.¹⁸² Indeed, it is just those arguments

justified." See *id.* ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). Thus, as Professor Jed Rubenfeld observes, the purpose of strict scrutiny has shifted from smoking-out to balancing. Rubenfeld, *supra* note 39, at 465.

¹⁷⁹ *Adarand Constructors v. Pena*, 515 U.S. 200, 230 (1995).

¹⁸⁰ Thus the fact that affirmative action programs impose only a statistically minimal disadvantage on white applicants, see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1078–80 (2002), is not relevant to the Court's calculus. See *Shaw v. Reno*, 509 U.S. 630, 650–51 (1993) (suggesting that racial classification in redistricting by itself is an injury, regardless of effects on voting power).

¹⁸¹ Justice Stevens made a similar point in his *Adarand* dissent:

I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. . . . If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

Adarand, 515 U.S. at 248 n.5 (Stevens, J., dissenting).

¹⁸² The chief value of judicial review in such cases, I have suggested, is that the judiciary may serve as a second negative, and one less susceptible to the temporary excesses of popular sentiment that can infect legislatures. See *supra* Section III.A. But

that make modern fundamental rights substantive due process jurisprudence look illegitimate.¹⁸³

One of the ironies of the affirmative action cases, then, is that those Justices who most strongly deplore unwarranted judicial intrusion into democratic decisionmaking in the due process arena support a similar intervention in the name of equal protection, in spite of the similarities between the two areas. Like the Due Process Clause, the Equal Protection Clause offers a general and highly abstract principle. It makes no more mention of race than the Due Process Clause does of abortion or child-rearing. What is required to get specific decision rules out of these general propositions is a theory about when legislatures cannot be trusted.

Here the foes of affirmative action stand perhaps on weaker ground than the proponents of fundamental rights due process. The heavy burden imposed by laws prohibiting abortion or same-sex sodomy is fairly clear.¹⁸⁴ The high cost of a racial classification is somewhat less obvious, and the Court has never offered any empirical evidence for its existence. Instead, the Justices tend to write as though the Equal Protection Clause simply contained a categorical ban on racial classifications.¹⁸⁵ The Reconstruction Congress did give us some such concrete negations, notably the Thirteenth and Fifteenth Amendments.¹⁸⁶ But the Fourteenth Amendment does not ban any particular practice with similar specificity. If the members of the Reconstruction Congress thought they were flatly prohibiting anything, it was probably invidious discrimination against blacks. They did not think they were categorically prohibiting race-based remedial measures; they enacted some themselves.¹⁸⁷

affirmative action programs are not generally adopted in response to popular hysteria.

¹⁸³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J. concurring in part and dissenting in part); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 923 (1973).

¹⁸⁴ See Ely, *supra* note 183, at 923.

¹⁸⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., concurring in part and dissenting in part) (“What the Equal Protection Clause does prohibit are classifications made on the basis of race.”).

¹⁸⁶ The Thirteenth Amendment bans slavery, U.S. Const. amend. XIII, § 1, and the Fifteenth Amendment prohibits disenfranchisement on racial grounds. U.S. Const. amend. XV, § 1. The term “concrete negation” I owe to Professor Richard Primus. Richard A. Primus, *The American Language of Rights* 7 (1999).

¹⁸⁷ See Rubinfeld, *supra* note 39, at 430–31.

The assertion that racial classifications are generally prohibited, then, is not plausible as an account of the operative proposition behind the Equal Protection Clause. It is supported neither by text nor history. It must be defended as a decision rule, and here the only justification put forward is that racial classifications are high cost.¹⁸⁸ This can be a partial justification, but its application to affirmative action shows its deficiencies in a particularly glaring light.

