Reasoning about the Irrational: The Roberts Court and the Future of Constitutional Law

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At the close of the Supreme Court’s October Term 2009, the commentators seemed to divide into two main groups. On the one hand, the editorial board of the New York Times spoke for a host of other critics in complaining that “the Roberts court demonstrated its determination to act aggressively to undo aspects of law it found wanting, no matter the cost” – by “the Roberts Court,” the editors meant what they described as a five-justice “conservative majority [that] made clear that it is not done asserting itself” on issues of grave national importance, perhaps including the constitutionality of health care reform.¹ From the perspective of these commentators, the Roberts Court has “come of age” and “entered an assertive and sometimes unpredictable phase,” in which (despite the occasional surprise) the majority justices are “fearless” in exerting their power to advance the politically conservative (pro-business, pro-gun, anti-criminal defendant) interests they favor.² Elena Kagan’s succession to the seat of John Paul Stevens, on this view, was at best a holding action against the Court’s complete takeover by the Right.

¹ See “The Court’s Aggressive Term” (July 2, 2010), http://www.nytimes.com/2010/07/05/opinion/05mon1.html. The Times editors, to be sure, grudgingly conceded that it had not been “a thoroughly disappointing term,” but few readers will have doubted the editors’ fundamental agreement with other, less nuanced critiques of the Court.

On the other hand, the admirers of the Court’s decisions generally insisted that the critics were vastly overstating both the ideological content of the Court’s judgments (some of which, admittedly, were what the blogosphere calls conservative) and the aggressiveness of the justices who usually made up the majority in highly ideological, divided decisions. The error of analysis, furthermore, was quite deliberate, and the tale of political takeover is “all such tedious sophistry” by the Left, a dishonest demonization of justices whose decisions were marked by caution and attention to the specific demands of the judicial process.3 “The Roberts Court is a work in progress, and the change in Court personnel will introduce new dynamics, as will a different combination of cases and issues that come before the Court. [A]t present, we can characterize the Roberts Court as a moderately conservative minimalist Court.”4

No reader, I suspect, was surprised to notice that critics of an aggressively ideological Roberts Court are, almost of all them, to the left of center in terms of American politics, or that admirers of a judicially modest majority are equally likely to occupy positions to the political center’s right. Those are precisely the positions of criticism or apologetics that would one expect, given contemporary politics and the contemporary Court. In itself, this correlation between the politics of the commentator and his or her perceptions of the Court proves nothing: either the liberal critique or the conservative apologetics might actually be warranted by the Court’s actions even if there are political or sociological explanations for the


4 Jonathan Adler, http://volokh.com/2010/07/02/making-sense-of-the-supreme-court/ . Like the Times editors, Adler noted that it would be wrong to treat the Court’s decisions as monolithic, in his case by qualifying his “moderately conservative minimalist” characterization of the majority: “(except when its not).”
views the observers espouse.\(^5\) I believe it does suggest, however, that we are unlikely to make jurisprudential sense of “the Roberts Court,” or more precisely of the law announced by the Court’s current working majority in the (most) divisive cases, if we let our analyses move too quickly to the bottom line issues of political, economic and moral significance to the Court’s decisions. The outcomes simply matter too much, to most of us and to the justices too, and the demonstrable ideological content of the cases is reflected, isomorphically, in the demonstrable ideological slant of the commentators’ analyses. As a result, much of what has been said about the Roberts Court has told us a great deal about the commentators’ political (economic, moral) commitments and very little about the Court’s decisions as judgments of law.\(^6\)

One response to the emptiness and predictability of so much purported analysis, enthusiastically endorsed by many political scientists, is to conclude that there is little or no value to the enterprise of making jurisprudential sense of the Supreme Court’s constitutional decisions, in this or any other era. The Court is a political actor, the justices’ constitutional decisions are exercises of political choice (which of course need not mean political choice in a crude, partisan sense), and whatever socially-valuable contributions scholars can make by studying the Court must lie in the various modes of empirical investigation into the demonstrable sources and ascertainable consequences of the Court’s decisions. But empirical research,

\(^5\) Perhaps the clearest statement of this fundamental truth – that we can recognize the relativity of all perspectives without that recognition implying in the least that no view is in fact correct – is to be found in Peter Berger’s classic discussion of religious belief. See Berger, *A Rumor of Angels* 31-53 (1969). We cannot stop to discuss the philosophical issues; my intent is solely to take of and reject out of hand any argument that evaluation of the Court can only be an expression of the evaluator’s prejudices.

\(^6\) There is little value in trying to determine whether any individual decision (or decisions) or justice (or coalition of justices) is activist or restrained; there again the conclusions are too predictable to be enlightening. The problems with “judicial activism” as a meaningful tool of analysis are well-known, and no purpose would be served by rehearsing them here.
valuable as it is in ascertaining the Court’s patterns of decision and its impact on the world, cannot displace entirely normative analysis, at least without a price heavier than most of us (perhaps) are willing to pay. The search to make sense of what the Court actually does in the light of what the Court ought to do is essential to the idea that the Court is actually doing law when it announces constitutional decisions. If we can say nothing about the Court’s success, or failure, in carrying out the task of constitutional decision responsibly, as a matter of law, other than to express our pleasure or dismay at the apparent politics of the justices, then we have emptied that task, and constitutional law itself, of any distinctive quality.

Despite the political predictability of most of their work, however, the Term-end commentators on the Roberts Court – both the critics and the apologists – were right to look for legal patterns in the work of the Court. Their analyses, as I have suggested, ended up generating more heat than light because the analysts tackled their subject too directly, looking too quickly at the Roberts Court’s outcomes. Those outcomes sort out along ideological lines neatly enough that the analysts find it all but impossible to more than attack or defend the Court along lines essentially, and demonstrably, political. What we needed – what we need – is more in the way of indirect analysis, commentary that looks at the patterns of thought, the assumptions and preconceptions, that the justices of the Robert Court employ. It is in these jurisprudential patterns of thought that we can hope to ground evaluations of the Court’s constitutional work that do not simply replicate our own or the justices’ political predispositions. This article is meant as a modest contribution to this task of making jurisprudential sense, lawyers’ sense, out of the decisions of the Roberts Court through the indirect approach of asking not what the Court held in constitutional cases but rather how the justices think about the practice of constitutional
decision-making.

I. Looking for clues in *McDonald* and *Heller*

Following what has become tradition (whether out of necessity or prudence), the Supreme Court handed down several long-awaited decisions on the last regular day of its 2009 Term, among them *McDonald v. City of Chicago*.\(^7\) *McDonald* held, by a bare majority, that the individual right to bear arms recognized in 2008 in *District of Columbia v. Heller*\(^8\) constrains state and local governmental action.\(^9\) The Court having signaled through their timing the justices’ awareness that the decision in *McDonald* was momentous and unavoidably controversial, the commentators obligingly treated the outcome as affording important clues to the purposes and future course of action of the Roberts Court. Unfortunately, for the reasons I suggested in the introduction, they generally looked in the wrong direction, at the fact that a majority upheld the gun-owners’ claim. That the outcome in *McDonald*, like that in *Heller*, was of great human significance is undeniable: the extent to which law-abiding citizens can possess operational firearms is of life and death significance, sometimes literally (although of course

\(^7\) 130 S.Ct. 3020 (June 28, 2010).


\(^9\) The lead opinion in *McDonald*, written by Justice Alito, concluded that the second amendment right the Court found in *Heller* applies to the states because of its incorporation into the due process clause of the fourteenth amendment. Justice Thomas reached the same outcome by way of the privileges or immunities clause, and therefore did not join the sections of Alito’s opinion rejecting the petitioner’s argument based on that clause. See 130 S.Ct. at 3025. Justices Stevens, Ginsburg, Breyer and Sotomayor dissented. Most commentary on *McDonald* found this breakdown of the justices in *McDonald* unsurprising in that it replicated the vote in *Heller*, except for the substitution of Sotomayor (a Democratic appointment to the Court) for Justice Souter (a “liberal” in contemporary journalistic usage).
people argue over which side of that dichotomy is at stake), but it is unclear to me that
*McDonald’s* holding was particularly significant in any broader jurisprudential sense. Having
decided in *Heller* that the second amendment protects an individual right to bear arms,\(^{10}\) the
further conclusion that the amendment is “a provision of the Bill of Rights that protects a right
that is fundamental from an American perspective” and therefore “applies equally to the Federal
Government and the States,” is both plausible and self-limiting.\(^ {11}\) Whatever their societal
importance, however, it is not the holding in *McDonald* or that in *Heller* that I want to address,
but rather what might seem a side-bar issue that appeared, in somewhat different forms, in both
cases.