The decision rules perspective, I have noted, allows one to describe the march of equal protection as the story of a progressive Court ratifying the achievements of social movements. Groups make their claims for equal treatment, and at a certain point the Court steps in and announces that the struggle is over: Discrimination against that group has been established as invidious, and it will no longer be allowed.¹⁸⁹ If equal protection jurisprudence focuses on classifications rather than classes, however, the story is somewhat different. Historically downtrodden groups make their claims, and after they have achieved a certain degree of success, the Court steps in and announces that they cannot be treated differently at all. Discrimination against them is no longer allowed, but the interest group politics that long disfavored them cannot be used to their advantage. The government may grant subsidies to farmers, married couples, or the unemployed; universities can adopt preferential admission policies for athletes, flautists, alumni children, or applicants from remote geographical regions.¹⁹⁰ Racial minorities, almost alone, cannot be favored, and if we ask why, the reason is

¹⁸⁸ The Court also has observed that racial classifications are “in most circumstances irrelevant and therefore prohibited.” *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This is at best an extremely odd thing to say. Legions of irrelevant classifications receive rational basis review, and as Justice Ginsburg has observed, “[o]ur jurisprudence ranks race a ‘suspect’ category” not because it is irrelevant but “because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.” *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (quoting *Norwalk Core v. Norwalk Redev. Agency*, 395 F.2d 920, 931–32 (2d Cir. 1968)).

¹⁸⁹ See *supra* Section IV.C.

¹⁹⁰ Surprisingly, Justice Thomas made much of this point in arguing against the University of Michigan Law School’s affirmative action program. *Grutter*, 539 U.S. at 368 (Thomas, J., concurring in part and dissenting in part) (“The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures.”).

essentially that they have been discriminated against in the past.

In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that barred gays and lesbians from securing protection under local antidiscrimination ordinances.¹⁹¹ Such an exclusion of a group from the ordinary play of politics was “unprecedented in our jurisprudence,” Justice Kennedy wrote, “a denial of equal protection . . . in the most literal sense” and “inexplicable by anything but animus.”¹⁹² Some of that may be true, but not the unprecedented part. This prohibition on using the political process to gain advantage is exactly what current equal protection jurisprudence does to racial minorities.

The argument that the Equal Protection Clause cannot make some people more equal than others alludes to *Animal Farm*,¹⁹³ but it is the Court’s current jurisprudence that is truly Orwellian. It makes sense neither as operative proposition nor as decision rule, and it is hardly surprising that the consequence has been subterfuge: the unusually enervated form of strict scrutiny employed by the *Grutter* majority.¹⁹⁴ Subterfuge is the natural response to doctrine that appears to direct the wrong outcome, and if doctrine has changed from a shield for politically weak groups to a barrier that stops majorities from accepting disadvantage in order to promote racial equality, it will continue to generate results that seem unjust under the Equal Protection Clause.

3. Congressional Enforcement Powers

The key question with respect to congressional enforcement powers is how courts are to determine the existence of a constitutional violation that the enforcement powers may be deployed to remedy or deter. The early cases reflect the understanding that, like the existence of the substantial effect on interstate commerce required for exercises of the commerce power, the existence of such a constitutional violation is a determination for Congress in the first instance, with deferential review by the Court.¹⁹⁵ More-

¹⁹¹ 517 U.S. 620, 623–24 (1996).

¹⁹² *Id.* at 632, 633.

¹⁹³ George Orwell, *Animal Farm* (1946).

¹⁹⁴ See *Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting).

¹⁹⁵ See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“[Section] 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determin-

over, in making that determination, Congress was allowed to deploy its own institutional competence and was not bound by the rules of administration that restrained judicial review. From the decision rules perspective, this meant that Congress was allowed to legislate in response to violations of operative propositions, not merely decision rules. That is, Congress could identify as unconstitutional practices that the Court would not strike down.¹⁹⁶ Again, as the Court lost sight of the distinction between decision rules and operative propositions, this understanding collapsed. *City of Boerne v. Flores* was the first step.¹⁹⁷

In *Boerne*, the Court considered the Religious Freedom Restoration Act (“RFRA”). Enacted, as the legislative history candidly confessed, “to overturn the Supreme Court’s decision in [*Employment Division v. Smith*],”¹⁹⁸ RFRA sought to restore the test of *Sherbert v. Verner*.¹⁹⁹

Whether RFRA was appropriate enforcement legislation thus turned on the relationship between *Smith* and *Sherbert*, or rather, on the nature of the free exercise right. If free exercise is a fundamental right, which the Court decided for institutional reasons to underenforce in *Smith*, then RFRA was simply an instance of Congress legislating to the full extent of the operative proposition, something the earlier cases had suggested was plainly within its power. If, however, free exercise is only a right against laws that target religious belief, which the Court overenforced in *Sherbert*, then RFRA adopted such a broadly prophylactic rule that it might well seem to pass the bounds of appropriate legislation.

Boerne took the latter view, but it spent no time discussing the

ing whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”).

¹⁹⁶ *Morgan* is difficult to read, but that this is what Justice Brennan was thinking when he wrote the opinion can be gleaned from his opinion in *Oregon v. Mitchell*. 400 U.S. 112, 246 (1970) (Brennan, J., dissenting in part and concurring in part) (“But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment.”).

¹⁹⁷ 521 U.S. 507 (1997).

¹⁹⁸ S. Rep. No. 103-111, at 12 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1902.

¹⁹⁹ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2000) (citing to *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

relationship between the operative free exercise proposition and the different decision rules of *Smith* and *Sherbert*. Instead, it seemed to take for granted that *Smith*, as the Court's latest word on the subject, set out precisely the scope of the free exercise right. State regulations that would survive the *Smith* test, it assumed, were necessarily constitutional. The question on which the Court focused was whether RFRA was "congruent and proportional" to the rule of *Smith*, not to the free exercise right itself.²⁰⁰

This does not make the outcome in *Boerne* wrong. Whether one thinks the decision correct turns largely on one's theory of the Free Exercise Clause, and those who believe that it is a merely a right against targeting (the rule of *Smith*) tend to find *Boerne* correct, regardless of their views on the proper scope of the Section Five power. Professor Larry Sager believes that Congress can legislate to the full scope of underenforced rights but argues that *Smith* accurately depicts the free exercise operative proposition and that RFRA's prophylaxis was too broad.²⁰¹ On the other side, Professor Michael McConnell shares an expansive view of the Section Five power,²⁰² but criticizes *Boerne* on the grounds that *Smith* is an underenforcing rule:

[T]he *Smith* decision was based not on what "free exercise of religion" means (either historically or normatively), but on the institutional point that "democratic government," despite its admitted inability to accord full and equal accommodation to all religious denominations, is to be "preferred" to a system in which courts make highly subjective and intrusive judgments that

²⁰⁰ See *Boerne*, 521 U.S. at 534 (observing that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise").

²⁰¹ See Lawrence G. Sager, *Congress as Partner/Congress as Adversary*, 22 *Harv. J.L. & Pub. Pol'y* 85, 85–86, 89 (1998) ("RFRA requires the Supreme Court to act as though constitutional religious liberty has a radically different shape than the Court justifiably believes it to have."); see also Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 *Sup. Ct. Rev.* 79, 83 (1998) ("Where the Constitution's objective was to protect religious believers against unfair imposition of special disadvantages, RFRA privileged religious believers in a way that was both normatively unattractive and practically unworkable.").

²⁰² McConnell, *supra* note 33, at 171 (suggesting that "Congress may be seen as having some degree of authority to determine for itself what the provisions of the Fourteenth Amendment mean").

“weigh the social importance of all laws against the centrality of all religious beliefs.”²⁰³

The tendency to equate constitutional meaning with judicial decisions, suggested in *Boerne*, came to full flower a few years later in cases involving the application of the Americans with Disabilities Act (“ADA”) and Age Discrimination in Employment Act (“ADEA”) to the states. In *Board of Trustees of the University of Alabama v. Garrett*²⁰⁴ and *Kimel v. Florida Board of Regents*,²⁰⁵ the Court struck down these applications, making clear that it was measuring Congress’s enforcement power against its decision rules. The operative proposition behind the Equal Protection Clause, which Congress claimed to be enforcing, prohibits invidious discrimination, and in *Katzenbach v. Morgan*, the Court had stated explicitly that Section Five legislation was justified if Congress reasonably found a particular practice invidious. But *Garrett* and *Kimel* focused not on invidiousness but on irrationality, what would be required for the Court to strike down discrimination on non-suspect categories such as age and disability.