Justice Scalia’s opinion for the Court in *Heller* reached the substantive merits and held
the District of Columbia’s handgun ordinance unconstitutional. In contrast, in *McDonald*, the
lower federal courts had thought themselves bound by old Supreme Court precedent to dismiss a
right-to-bear-arms challenge to two local handgun laws, and Justice Alito’s plurality opinion
accordingly limited itself to deciding that the second amendment right, through its incorporation
in the fourteenth amendment, is relevant to evaluating a local law’s constitutionality. Whether
the local ordinances are constitutional, and precisely what standard of review to apply in
determining the answers, remains to be decided on remand. Alito did, however, state two

\(^{10}\) The respondent municipalities in *McDonald* did not ask the Court to reconsider *Heller* and
Justice Alito noted for the majority that “nothing written since *Heller* persuades us to reopen the
question there decided.” *Id.* at 3048. (Justice Alito specifically had in mind the “question of
original meaning” that the *Heller* majority thought determinative on the legal question of the
second amendment’s meaning.)

\(^{11}\) *Id.* at 3046. As Justice Alito noted, only four provisions of the Bill of Rights remain
unincorporated, and two of those (the grand jury requirement of the fifth and the civil jury
guarantee of the seventh amendment), *id.* at 3035 n. 13, are excluded from incorporation by
“considerations of *stare decisis*” that he suggested would govern the Court if the issue should be
raised. *Id.* at 3046.
propositions that the plurality justices presumably intend to bind future decisions. First, he reiterated the *Heller* Court’s express repudiation of any implication that the right to bear arms is absolute:

our holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” Id., at ---- - ----, 128 S.Ct., at 2816-2817. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.\(^\text{12}\)

Second, Alito countered Justice Breyer’s assertion in dissent that “incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise:”

As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. “The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is really worth insisting upon.” *Heller*, supra, at ----, 128 S.Ct., at 2821.\(^\text{13}\)

\(^\text{12}\) *Id.* at 3047.

\(^\text{13}\) *Id.* at 3050.
Justice Breyer was unpersuaded. If the right is not absolute – and Justice Alito both affirmed that it is not and gave examples of gun control laws that might not violate it – how, Breyer asked, are courts to decide which laws are valid and which transgress the constitutional right?

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone's 18th-century perception that a man's home is his castle. See 4 Blackstone 223. Nor can the plurality so simply reject, by mere assertion, the fact that “incorporation will require judges to assess the costs and benefits of firearms restrictions.” Ante, at ----. How can the Court assess the strength of the government's regulatory interests without addressing issues of empirical fact? How can the Court determine if a regulation is appropriately tailored without considering its impact?14

Alito’s examples of (potentially) valid regulations of gun possession, according to Breyer, have no basis other than the ipse dixit of the McDonald plurality and before that of the Heller majority:

the Court has haphazardly created a few simple rules ... But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply

14 Id. at 3127 (Breyer, J., dissenting).
invented rules that sound sensible without being able to explain why or how Chicago’s handgun ban is different.\footnote{Id.}

There is an unfortunate tone of asperity in these comments that might mislead the unwary reader into thinking that one side or the other is guilty of a lapse in judicial candor, that Justice Alito is hiding the ball or Justice Breyer is proposing that judges surreptitiously rewrite the Constitution’s commands, but I think either conclusion would be wrong. Alito and Breyer debated the question how to think about a standard of review for legislation affecting second amendment rights because they disagree even more fundamentally, and as a matter of principle, over what constitutional law is, and how judges are to understand their task in enforcing that law. Their debate is a clue, if a somewhat murky one, to the nature of this profounder disagreement.

In order to clarify what this deeper argument might be, I suggest we turn to the exchange in the earlier \textit{Heller} decision which lay behind the remarks of Justices Alito and Breyer in \textit{McDonald}. In \textit{Heller}, Justice Scalia for the majority asserted that the D.C. ordinance under review (which was a near-absolute ban on private possession of operable handguns) was unconstitutional “under any of the standards of scrutiny that we have applied to enumerated constitutional rights.”\footnote{128 S.Ct. at 2817-18.} Breyer in dissent responded that the ordinance “certainly would not be unconstitutional under, for example, a ‘rational basis’ standard,”\footnote{Id. at 2851 (Breyer, J., dissenting).} an observation that Scalia addressed in his footnote 27. Scalia acknowledged that Breyer was correct that the Court would uphold the law under the familiar rational basis test, but according to Scalia that was irrelevant:
rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

The Heller dissenters ignored footnote 27, and as yet it has attracted little attention from the commentators, who generally have focused on the second amendment issues. The footnote’s apparent obscurity is understandable but, I believe, a mistake, for it provides a deeply revealing window into how at least two key members of the Roberts Court, Scalia and the Chief Justice himself, are attempting to reorient constitutional law as a whole. The debate between Alito and Breyer in McDonald is only one of several indications from the October Term 2009 that this attempt is ongoing. Here is my thesis in summary form.18

18 Footnote 27 is admittedly dicta and at another place in his Heller opinion, Justice Scalia dismissed the importance of what he termed a “gratuitous” comment found in a footnote in an earlier case. See Heller, 128 S.Ct. at 2816 n. 25, citing Lewis v. United States, 445 U.S. 55, 65 n. 8 (1980). “It is inconceivable,” Justice Scalia asserted, “that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.” In this regard, it is ironic that footnote 27 quotes the famous footnote four of Carolene Products in criticism of Justice Breyer. Footnote four, of course, was the sheerest dicta on a “point ... not at issue and ... not argued,” and for precisely that reason Justice Frankfurter vehemently objected in a later case when other justices suggested that footnote four represented a position endorsed by the Court. See Kovacs v. Cooper, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring) (“A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the Carolene footnote did
The rational-basis test flows from a presupposition of American constitutionalism so basic and pervasive that it is easy to overlook: in its dealings with persons, American government is under a constitutional obligation to act rationally, and rationality in turn requires both that public actions make sense and that they make good sense, that they have some legitimate purpose. The constitutional law of liberty and equality is, in short, a mode of reasoning about what is rational in the public sphere – and rational in this broad and partly normative sense. Footnote 27, following on arguments that Justice Scalia has advanced elsewhere and that Chief Justice Roberts further explicated in an opinion issued shortly before *Heller*,19 rests on a presupposition that is almost entirely the reverse. What makes good sense, what is a legitimate end as opposed to an illegitimate one, is a matter not for reason but for choice, and as such it ineluctably belongs to the world of politics. The Constitution, through the judicial enforcement of rules that are themselves the product of political will, may set bounds on this political domain but has no purchase within it. Constitutional law is a form of reasoning about the irrational, about the line that necessarily separates decisions that are susceptible to rule from those that are in the most literal sense arbitrary, the expression of the will.

not purport to announce any new doctrine”). Despite Frankfurter’s protest, that footnote went on, of course, to become one of the best known and most influential statements in any judicial opinion in American history, which gives one pause in resting too much on the suggestion that footnoted dicta are of little importance. Footnote 27, in any event, is not the first example of Scalia placing a major statement about constitutional law in a footnote. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989) (opinion of Scalia, J., announcing the judgment of the Court) (discussing role of tradition in constitutional analysis). Cf. Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 97-98 (1991) (“Justice Scalia's footnote 6 ... seems destined to take its place alongside Justice Stone’s famous footnote 4 as one of constitutional law's most provocative asides”). Today’s dictum is tomorrow’s ratio decidendi, footnote or not.