Kimel began with the premise that “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest” and went on to measure the ADEA “against the rational basis standard of our equal protection jurisprudence.”²⁰⁶ Because the Act “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard,” the Court found that it crossed the boundary from enforcement legislation to an impermissible “attempt to substantively redefine the States’ legal obligations.”²⁰⁷

Garrett offers an even sharper display of the unthinking equation of constitutionality with the outcome of adjudication. The opinion

²⁰³ *Id.* at 156 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)); see also Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 Va. L. Rev. 1, 59 (1993) (“*Smith* indicates that it is a decision about institutional arrangements more than about substantive merits.”).

²⁰⁴ 531 U.S. 356, 374 (2001).

²⁰⁵ 528 U.S. 62, 67 (2000).

²⁰⁶ *Id.* at 83, 87.

²⁰⁷ *Id.* at 86, 88.

comes very close to saying that invidious discrimination against the disabled is constitutionally acceptable. Though negative attitudes and fear, the Court observed, “may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make.”²⁰⁸ After demanding that Congress find irrationality as a predicate for the exercise of its enforcement power, the Court assessed the congruence and proportionality of the ADA by comparing it to adjudication, right down to the allocation of the burden of proof.²⁰⁹

Justice Breyer’s dissent made the obvious reply that by using the rational basis test as the standard of constitutionality, the majority had adopted the wrong yardstick: “[N]either the ‘burden of proof’ that favors States nor any other rule of restraint applicable to judges applies to Congress when it exercises its [Section Five] power.”²¹⁰ Justice Breyer also suggested that Congress should be required only to find invidious (rather than irrational) discrimination.²¹¹ My purpose here is not simply to repeat that observation but to locate *Garrett* and *Kimel* within a larger jurisprudential trend. Repeatedly, the Court has come to treat its decision rules as if they were operative propositions, and repeatedly the confusion

²⁰⁸ *Garrett*, 531 U.S. at 367; see also *id.* at 370 (“‘[A]dverse, disparate treatment’ often does not amount to a constitutional violation where rational-basis scrutiny applies.”).

²⁰⁹ *Id.* at 372.

²¹⁰ *Id.* at 383 (Breyer, J., dissenting). Justice Breyer went on to argue that “[t]here is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court’s institutional limitations” and followed with an analysis of differing judicial and legislative competencies. *Id.* at 384–85 (Breyer, J., dissenting).

²¹¹ *Id.* at 377–82 (Breyer, J., dissenting) (noting support in the legislative record for “Congress’ finding that the adverse treatment of persons with disabilities was often arbitrary or invidious”). Academics have amplified the point, notably Professors Robert Post and Reva Siegel, in a series of excellent articles. See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1, 8–11 (2003) [hereinafter Post & Siegel, *Protecting the Constitution from the People*]; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 464–65 (2000). Professors Post and Siegel are not working entirely within the decision rules perspective, however, as they seem to believe that their position requires granting Congress “equal interpretive authority” with respect to the content of the Constitution’s operative propositions. See Post & Siegel, *supra* note 125, at 1947.

has warped the doctrine.²¹²

In each of the contexts I have discussed, the Court began with a principle that seemed unassailable. Of course, one might think, the commerce power cannot be entirely unbounded. Of course, the Equal Protection Clause cannot offer some groups more equal protection than others. And, of course, Congress cannot change the meaning of the Fourteenth Amendment.

These are all plausible principles, if not necessarily as incontrovertible as the Court supposed. But they are principles relating to constitutional operative propositions, not to decision rules. It might well be the case that the Constitution leaves the job of determining whether the commerce power has been exceeded primarily with Congress. It might be the case—indeed, it almost certainly is—that laws burdening politically powerful groups are less likely than those burdening weak groups to be the product of legislative hostility or indifference. And it might be that congressional judgment as to whether a particular practice is invidious is sensibly reviewed in light of the institutional competence of Congress, and not as though Congress were a litigant or an inferior court. Distinguishing

²¹² The current § 5 jurisprudence also seems on the way to subterfuge. In the two most recent cases, the Court upheld enforcement legislation as valid. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (upholding Title II of the ADA as applied to cases implicating access to the courts); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding the Family and Medical Leave Act). *Lane* may be reconciled with *Garrett* and *Kimel* on the grounds that the law at issue addressed discrimination “implicating the fundamental right of access to the courts,” making it easier for Congress to establish a violation of the Court’s decision rules sufficient to trigger the enforcement power under *Garrett* and *Kimel*. *Lane*, 541 U.S. at 533–34. *Hibbs* is harder, for Justice Rehnquist’s majority opinion suggests that the equal protection violation the FMLA sought to avert was simply disparate impact. 538 U.S. at 732. An employer practice of offering leave only to women would be a clear equal protection violation of the sort Justice Ginsburg made her early career attacking: While superficially benefiting women, it would hamper their participation in the economy by making them less attractive employees. See *id.* at 736 (noting that practice of offering leave only to women “created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees”); cf. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–39 (1975) (striking down Social Security provision that granted benefits to widows, but not widowers, with minor children in their care). But Chief Justice Rehnquist went on to note that federally mandated minimum leave was appropriate because sex-neutral but inadequate leave policies “would exclude far more women than men from the workplace.” *Hibbs*, 538 U.S. at 738. That sort of disparate impact would not violate the equal protection decision rules.

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between decision rules and operative propositions does not require any of these approaches, but it discloses possibilities that seem to have vanished from the Court's sight.

B. Articulation of Erroneous Norms

A second problem arises when the Court equates the meaning of the Constitution with the outcome of constitutional cases: Such pronouncements create a misleading impression of the Constitution. When the Court treats its decision rules as operative propositions, it announces as constitutional truths rules that should neither be followed by nonjudicial actors nor internalized by the general public.²¹³ The Constitution does not say that invidious discrimination against the disabled is perfectly acceptable; it is not that callous. It does not say that intrastate noncommercial activity indirectly harming interstate commerce is beyond congressional regulation; it is not that formalistic. And it does not say that the majority may accept burdens in order to favor virtually any group except those that have historically been the targets of discrimination; it is not that perverse.²¹⁴

This is not to say that the decision rules echoed in the preceding paragraph are mistaken, though I believe they are. It is to say that they require explanation and defense. Simply to announce them as operative propositions gives an impoverished and unattractive view of the Constitution and the Court alike. Some of the pronouncements about race sound as ridiculous now as the embrace of a formal contractual equality did a hundred years ago. The suggestion that strict scrutiny for affirmative action helps prevent the intern-

²¹³ Cf. Amar, *supra* note 16, at 27 (“Even worse than doctrine’s regular sterility is its recurrent perversity.”). The problem here is in some ways the same one discussed by Professor Dan-Cohen: When the Court recites a decision rule as an operative proposition, it frequently “conveys . . . a normative message that opposes or detracts from the power” of the operative proposition. Dan-Cohen, *supra* note 21, at 632. It is to overcome this problem that Dan-Cohen invokes the idea of acoustic separation in his thought experiment and then points to the possibility of selective transmission as its real-world analog. See *id.* at 634–36 (describing “strategies of selective transmission”).

²¹⁴ See Stephen L. Carter, *When Victims Happen To Be Black*, 97 *Yale L.J.* 420, 433–34 (1988) (“To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn’t exist.”).

ment of racial minorities²¹⁵ is a bad joke; Fred Korematsu did not receive admissions preferences to a concentration camp. More generally, the repeated assertion that equal protection means excluding racial minorities from the benefits of interest group politics is much the same cruel charade as protecting the liberty of bakers to work crushing hours.²¹⁶ When such rules are trumpeted as the protectors of equality, the Constitution appears defective and the Court either delusional or insincere. Describing the *Lochner* era, Professor Roscoe Pound wrote, “those decisions wrought an injury to the courts and to the public regard for law and for constitutional law in particular.”²¹⁷

The danger is not just a loss of public confidence in the Court or the Constitution. For a rather stark illustration of the costs of mistaking decision rules for operative propositions, consider Justice Thomas’s dissent in *Hamdi v. Rumsfeld*.²¹⁸ The plurality there held that the Executive did possess the authority to detain U.S. citizens who were “enemy combatants,” but that a detained citizen was entitled to some opportunity to argue before a neutral decisionmaker that he was not, in fact, an enemy combatant.²¹⁹ Justice Thomas, dissenting, agreed on the constitutional operative proposition: The Executive may detain enemy combatants, but not loyal citizens. The factual determination as to whether a given individual was in fact an enemy combatant, however, he would have left to the good faith of the Executive, on the grounds that courts “lack the relevant information and expertise” to review an executive determination.²²⁰

Justice Thomas’s decision rule is thus that the Executive may detain anyone it pleases. Courts will not interfere; any challenge to a

²¹⁵ See *Adarand Constructors v. Peña*, 515 U.S. 200, 236 (1995) (“Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.”).