The understanding of constitutional law to which footnote 27 is an important clue has profound implications for the role of constitutional law in our society. If the vision encapsulated in footnote 27 came to supply the accepted presuppositions on which lawyers approach constitutional issues, the results would profoundly affect not only the specific outcomes the Supreme Court might reach, but the overall role of constitutional law in the life of the Republic. Sections II, III, and IV outline key features of constitutional law, as it is now practiced, that footnote 27 implies we should abandon. In Section II, I discuss the role of constitutional doctrine, judicial standards of scrutiny or modes of analysis that the Court creates in order to implement constitutional norms without claiming that the standards or modes of review are themselves identical to those norms. The distinction between the constitutional norm, and the judicially created standard the courts apply to make the norm operational in deciding legal controversies implies the existence of what I call the “doctrinal gap,” a feature of constitutional thought that is of great practical importance in at least two respects. In Section III, I discuss the significance of the doctrinal gap in argument over the authority of the Court’s constitutional decisions. If a precedent is understood to rest on a doctrinal basis rather than to involve the direct application of a constitutional norm, the Court has considerable freedom to follow the precedent even if a majority of the justices are unsympathetic to it as a matter of constitutional principle. A precedent that is equated to the content of the norm, in contrast, tends to stand or fall with the continuing existence of a majority that believes it to be correct. Section IV turns to the significance of the doctrinal gap for our understanding of the roles of the judiciary and the political branches of government in the enforcement of the Constitution: IV.A briefly restates the case for rejecting claims that constitutional law is an exclusively judicial concern, and IV.B
argues that the prevalence of the doctrinal gap in constitutional law creates an intellectual space for political-branch enforcement that recognizes the priority of the courts’ (and the Court’s) decisions. IV.C examines the way this argument plays out in understanding a famous rational-basis decision, *Williamson v. Lee Optical*, and thus brings the reader back to the central claim of footnote 27, that rational-basis scrutiny gives rise to no doctrinal gap because it is a direct application of the constitutional norm it implements.

In Section V, I show that footnote 27’s attack on the doctrinal gap could lead to profound changes in current constitutional thought and practice, rendering judicial precedents more brittle and less stable and undermining the independent role of the political branches in the implementation of the Constitution. Section VI examines Justice Scalia’s assertion in footnote 27 that constitutional commands enforced by rational-basis review “are themselves prohibitions on irrational laws” and lays out the argument for the thesis I summarized above. Section VII reflects on how footnote 27, and the constitutional vision it embodies, fit into contemporary debate, and what they may say about the future of constitutional law in the era of the Roberts Court.

II. The strategic nature of constitutional doctrines and the significance of the doctrinal gap

Footnote 27's central assertion is that “‘rational basis’” is not just the standard of scrutiny” in cases where the Court properly employs it, but is “the very substance of the constitutional guarantee” itself.20 The distinction Justice Scalia is drawing in this observation

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20 Footnote 27 also claims that the Supreme Court does not employ the rational basis test when the “constitutional command” at issue is “a specific, enumerated right.” Justice Breyer’s
reflects the omnipresence of *doctrine* in constitutional law. The Supreme Court often announces, applies or rejects constitutional doctrines, by which I mean the standards or tests or modes of scrutiny or implementation that the Court employs in applying the Constitution to particular cases. In terms of legal method, as Professor Henry Paul Monaghan pointed out in a seminal article, such doctrines involve “the creation of a common law substructure to carry out the purposes and policies” of the Constitution’s commands. Like traditional common law decisionmaking, the creation of constitutional doctrine reflects a judicial evaluation and choice among competing means of executing the principles in question, although the justices often do not comment on the rationales for (and against) particular doctrines. This sort of second-order invocation of the test was therefore entirely beside the point, since the second amendment is (literally!) enumerated. Although this sounds like a truism – of course the flaccid rational basis test has no application when enumerated constitutional rights are at stake! – it is less self-evidently true than a careless reader might think. See H. Jefferson Powell, Rational Basis and Enumerated Rights (manuscript on file with author).

21 There is no single or canonical definition of “doctrine” in constitutional law, although in recent years a number of eminent constitutional scholars have devoted considerable effort to examining what aspects of constitutional law the term encompasses. See, e.g., Richard H. Fallon, Jr., *Implementing the Constitution* (2001); Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140 (1994); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996). I am not using the word in any precise or highly theoretical sense. Professor Brannon P. Denning has written a valuable essay on this scholarship in relation to *Heller*. See Denning, The New Doctrinalism in Constitutional Scholarship and *District of Columbia v. Heller*, 75 Tenn. L. Rev. 789 (2008).

22 See Monaghan, The Supreme Court, 1974 Term – Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 18 (1975). Monaghan argued that such doctrines ought to be subject to congressional modification, a view the Court declined to adopt as to the *Miranda* warnings in *Dickerson v. United States*, 530 U.S. 428, 442 (2000), discussed infra, –.

23 In addition to footnote 27, *Heller* contains an interesting back and forth between Justices Scalia and Breyer over Breyer’s answer to the question “[w]hat kind of constitutional standard should the Court use” in applying the second amendment? 128 S.Ct. at 2851 (Breyer, J., dissenting) (emphasis added). Justice Breyer argued that in practice any standard will “turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other,” and proposed “adopt[ing] such an
or meta-doctrinal discussion, when it does occur, almost always confirms the “strategic” nature of doctrine: doctrinal formulations blend the justices’ understanding of the Constitution’s meaning with the practicalities of judicial decisionmaking. A few examples will illustrate this theme.

In *Grutter v. Bollinger*, in her opinion for the Court Justice O’Connor explained that the Court has ordained the use of strict scrutiny in equal protection cases involving explicit racial classifications in order to identify those situations in which the classification is in fact being used for a constitutionally improper purpose.

Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what “classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool. ... strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the

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interest-balancing inquiry explicitly.” Id. at 2852. Justice Scalia responded that such “a free-standing ‘interest-balancing’ approach would be unprecedented” and contrary to the very purpose of the “enumeration of the right.” Id. at 2821.

24 For the adjective “strategic,” and an insightful study of this aspect of constitutional doctrine, see Fallon, *Implementing the Constitution*, at 5 (“the Court devises and then implements strategies for enforcing constitutional values”). Professor Fallon clearly does not intend, nor do I in adopting his terminology, any suggestion of ulterior, much less improper motivation on the Court’s part.
governmental decisionmaker for the use of race in that particular context.25

O’Connor’s rationale, which she first articulated in the City of Richmond v. J.A. Croson Co. decision years before, is quite different from that which Justice Kennedy stated in Croson. Kennedy wrote that in light of the Court’s caselaw, strict scrutiny was the appropriate means to respect stare decisis while implementing what he saw as the Constitution’s almost per se ban on racial classifications regardless of governmental purpose: “On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule” of strict scrutiny.26 Where O’Connor saw strict scrutiny as an affirmative tool enabling the courts to uncover unconstitutional state action masquerading under a claim of legitimacy, Kennedy perceived an underenforcement of the actual constitutional norm, acceptable only on the assumption that the shortfall in constitutional principle would be minimal.

Writing for the Court in City of Boerne v. Flores, Justice Kennedy explained his articulation of a new doctrinal standard by referring to the danger posed to one constitutional principle (Congress’s power to enforce the fourteenth amendment is a power to remedy or prevent violations of the amendment) by another (Congress must have “wide latitude” to devise remedial legislation).

There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a

25 539 U.S. 306, 326 (2003). I’ve omitted a set of quotation marks that are even more distracting than the Court’s unhappy norm, as well as the citation to Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion per O’Connor, J.).

26 J.A. Croson Co., 488 U.S. at 519 (Kennedy, J., concurring in part and in the judgment).
connection, legislation may become substantive [i.e., not remedial] in operation
and effect. History and our case law support drawing the distinction, one apparent
from the text of the Amendment.\textsuperscript{27}

The Constitution itself distinguishes the remedial legislation it authorizes from the substantive it
does not; the test of congruence and proportionality is the means Kennedy devised to enable the
Court to police Congress’s (possibly innocent) tendency to overreach.\textsuperscript{28} What has been for many
decades the Court’s standard explanation for rational basis scrutiny in equal protection cases is
very similar, only there the Court’s stated concern has been to police itself and other courts
against overreaching into the constitutional domain of the legislature. Justice Thomas’s opinion
for the Court in \textit{FCC v. Beach Communications} is typical:

\begin{quote}
This standard of review is a paradigm of judicial restraint. “The Constitution
presumes that, absent some reason to infer antipathy, even improvident decisions
will eventually be rectified by the democratic process and that judicial
intervention is generally unwarranted no matter how unwisely we may think a
political branch has acted.” ... “Only by faithful adherence to this guiding
principle of judicial review of legislation is it possible to preserve to the
\end{quote}

\begin{enumerate}
\item[\textsuperscript{27}] \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997).
\item[\textsuperscript{28}] Although Justice Kennedy commanded a near-unanimous Court in \textit{City of Boerne} on this
issue, the congruence and proportionality test is already under considerable strain, with Justice
\end{enumerate}
The rational basis test, like the congruence and proportionality test, is instrumental or strategic, the means by which the judiciary avoids its own (doubtless innocent) temptation to correct unwise legislative choices.

In *Dickerson v. United States*, the Court addressed the constitutionality of a 1968 statutory provision that was an unabashed congressional attempt to overrule the famous *Miranda* decision. There was language in post-*Miranda* opinions strongly implying, if not more, that *Miranda* was indefensible constitutionally, and in dissent Justice Scalia said as much and insisted that the Court lacked the authority to invalidate the act of Congress, there being no violation of the Constitution. For the Court, Chief Justice Rehnquist conceded that warnings required by *Miranda* are not “required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements;” the warnings were a strategic device created and imposed by the Court because the justices believed existing practice ran an unacceptably high risk of permitting unconstitutional criminal convictions. The fact that the warnings themselves are not directly commanded by the Constitution, however, did not make *Miranda* sub- or non-constitutional in nature. Such a decision is “a normal part of constitutional law” and it “announced a constitutional rule” that, unless changed by the Court, is as obligatory as the direct commands of the Constitution’s text. Judge-made constitutional doctrine, then, can impose

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31 Despite his characteristic vigor in expressing his disagreement with the *Dickerson* majority, 530 U.S. 457-61 (Scalia, J., dissenting) (attacking as “a lawless practice” the imposition of prophylactic rules that go beyond the actual substance of constitutional prohibitions), it is a
restrictions on other governmental entities that go beyond what the Constitution itself directly requires where, in the Court’s view, doing so is necessary to protect a constitutional norm.

The justices agree, or agreed before footnote 27 in Heller (as we shall see), that constitutional doctrine is strategic, crafted in light of the justices’ perceptions of the courts’ capabilities, the practical consequences of adopting (or failing to adopt) a given rule, and the likelihood in the given circumstances that there has been an actual violation of the Constitution. There is, then, ordinarily or perhaps always a gap between what the direct command of the Constitution literally requires, what must of necessity be done, by the courts or other entities, “to satisfy [the letter of the] constitutional requirements,” and what the Court deems appropriate or even essential in the enforcement of those requirements. It is the existence of this gap or distance between constitutional command and judicial rule, standard or pattern of analysis, in a sense, that defines constitutional doctrine.

III. Faulty doctrine versus erroneous interpretation and the operation of stare decisis

mistake to read Justice Scalia’s Dickerson opinion as an outright rejection of doctrine. See, e.g., Maryland v. Shatzer, 130 S.Ct. 1213 (2010) (opinion of Scalia, J., for the Court) (adopting, after considering benefits and costs of various rules, a 14-day presumption that a confession is involuntary under Edwards v. Arizona after a break in custody); Montejo v. Louisiana, 129 S.Ct. 2079, 2089 (2009) (opinion of Scalia, J., for the Court) (discussing the proper reasoning to apply “[w]hen this Court creates a prophylactic rule in order to protect a constitutional right”); United States v. Virginia, 518 U.S. at 568 (Scalia, J., dissenting) (“I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that “equal protection” our society has always accorded in the past.”).
The obvious question at this point is whether there is anything of more than theoretical significance to the fact that constitutional doctrine is characterized by the admitted gap between its content and the Constitution’s direct commands. At first glance, *Dickerson* might seem to eliminate any practical distinction between a rule or standard that the Constitution literally requires and a rule or standard that is the product of the Court’s doctrinal creativity: the latter, so long as the Court adheres to it, is as binding as the former. In fact, however, the doctrinal gap, as we might call it, plays a critical role in the judicial elaboration of constitutional law because of its significance in the application of stare decisis.

Any sensible resolution of the difficult question of when the Court should overrule constitutional precedent has to depend, in part, on whether the challenge to the precedent rests on the claim that the earlier Court misunderstood the Constitution itself, or instead that the doctrinal strategy it adopted for implementing the Constitution has turned out to be faulty. Justice Kennedy’s opinion in *Croson* expressly recognized the possibility that he might subsequently rethink his willingness to employ strict scrutiny in the analysis of affirmative action programs: he concurred in doing so on the assumption that strict scrutiny, a doctrinal tool that is less absolute than a per se ban on racial classifications, would nevertheless “vindicate the principle of race neutrality found in the Equal Protection Clause.” If in practice strict scrutiny proved to allow uses of race that undermined that principle, Kennedy was prepared to discard the doctrine.

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32 *Dickerson* is a particularly striking case in this regard since *Miranda* itself had acknowledged that there might be other, legislative means of insuring against the constitutional violations that the *Miranda* warnings were meant to prevent, an unusual admission by the Court that the very doctrine it was creating was contingent and subject to political rethinking. The statutory provision that Congress enacted, however, was simply and nakedly an attempt to restore the legal test that the *Miranda* Court had found inadequate to protect the constitutional norms – it was, in short, an attempt by Congress to overrule the Court rather than to meet the Court’s concerns in some other fashion.
notwithstanding stare decisis. The sort of argument relevant to persuading Kennedy to act on this announced reservation would concern not the meaning of equal protection but the practical results of applying strict scrutiny.

Justices are not usually so explicit about the possible problems with the doctrine they are announcing, but a reservation similar to Justice Kennedy’s in Croson is implicit in every explanation of a justice’s, or the Court’s, adoption of a particular doctrine. Consider Justice O’Connor’s doctrinal explanation in Grutter, which quoted from her Croson opinion announcing strict scrutiny as the test for evaluating race-based affirmative action. The rationale for using the test, she wrote, is that it “provide[s] a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker,” thus enabling the courts “to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” Implicit in this reasoning is the reservation that O’Connor (or the Court) would adopt a different approach if strict scrutiny were shown to be inadequate or misguided as a means of “smoking out” illegitimate uses of race.

There is, of course, a quite different line of argument that someone might mount in trying to persuade these justices, and the Court, to abandon the doctrinal position staked out in Croson

To be precise, Croson adopted strict scrutiny for state and local-governmental use of race in affirmative action. The later Adarand decision, in an opinion also written by Justice O’Connor applied the test to federal actions. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

There is an interesting ambiguity in Justice O’Connor’s explanation. Her reference to strict scrutiny determining whether the government has “a goal important enough to warrant use of a highly suspect tool” suggests a quite different rationale for using this doctrine: a direct weighing of the importance of the governmental purpose – ex hypothesi legitimate or benign as opposed to covertly malicious – against the harm to constitutional values. Grutter, 529 U.S. at 327 (“framework”), 326 (“‘smoking out,’” quoting Croson, 488 U.S. at 493).
and *Adarand Construtors, Inc. v. Pena* that the courts should apply strict scrutiny to the use of race in governmental decisionmaking: not that strict scrutiny is ineffective or inapt in light of the constitutional principle *Croson/Adarand* meant it to implement, but that the decisions misinterpreted the Constitution – misconstrued the relevant constitutional principle, in the first place. In *Croson*, Justice O’Connor’s rationale for employing strict scrutiny seems to rely on an underlying view of equal protection that identifies the intentionally or purposive infliction of harm as the primary concern of equal protection with respect to race – strict scrutiny “smokes out” concealed purposes of that prohibited kind – while Justice Kennedy’s concurrence identifies “race neutrality” as the constitutional principle at stake. The arguments crafted to convince O’Connor that she adopt Kennedy’s interpretation of the Constitution, \(^35\) or Kennedy O’Connor’s, would be quite different from those merely aimed at persuading either to adopt a different doctrinal approach in order to implement an understanding of the constitutional norm that remained unchanged. Because of the presence of the doctrinal gap, for either justice to modify or even abandon strict scrutiny as the appropriate test in affirmative action cases would be nothing more than what Chief Justice Rehnquist in *Dickerson* called “the sort of modifications” that are “a normal part of constitutional law” because “no constitutional rule is immutable.”\(^36\)

Justice Scalia’s changing view of the congruence and proportionality test adopted in *City...