²¹⁶ Just as the *Lochner* Court’s understanding of liberty of contract suggested that a maximum hours law violated the rights of workers as well as employers, *Lochner v. New York*, 198 U.S. 45, 52–53 (1905), the Court’s current anti-classification approach to equal protection suggests that if classifications themselves constitute the injury, affirmative action programs violate the rights of their beneficiaries. Indeed, it has said as much in the voting rights context. See *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

²¹⁷ Roscoe Pound, *Liberty of Contract*, 18 *Yale L.J.* 454, 487 (1909).

²¹⁸ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting).

²¹⁹ *Id.* at 2635 (majority opinion).

²²⁰ *Id.* at 2678 (Thomas, J., dissenting).

detention will be dismissed. Like the plurality, I find this an unappealing decision rule—it defers to the Executive on a factual question courts seem quite capable of answering, and in a context in which the Executive has proven itself untrustworthy in the past.²²¹ But it need not lead to constitutional violations unless the Executive errs in its determination of enemy combatant status. That determination is committed to the executive branch, but it is one that the Constitution requires the Executive to make in good faith.

Now imagine that the Court comes to understand Justice Thomas's decision rule as an operative proposition: The Constitution gives the Executive the power to detain whomever it wants, for as long as it wants. At this point, things have gotten worse. Giving one branch of government the unreviewable authority to detain American citizens indefinitely is exactly the sort of threat to individual liberty that the separation of powers is supposed to avert.²²² Once we see judicial refusal to review detentions not as a decision rule underenforcing the operative proposition (that the Executive may detain enemy combatants and no one else), but as the operative proposition itself, we have lost the idea that there exists a constitutional line that the Executive has an obligation to observe. Still, even in this world, other branches of government and the general public might interpret the Constitution to offer greater protection to individual liberty. The Executive might decline to act as the Court announces it can; if not, Congress, the states, or the people might resist.

Now imagine a world in which everyone has internalized this proposition: The Executive is constitutionally entitled to detain anyone it wants, for as long as it wants, for any reason whatso-

²²¹ In *Korematsu*, military authorities relied on a report known to be false, and the Solicitor General's office compounded the problem by not sharing with the Court its own knowledge of the report's falsity. See Petition for Writ of Error Coram Nobis, *Korematsu v. United States*, 584 F. Supp. 1406, 1417–19 (N.D. Cal. 1984) (No. CR-27635 W), reprinted in *Justice Delayed: The Record of the Japanese American Internment Cases 137–51* (Peter Irons ed., 1989). The Justices' awareness of this historical precedent doubtless affected the degree of deference they were willing to grant the Executive in *Hamdi*.

²²² See Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 Harv. J.L. & Pub. Pol'y 67, 72 (1998) (“[A]ll three branches must at least acquiesce for a serious violation of constitutional liberty to proceed.”).

ever.²²³ That is a police state, precisely the sort of thing that we say cannot happen here. And it probably will not. The example is hyperbolic; the *Hamdi* Court commendably refused to take even the first step down this road. But I hope it illustrates the distortions that occur when the Court announces decision rules as operative propositions, and the worse harms that follow when others believe it.