\(^35\) Her language suggesting that strict scrutiny balances governmental purpose against individual interest makes it slightly unclear what Justice O’Connor’s understanding of the underlying constitutional norm is, but the predominant impression, I think, is that created by her invocation of the “smoking out” metaphor.

\(^36\) As the Chief Justice noted, “[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it.” *Dickerson*, to be sure, reminds us that because of stare decisis, the burden of persuading a justice or the Court to abandon altogether a doctrine is considerably greater than is required to convince the Court to make adjustments to the doctrine. 530 U.S. at 441.
of Boerne is a good example of a justice responding to later experience that, in his view, shows a doctrinal approach to be misguided. Scalia joined Justice Kennedy’s opinion for the Court without any stated reservation about the new doctrinal formulation, although he subsequently stated that he did “so with some misgiving ... because [such tests] have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”

But in Tennessee v. Lane, the second of two decisions that he thought failed to respect the underlying constitutional norm despite their application of the test, Scalia announced a change of position:

I yield to the lessons of experience. The “congruence and proportionality” standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. ... I would replace “congruence and proportionality” with another test – one that provides a clear, enforceable limitation supported by the text of § 5.

As he made clear in his opinion in Lane, Scalia continued to agree with the City of Boerne Court’s interpretation of the constitutional norm governing Congress’s exercise of the power to enforce the fourteenth amendment; it was the doctrinal approach in that decision, not its understanding of the amendment, that he had concluded was faulty.

37 Justice Scalia declined to join one subsection of Justice Kennedy’s opinion, dealing with the legislative history in Congress of section five of the fourteenth amendment, but stated no concerns with the substance of the congruence and proportionality test. See City of Boerne, 521 U.S. at 511 n.*.

38 Tennessee v. Lane, 541 U.S. at 557-58 (Scalia, J., dissenting). Justice Scalia’s explanation of his proposed replacement for the City of Boerne test is an unusually explicit discussion of the process by which a justice reaches a doctrinal position. See id. at 561-65. The other decision that in Scalia’s view showed the flawed nature of the test was Nevada Dept. of Human Resources
In contrast, an argument aimed at convincing a justice that she should repudiate or substantially modify part of her understanding of the Constitution itself asks her to confess error on an altogether more fundamental level. Such arguments are, unsurprisingly, rarely successful, and even more rarely does a justice admit that he has changed his mind at the level of underlying constitutional understanding. The Court itself, as a corporate body, does admit to error of this sort with some frequency, but as a matter of fact such shifts in interpretation usually reflect changes in the Court’s membership rather than in the individual justices’ mindsets. The doctrinal gap between Court’s articulation of the caselaw that implements the Constitution, and the justices’ often conflicting views on the meaning of the Constitution itself, marks for most purposes the boundary between the domain of legal arguments that might plausibly lead to a change in the Court’s position, and that area in which the justices’ commitments to their vision of constitutional principle are too deep to change. In the former realm, that of doctrine, the presence of strategic considerations makes constitutional law fluid, flexible, open to the sorts of change and adjustment that Chief Justice Rehnquist called “a normal part of constitutional law.” The area of principled commitment to underlying constitutional meaning is, on the other hand, relatively static, fixed by the divergent visions of individual justices that, as with all persons engaged with American constitutionalism, are largely shaped by what another great Chief Justice, John Marshall, called “the wishes, the affections, and the general theories” of the individual.39 Because such factors are far more deeply a part of the individual, they are far less

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susceptible to change.\textsuperscript{40} Where there is little or no doctrinal gap between the Court’s approach to deciding particular issues and the justices’ underlying constitutional commitments, precedent tends to be brittle – hard and unyielding insofar as it commands five votes, while susceptible to unconvincing “application” or simple repudiation when it lacks, or loses, a consistent majority.

IV. Doctrinal decisions and extrajudicial constitutional interpretation

A. The non-exclusivity of the judicial power to say what constitutional law is

The distinction between constitutional doctrine and the commands of the Constitution that doctrine is meant to implement is important not only because of its role in the Court’s dealings with its own precedents; it is equally or even more significant for the part it plays in defining the role of the political branches of government as constitutional interpreters. But what is that role?\textsuperscript{41}

\textsuperscript{40} Individual justices (and other constitutionalists) differ not only in the substance of their commitments but in the range of constitutional issues about which they hold fixed as opposed to fluid views. Justices who have relatively small areas of constitutional law in which they have deep commitments about underlying meaning, or whose commitments are more complex (or confused, according to their critics), notoriously can enjoy a disproportionate sway over the Court’s outcomes because far more cases end up for them on the flexible, fluid side of the doctrinal gap. One thinks of Justice Powell on the Burger Court, Justice O’Connor on the Rehnquist Court, and, perhaps, Justice Kennedy on the Roberts Court. Commentators tend to lump such “swing-vote” justices together as exemplars of a common characteristic, with the commentators divided over whether the justices’ behavior is admirably judicious or hopelessly inconsistent. My own view is that the mere fact that a justice seems often to be the “swing vote” says little in itself other than that the Court is polarized over issues about which the justice in question often does not have a broad and unyielding commitment on the question of underlying constitutional meaning.

\textsuperscript{41} I am not concerned in this article with the related but distinct issue of the executive branch’s obligation to enforce federal-court judgments even when the executive conscientiously believes
In theory at least, it would be possible to treat the Constitution as the concern solely of the judiciary. Other governmental actors (legislatures, high executive officers, administrators, police officers, etc.) would be normatively free to do whatever they thought best, with the Constitution and the judiciary’s enforcement of it as solely a matter of external constraint. On this view, if you (legislature, executive, whoever) can get away with X without interference from the courts, the Constitution itself should give you no other pause: it is the judges’ concern, not yours. Some people think this opinion is legitimately the American system, and many more believe (or fear) that it is the American norm in practice. From this perspective, the Constitution stands to governmental officials other than judges roughly as the Internal Revenue Code does to taxpayers. There are rules that the taxpayer must not transgress, on pain of external sanction, but as long as he stays within those rules the taxpayer owes no further regard to the purposes of the Code. “Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.”\textsuperscript{42} The Code imposes no internal obligations. On the analogous view of the Constitution, governmental officials (except judges – but why are they different?) owe nothing to the Constitution for its own sake, except the duty to obey judicial orders issued in the Constitution’s name (but, again, why?). The domain of politics and the domain of constitutional principle have only one necessary point of contact: the constitutional domain sets bounds on the

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that the court (Court) is in error. While that question is apparently of great interest to scholars, see, e.g., William Baude, The Judgment Power, 96 Georgetown L.J. 1807 (2008), I believe that it settled, and rightly so, as a matter of judicial and executive practice. See H. Jefferson Powell, A Community Built on Words 127 (2003) (referring to the almost “unbroken tradition of executive branch implementation of judicial decisions”); id. at 207 (“American executive officers must obey judicial orders, at least once affirmed at the highest level”).
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\item \textsuperscript{42} Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, Cir.J.), aff’d, 293 U.S. 465 (1935).
\end{itemize}
political. Beyond respecting orders policing that boundary, political decisionmakers may simply ignore the Constitution and its judicial guardians. There is no need for political actors to interpret the Constitution or concern themselves independently with its implementation. The only constitutional advice a lawyer could really give a legislator or executive officer would be a prediction about whether the courts would interfere, and if so what they would be likely to do. This perspective treats non-judicial officials as if they were supposed to behave like Holmes’s famous Bad Man, interested only in predicting what penalties, if any, their conduct might incur.

The Constitution as Internal Revenue Code dovetails nicely with the Supreme Court as Constitutional Oracle, a position usually associated, perhaps unfairly, with the opinion in Cooper v. Aaron, signed by all nine justices, which famously asserted that “the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” If the political branches of government have no role in determining the meaning and seeing to the implementation of the Constitution, those activities fall by default into judicial hands and, given the hierarchical nature of the American judiciary, that means the Supreme Court of the United States. There is no mystery about the obligation to give Miranda warnings or desegregate schools: the Court’s decisions define both as constitutional obligations, period. As regards whatever the Court deems to be a constitutional matter, its views exhaustively address any questions. There is no normative

43 358 U.S. 1, 18 (1958). In the context of Cooper the justices’ immediate point was to reject the legitimacy of any attempt by state governmental officials to interfere with federal-court desegregation orders and perhaps they meant only the point Dickerson was to make decades later, that political actors cannot “supersede [the Court’s] decisions interpreting and applying the Constitution,” except of course through the amendment process. See Dickerson, 530 U.S. at 428.
space, as it were, for political actors to interpret the Constitution or concern themselves with its implementation beyond obeying court orders, for to do so would be to usurp the exclusive role of the judiciary.\textsuperscript{44} Judicial enforcement defines constitutional obligation.

As an historical matter, however, this perspective on the Constitution is clearly not, I think, the best understanding of the American constitutional tradition. At the simplest level, it implies an eviscerated view of the constitutional oath required of all American governmental officers that directly contradicts part of the reasoning by which John Marshall defended the power of judicial review in \textit{Marbury v. Madison}. There are those who believe that the oath is nothing more than a pledge of allegiance to the American political system,\textsuperscript{45} but the mainstream view, I believe, has been that legislators and executive officials have an independent duty to interpret and implement the Constitution. Evidence to this effect is not difficult to find. As the reader will recall, \textit{City of Boerne} was a decision directed toward curbing congressional overzealousness in promoting legislative views of the Constitution’s meaning. In doing so, however, the Court stated its respect for the Congress’s exercise of the authority to construe and apply the Constitution.

In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that “it would be officious”

\textsuperscript{44} Obviously someone holding this view would need to nuance it considerably to address such practical issues as constitutional questions not yet addressed by the judiciary, situations in which it might seem clear what the courts would rule but unclear that any court would actually be able to entertain a case allowing a ruling, and the interpretation of ambiguities in judicial decisions. We can leave to one side these issues for resolution by the advocates of an imperial judiciary.

\textsuperscript{45} On this issue, see H. Jefferson Powell, \textit{Constitutional Conscience} 3-6 (2008).
to consider the constitutionality of a measure that did not affect the House, James Madison explained that “it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.”

Madison as president took the same view of the executive branch’s relation to the Constitution, but my observation does not depend on his admittedly huge stature as a constitutionalist. From the beginning, the almost universal acceptance by Americans of judicial review has gone hand in hand with a wide-spread understanding that other governmental officials have a duty to govern themselves by the Constitution and not merely to avoid constitutional entanglements with the courts.

B. Doctrinal underenforcement of the Constitution

What I have called the doctrinal gap, the distinction between the doctrines that the judiciary follows in its exercise of judicial review, and the commands of the Constitution in themselves, is a primary source of the normative space in which political actors can and should undertake their own task of constitutional review (or self-review). Congress’s power to spend

46 *City of Boerne*, 521 U.S. at 535 (citing 1 Annals of Congress 500 (1789)).


48 This is, to be sure, fully the case only when judicial doctrine falls short of full enforcement of the actual constitutional norm. Where, as in the *Miranda* rule upheld in *Dickerson*, doctrine limits political action beyond what the Constitution itself directly requires, different considerations apply. *Dickerson* and *City of Boerne* (both of which invalidated acts of Congress
money, the Court has said, is limited by several “general restrictions,” the first of which “is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of ‘the general welfare.’” As the Court has also noted, “the level of deference” that courts must give “to the congressional decision [whether an expenditure is for the general welfare] is such that the Court has ... questioned whether ‘general welfare’ is a judicially enforceable restriction at all.” In fact, the Court has not gone quite so far as overtly to deem the issue a non-justiciable political question, but two things are nonetheless clear: the spending power is constitutionally limited by the requirement that it serve the general welfare and it is Congress (and the president through exercise of the veto power) that is primarily charged with the responsibility of enforcing the constitutional limitation. Judicial doctrine, which in this area employs a quite sensible rule of deference to congressional judgments about what expenditures are in the national interest, leaves a very substantial area in which the constitutional limitation at issue must be implemented by the political branches or it will go unobserved.

passed in direct response to constitutional decisions by the Court) make it clear that the Court will not acquiesce in simple attempts by Congress to replace in practice the Court’s constitutional views with the legislature’s, but it does not follow that there is no normative space for independent political-branch constitutional interpretation in situations of judicial “overenforcement.” Miranda expressly contemplated the possibility of other, legislatively-ordained means for securing the constitutional principles at stake other than by the Court’s prescribed warnings. See Dickerson, 530 U.S. at 440-42 (discussing why the congressional response failed to satisfy the Miranda Court’s concerns). Perhaps “the Miranda Court’s invitation for legislative action,” id. at 440, is implicit in any situation where the Court announces doctrine that is prophylactic in nature.


50 The per curiam opinion in Buckley v. Valeo, 424 U.S. 1 (1976), arguably reached that conclusion, see id. at 90 (“It is for Congress to decide which expenditures will promote the general welfare”), but if so, Dole marked a slight retreat, both in terms of the Court’s language (“courts should defer substantially”) and its actions (the Court briefly but substantively considered whether the act of Congress under review was “reasonably calculated to advance the general welfare”). 483 U.S. at 207, 208.
The best known argument resting on this observation is probably Lawrence Sager’s 1978 article on the judicial underenforcement of constitutional norms.\(^{51}\) In contrast to what he viewed as the prevailing assumption that “the legal scope of a constitutional norm [is] inevitably coterminous with the scope of its federal judicial enforcement,” Dean Sager argued that “governmental officials are legally obligated to obey the full scope of constitutional norms which are underenforced by the federal courts.”\(^{52}\) The equal protection clause, in his view, provides a clear example of such underenforcement since the general or default doctrine that applies to most equal protection challenges is the extremely permissive rational basis test. Under that test, “only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand.” “We thus depend heavily,” in Sager’s view, “upon other governmental actors for the preservation of the principles embodied in” the equal protection clause.\(^{53}\)

Dean Sager’s article has been influential, and justly so,\(^{54}\) as a powerful interpretation of

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\(^{51}\) Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978). As my comments on the American constitutional tradition indicate, I think Dean Sager perhaps underestimated the extent to which his was in fact an elegant restatement of a long-standing if rather inchoate presupposition of mainstream constitutional thought. See Professor Monaghan’s earlier article on constitutional common law, supra n. –, and Professor Paul Brest’s The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585, 594-99 (1975).

\(^{52}\) Id. at 1213, 1264.

\(^{53}\) Id. at 1216, 1263. Sager cited “the due process clause of the fourteenth amendment, particularly in its substantive application,” id. at 1222, as another good example of an underenforced norm, presumably because the general or default doctrinal inquiry in substantive due process cases is, once again, the rational basis test.

\(^{54}\) Professor Fallon – himself a major voice in constitutional scholarship – has recently listed Sager’s Fair Measure as one of those “works that are almost universally regarded as being of highest quality.” Richard H. Fallon, Jr., Why and How to Teach Federal Courts Today, 53 St. Louis Univ. L.J. 693, 707 (2009).
central aspects of modern equal protection doctrine. In doing so, furthermore, Sager suggested a means for identifying a proper role for political-branch constitutional interpretation and implementation: Congress and the executive have a special responsibility to safeguard the Constitution’s norms where those norms are not or cannot be fully protected by judicial review. As a formal legal opinion issued by the Department of Justice in 1996 put it:

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III’s requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. In such situations, the executive branch’s regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements.  