C. Judicial Sovereignty

One of the virtues of the decision rules perspective is that it allows us to see how judicial supremacy in constitutional interpretation can coexist with fairly robust forms of departmentalism or popular constitutionalism. Under the pre-*Lopez* Commerce Clause jurisprudence, the question of whether a given activity substantially affected interstate commerce was left to Congress in the first instance with deferential judicial review.²²⁴ Under the approach to equal protection adopted in cases such as *Frontiero v. Richardson*, the Court gave weight to congressional determinations that particular forms of discrimination were invidious.²²⁵ In each case, the Court remained the master of the meaning of the Constitution, but the Court's decision rules granted substantial power to other actors, either by allocating primary decisionmaking authority to an entity other than the Court or by heeding other views in the crafting of decision rules. As Professor Sager put it, the model "depicts a vision of judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . can come to be applied."²²⁶

If the distinction between decision rules and operative proposi-

²²³ In *Hamdi*, the Executive did assert essentially unreviewable authority to detain Americans, and one might plausibly ask whether I am not asking readers to imagine this world. See *Hamdi v. Rumsfeld*, 124 S. Ct. at 2639. There is a crucial difference, however. The Executive was arguing for this proposition as a decision rule—it was arguing that courts could not second-guess executive determinations that a given individual was an enemy combatant. It was not arguing for the constitutional power to detain anyone other than enemy combatants. A lack of judicial review would give the Executive this power as a practical matter, but it would not exist as a constitutional matter unless the decision rule came to be understood as an operative proposition.

²²⁴ See supra notes 141–42 and accompanying text.

²²⁵ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973).

²²⁶ Sager, supra note 19, at 1240.

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tions is lost, this sort of cooperation seems illegitimate, or defensible only on the grounds that non-judicial actors have independent authority to interpret the Constitution. Thus, Professors Post and Siegel argue that “Section [Five] is a structural device that fosters the democratic legitimacy of our constitutional order. . . . [by linking] the legal interpretations of courts to the constitutional understandings of the American people, as expressed through their chosen representatives.”²²⁷ This is quite consistent with a model on which Congress may legislate to deter or remedy invidious discrimination—conduct that violates the operative proposition underlying the Equal Protection Clause—rather than merely conduct that violates the Court’s decision rules. Yet Professors Post and Siegel argue instead for a model that “attributes equal interpretive authority to Congress and to the Court” so that “Congress does not violate principles of separation of powers when it enacts Section [Five] legislation premised on an understanding of the Constitution that differs from the Court’s.”²²⁸ This claim is stronger and far more controversial. I do not mean to suggest that it is wrong, only that it is unnecessary to the argument that the views of other branches should have some weight.²²⁹ In the Section Five context, as in all the doctrinal areas I have considered, the Court may guard its interpretive supremacy with respect to operative propositions as jealously as it wishes. The possibility for cooperation and dialogue between the branches still exists as long as the Court understands that decision rules are not the same thing.

When the Court forgets this—when it comes to believe that the meaning of the Constitution is exhaustively specified by a list of what judges will uphold or strike down—it denies nonjudicial actors their appropriate role in implementing the Constitution. In *Morrison* and *Lopez*, the Court recoiled from the idea that the question of whether a law fell within the bounds of the commerce power might be primarily within the legislative competence.²³⁰ *Garrett* and *Kimel* similarly anathematized the suggestion that Congress might find unconstitutional a practice that the Court

²²⁷ Post & Siegel, *supra* note 125, at 1945.

²²⁸ *Id.* at 1947.

²²⁹ For another example, see McConnell, *supra* note 33, at 171.

²³⁰ See *supra* Section VI.A.1.

would not strike down.²³¹ But in neither case was the issue really whether the Court would have the last word on the subject. It was whether the Court would have the only word.

The Court's reluctance to accept the idea that other branches might have something useful to say stems in large part from its supposition that independent interpretation of the Constitution is the only form such contributions could take. That supposition, of course, comes directly from the confusion of decision rules and operative propositions, the belief that the Constitution is what the Court does. It also is driven in part by a fear that Congress does not take its responsibilities seriously, a fear that to some extent appears justified.²³² Judicial deference breeds indifference to the responsibility to make an independent assessment of constitutionality. That is how the substantial effects test led to the unthinking invocation of the commerce power epitomized by the findings-free Gun Free School Zones Act.