Parallel observations about the constitutional responsibilities of Congress and state governments would be equally apposite. The normative space that exists between the Constitution’s actual commands and Supreme Court doctrine that underenforces those commands can be, and pursuant

55 The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 180 (1996). This opinion was written by the distinguished constitutional scholar Walter Dellinger, then serving as the assistant attorney general in charge of the Office of Legal Counsel, and thus one of the president’s chief legal advisors.
to their oaths ought to be, occupied by the constitutional decisions of non-judicial officials.\textsuperscript{56}

C. \textit{Williamson v. Lee Optical} as an example of judicial underenforcement through rational basis scrutiny.

This is all rather abstract and a concrete example may be useful. Consider that staple of Constitutional Law I classes, \textit{Williamson v. Lee Optical}.\textsuperscript{57} The case was a challenge brought by opticians to an Oklahoma statute that made it unlawful for anyone other than a licensed optometrist or ophthalmologist “to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.”\textsuperscript{58} The district court concluded that since the law “prohibit[ed] the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist,” the law’s practical effect was to “divert from the optician a very

\textsuperscript{56} Dean Sager believed that state courts should be included in the list of constitutional actors with the duty and authority to act in the doctrinal gap created by federal-court underenforcement. Sager, Fair Measure, 91 Harv. L.Rev. at 1242-63. The Supreme Court appears to have rejected that view. See, e.g., \textit{Minnesota v. Clover Leaf Creamery Co.}, 449 U.S. 456, 461 n.6 (1981) (“when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed”). Whether the Court was right to do so is beyond the scope of this article.

\textsuperscript{57} 348 U.S. 483 (1955).

\textsuperscript{58} The case also involved a separate claim by an ophthalmologist who challenged a section of the statute that prohibited kickbacks and related conduct. The district court rejected his claim, the Supreme Court affirmed, and no one today has any interest in that part of the decision. I have passed over other details that, like the out-of-luck ophthalmologist’s argument, are of no current concern.
substantial, as well as profitable, part of his business.” Since “the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist,” the district court held that the statute was “unreasonable and discriminatory” and violated both the due process and the equal protection clauses. The judges clearly thought the statute was what later economic jargon would term rent-seeking legislation, a successful attempt by the ophthalmologists and optometrists to appropriate part of the opticians’ business through manipulation of the legislative process, with no public-regarding purpose at all. The conclusion that on that state of facts the law was invalid seems entirely defensible, at least on the assumption that statutory classifications and intrusions on liberty must serve some legitimate public purpose.

A unanimous Supreme Court reversed, through an opinion written by Justice Douglas. The Court was not in the dark about the unmistakable economic effect, and no doubt the sub rosa intended purpose of the instigators, of the law under review. Indeed, it hardly requires a close


60 See Chris M. Franchetti, Not Seeing Eye to Eye: Chapter 8 and the Battle Over Prescription Eyewear, 30 McGeorge L.Rev. 474, 475 (1999): Because of the high volume of sales, “the optical industry, understandably, is highly competitive. However, as partially evidenced by the infamous controversy which gave rise to Williamson v. Lee Optical in 1955, such vigorous competition may be less than healthy. For decades, various industry participants have battled for control of eyewear sales, producing government investigations, lawsuits, and allegedly unethical political influence in the process.”

61 The Court of the 1950s accepted this principle. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 500-01 (1954) (“Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective”).

62 Douglas himself was an experienced observer of business behavior and highly unlikely to have been in doubt about the nature of the Oklahoma law. In any case, the opticians made the point starkly clear.
reading of his word to sense that Douglas drafted his opinion to protect the Court, or himself, from any charge of naivete. “The Oklahoma law may exact a needless, wasteful requirement in many cases,” Douglas conceded, but “[t]he legislature might have concluded that [situations where it is not are common enough] to justify this regulation of the fitting of eyeglasses. ... the legislature might have concluded that [an examination by an ophthalmologist or optometrist] was needed often enough to require one in every case. ... To be sure, the present law does not [actually require this, but] the law need not be in every respect logically consistent with its aims to be constitutional.”63 The discussion is, intellectually, entirely in the subjunctive, a matter of theoretical possibilities with no relationship to the opticians’ factual claim that the law was simply a means of transferring much of the opticians’ business to their competitors.64

The undisputed record evidence clearly establishes that optometrists in Oklahoma and elsewhere are in direct competition with opticians in the sale of eyeglasses, frames and lenses, and because of their economic dependence upon the sale of those articles, the merchandising interests of the optometrist play a dominant part in the establishment of their professional objectives and activities. ... The direct effect of [the law] is to transfer from the optician to the optometrist a large and profitable portion of the former’s business. [It] contains no regulations or standards for opticians but rather is a discriminatory statute that arbitrarily takes from the optician a major portion of his lawful business. ... all the evidence introduced demonstrates that the fitting, adjusting and duplication of eyeglasses by opticians is not an “evil” and that the prohibitions contained in [the law] have no real and substantial relationship to the announced purpose of the act – the protection of the public’s health and welfare.


63 348 U.S. at 487-88 (emphasis added) (rejecting the due process claim). See also id. at 489 (rejecting the equal protection claim on similarly hypothetical grounds).

64 See Brief for Respondents-Appellants Lee Optical of Oklahoma, Inc., et al., at 52, Williamson v. Lee Optical, 348 U.S. 483 (No. 184, 185) (the law “deprives opticians of a substantial portion of their business, which deprived portion of the opticians' business is transferred to optometrists or else channeled into the hands of a few opticians who possess the favor of ophthalmologists”).

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Douglas’s statement why this exercise in legal fantasy was sufficient to decide the case was very brief. “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” And with that exercise in non-explanation, the Court, almost certainly knowing what it was doing, allowed one side in an economic competition for profits to manipulate the competitive playing field through legislation, to the likely detriment of everyone in Oklahoma except the successful interest group. As we know, however, the Court had a reason for its decision, one that had nothing to do with eyeglasses or, in any direct fashion, interest groups: the justices’ desire to make unmistakably clear their repudiation of the vigorous protection of economic liberty through the due process and equal protection clauses associated, then and now, with *Lochner v. New York.* For veterans of the New Deal battle over judicial supremacy such as Justice Douglas, *Lochner* was the paradigm of a Court utterly forgetful of its duty to observe the limits on its own power and of the respect it owes the legislative function. The New Deal cure for the disease of

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65 348 U.S. at 488.

66 See Franchetti, Not Seeing, 30 McGeorge L.Rev. at 489 (“for optometrists nationwide, the case represented a significant early victory in the optical-industry battle. It confirmed that the activities of the profession's primary eyewear-sales competitors could be controlled by statute without violating the federal constitution”). As indicated in the text, before *Heller* it seemed likely that the last words in the parenthetical quotation should actually have read “without inference by courts on federal constitutional grounds.”


68 Whether this was entirely fair to the justices associated with *Lochner* is beside the point for present purposes: I shall use “*Lochner*” and “the New Deal [Court]” to stand, conventionally and respectively, for the Court’s (uneven) protection of economic liberty prior to 1937 and its almost complete retreat from such protection beginning in that year.
Lochner was to redraft, or redirect, constitutional doctrine so that courts would, at least in most circumstances, give legislatures the widest possible scope for their lawmaking decisions. As the Court put it, shortly after the 1937 shift, “[o]nly by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”

The extraordinarily deferential form of judicial review that the Court employed in Williamson, and that it adheres to in modern rational-basis cases such as Beach Communications (quoted above), springs out of this prophylactic or strategic intention. It is doctrine, crafted to prevent one constitutional actor, the judiciary itself, from violating however innocently the constitutional norms we collectively describe as the separation of powers. The Court replaced a paradigm of judicial overreaching with what Justice Thomas in Beach Communications termed “a paradigm of judicial restraint.”