But judicial contempt will breed indifference as well. If the Court refuses to pay any attention to the assessments Congress *does* make—to the findings of effects on commerce supporting the Violence Against Women Act or the findings of invidious discrimination supporting the ADA and ADEA—members of Congress might justifiably wonder why they should bother. If the Court is concerned that Congress does not take its responsibilities seriously, the appropriate thing to do would be to adopt deliberation-forcing rules, deferring to the legislative competency only if some evidence exists that the competency actually has been employed. The Court's current approach is just as likely to deaden the congressional sense of constitutional responsibility.

The same is true of the Court's relationship to the people. Writing of judicial review generally, Professor Thayer warned of its power to “dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”²³³ Just as Congress might be disheartened by judicial disdain for its attempts to think seriously about constitutional questions, so too might be the people. A con-

²³¹ See *supra* notes 204–12 and accompanying text.

²³² See *supra* text accompanying note 12. For a discussion of the interpretive competency of Congress, see generally Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *Duke L.J.* 1335, 1373–74 (2001).

²³³ James Bradley Thayer, *John Marshall* 107 (1901).

gressional decision to leave the Constitution entirely to the Court is troubling, but a similar popular abdication would be worse.

Dissenting in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Scalia lamented the popular attempts to influence judicial opinion. “How upsetting it is,” he wrote, “that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views.”²³⁴ Popular sentiment was beside the point, Justice Scalia argued, for the Supreme Court was, or should be, “doing essentially lawyers’ work” and “ascertaining an objective law.”²³⁵

Justice Scalia’s vision of constitutional decisionmaking as ordinary adjudication is not, and has never been, an accurate one. The Constitution is not ordinary law, created by the government and entrusted to judges. It is higher law, created by the people, and it does not belong to courts alone. Constitutional adjudication is shot through with value choices. Judges are called upon to decide whether a governmental purpose is legitimate; whether an act is reasonable, arbitrary, or conscience-shocking; whether a form of discrimination is justified or invidious. To make these decisions without reference to current societal understandings—to make them from the perspective of eternity or 1789—is as impossible as it is misguided.²³⁶ Social movements always have affected the way that judges view such questions, and there is nothing illegitimate about it.²³⁷ We must not lose sight of the fact that it is not just *a* Constitution the Court is expounding. It is *our* Constitution, and judges can no more sever its application from popular understandings than they can tell us who we are.

²³⁴ 505 U.S. 833, 999–1000 (1992) (Scalia, J., concurring in part and dissenting in part).

²³⁵ *Id.* at 1000.

²³⁶ See Post & Siegel, *Protecting the Constitution from the People*, *supra* 211, at 28 (“The Constitution . . . does not live in our society as mere ukase. Disputes about the Constitution often raise deep questions of social meaning and collective identity that are not of a kind that a democratic society settles autocratically.”).

²³⁷ See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 160 (1999) (“With a Constitution made in the name of ‘We the People,’ all of us are legitimately interested in the meaning of the Constitution—all of us must be welcome participants in the conversation.”).

CONCLUSION

In this Article, I have been critical of some recent decisions. The main point of the Article, however, is not to argue that particular decisions are right or wrong. It is to offer a different perspective on the creation and evolution of constitutional doctrine. That perspective allows for analysis and evaluation of doctrine, but it does not commit one to any particular view of any particular case. Others may, as I have said, argue that different operative propositions underlie particular constitutional provisions. Or they may argue that various factors support the creation of different decision rules than the ones I endorse. Those are matters about which reasonable people can differ, as my discussion of *Smith* and *Boerne* shows.

The value of the decision rules model is that it allows us to identify a mistake I think no reasonable person should commit: the conflation of decision rules and operative propositions. No one should believe that the lack of a judicially enforceable limit means no limit exists. No one should believe that a decision rule must be symmetrical merely because an operative proposition is. There are arguments in favor of judicial enforcement or symmetry, but they must be given. When we discuss *what* a particular constitutional provision is supposed to do or *why* a particular rule is a good way to enforce that provision, we are engaged in a discussion that can be fruitful. When we announce that the substantial effects test is inconsistent with a government of enumerated powers, or that the Equal Protection Clause must treat all racial classifications as equivalent, we are either begging the question or making a category mistake. I believe that the perspective of this Article facilitates fruitful discussions, and I offer my criticisms as the opening words of such a discussion. I hope and expect that they will not be the last.