Where there is a doctrinal gap, judicial doctrine is, by definition, either overenforcing or underenforcing an actual constitutional norm for strategic reasons. In the context of Williamson, there is of course no possibility that the Court is following a rule that is more stringent than the commands of the due process and equal protection clauses. As soon as one recalls the traditional, prophylactic justification for rational basis scrutiny, it becomes obvious that there probably is a doctrinal gap between the Court’s deferential standard of review and the constitutional principle (usually due process or equal protection) the Court is enforcing. The justification of a need to respect the legislative function, after all, does not speak in terms of the substance of those principles. Indeed, the constitutional commands that the Court’s justification appears to have in view concern separation of powers and the negative implications of the federal judiciary’s limitation to the exercise of the “judicial power” in specifically enumerated

cases and controversies. By the Court’s own reasoning, then, it would be in a sense coincidental if the self-restraint driven doctrine of deferential rational basis scrutiny produced the same operational rule as the substantive requirements of due process and equal protection – and of course all the cases in which the Court does not employ rational basis review in implementing those requirements make it seem very unlikely that there is such a coincidence.

The rational-basis test of *Williamson* is, as Dean Sager argued, most likely an example of judicial underenforcement. We should not read Justice Douglas’s opinion, therefore, as concluding that the legislation under review – an unabashed exercise in rent-seeking without any public-regarding purpose, as the district court (the trier of fact) found it to be – actually treated similarly situated parties similarly, or restricted the opticians’ liberty for some legitimate governmental purpose. *All* Douglas, or the Court, actually announced was that under the judiciary’s limited form of review, self-imposed out of respect for the legislature, the Court could not hold the statute unconstitutional. Douglas’s language suggested as much: “The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. *We* cannot say that that point has been reached here ... [t]or all this record shows.” On this reading of his language, whether in principle the statute is unconstitutional Douglas’s opinion left unanswered.

It would be possible in theory to conclude that the consequence of the Court’s strategic underenforcement is simply to leave the constitutional question in principle unanswered. But another rhetorical strand in the Court’s explanation for its deference to the legislature implies that Dean Sager is right, and judicial underenforcement triggers the legal obligation on the part of non-judicial government officials “to obey an underenforced constitutional norm ... beyond its
interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies.” For the New Deal Court, Justice Holmes was an iconic figure, and the justices of that era were well aware that in addition to his general attitude of deference, Holmes had written in *Missouri, Kan. & Tex. Ry. v. May* that “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”70 As Sager himself noted in his article, the *May* passage indicates that Holmes was an adherent to Sager’s thesis *avant la lettre*: “Holmes, I think ... meant quite literally that the legislatures were to be regarded as guardians of the liberties of the people – including and especially those enshrined in the Constitution – above the power of the Supreme Court to enforce those same liberties.”71

It is plausible that Douglas and his colleagues in *Williamson* explicitly thought that the gap between a less restrictive rational-basis doctrine and a more restrictive constitutional command was supposed to be filled by the legislature’s own conscientious respect for the command.72 The Court expressly stated this expectation in a different doctrinal context at the very dawn of its New Deal era. Discussing the Constitution’s limitation of Congress’s spending power to expenditures for the general welfare, Justice Cardozo wrote in 1937:

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71 91 Harv. L.Rev. at 1227 n. 48.

72 The relevant passage from Justice Holmes’s opinion in *May* appears in several opinions written before *Williamson* by justices who shared the New Deal rejection of *Lochner*. See *United States v. Lovett*, 328 U.S. 303, 319 (1946) (Frankfurter, J., concurring); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 (1940) (Black, J., for the Court); *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., joined by Brandeis & Cardozo, JJ., dissenting).
The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.\textsuperscript{73}

The norm that federal spending must serve the general welfare (or common defense) is a constitutional command; the judgment of which Cardozo wrote is a constitutional judgment as to the purpose and effect of congressional expenditures and Congress’s discretion in enacting spending legislation included the duty and authority to exercise its own judgment on the fit between a spending bill and the constitutional norm. One of the primary “constitutional constraints” insuring that Congress will observe this norm, then—Justice Stone wrote in a slightly earlier case, is “the conscience and patriotism of Congress and the Executive,”\textsuperscript{74} since judicial review of spending legislation ought to be limited to what Cardozo called “the display of arbitrary power.” Dean Sager’s views on the political branches’ responsibility were orthodoxy for the New Deal Court.

Justice Douglas’s opinion in \textit{Williamson} invites speculation about how legislative implementation of an underenforced constitutional norm might work. Imagine a state legislature

\textsuperscript{73} \textit{Helvering v. Davis}, 301 U.S. 619, 641 (1937).

\textsuperscript{74} \textit{United States v. Butler}, 297 U.S. at 87 (Stone, J., dissenting). Justices Brandeis and Cardozo joined the dissent, which went on vigorously to reject “any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government.” Id. at 87-88.
debating whether to enact a law materially the same as that upheld in *Williamson*, but in circumstances where Holmes’s dictum about legislatures being ultimate guardians of the liberties of the people was a live part of legislative discussion. One potential topic for deliberation would be the constitutionality under the equal protection clause of dividing businesses factually able to fit lenses into new frames into ophthalmologists and optometrists (who could do so without referring the customer to a different business for a required prescription) and opticians (who could not). In the light of *Williamson*, it would be evident that the courts would almost certainly not interfere on federal constitutional grounds, but reciting that observation would not discharge the legislators’ constitutional duty. What does equal protection require of us? would be the issue. 75 Looking to the Supreme Court’s caselaw not to predict the judiciary’s actions but to discern the actual constitutional norm, a representative might reason that the underlying norm applicable to his or her lawmaking actions in principle is something like the following: “the classification ‘must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,’” or (put differently) must “rest[] upon some reasonable consideration of difference or policy.” 76 Given factual evidence of the sort presented to

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75 This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins. At a minimum, the obligation of public officials in this context, as in any other, is one of “best efforts” to avoid unconstitutional conduct.

Williamson district court, legislators might ask questions about the public benefit served by the law, and the fairness and policy of excluding opticians from performing services they can provide without obvious public detriment. We need not indulge an unrealistic romanticism about politicians to see potential practical value from such questions, in addition to the intrinsic rule of law value in public officials acting in accordance with their legal duties. In some situations, constitutional doubts might in fact lead to the defeat of egregious rent-seeking and other substantively indefensible bills; in others constitutional opposition to a proposed law might lead to improvements in the legislation, or create a legislative record making popular repudiation of or judicial intervention against improvident or special-interest laws more likely.

The Constitution does not, of course, guarantee that legislatures will make no mistakes or even that they will avoid giving in to political pressure. At the same time, as our tradition has interpreted equal protection (and due process) for a very long time, it does guarantee that there are significant limits to the extent to which classifications can serve selfish concerns or liberty can be impaired without some discernible benefit to the common good. If, as Justice Holmes wrote, “legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,” the consideration of constitutional issues concerning those liberties is an intrinsic part of the legislative function, and Dean Sager’s thesis, that the legislature has a special responsibility where the federal courts cannot guard constitutional liberty, seems very persuasive.

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77 The Court has observed that an inquiry into the relation between the legislature’s goals and its use of classifications is of value to the legislative process. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass”).
V. Footnote 27’s rejection of the strategic understanding of rational basis

Footnote 27, to which we now return, overturns almost everything I’ve just written. According to Justice Scalia, the rational-basis test is not a strategic doctrine, designed to avoid judicial interference with “the rightful independence and ability to function of the legislative branch,” as the Court has so often indicated. At least with respect to equal protection (and there is no reason to doubt that he meant to include due process as well), the footnote indicates that rational basis inquiry does not underenforce the Constitution’s actual commands, as Dean Sager thought. Indeed, the rational-basis test isn’t really judicially-crafted doctrine at all, but a straightforward restatement of the constitutional norms at issue:

rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee.

There is no doctrinal gap: the Court enforces the entirety of the constitutional guarantee, which itself extends only to prohibiting “irrational laws.”

We are now in a position to see why footnote 27 is potentially so important. First, the footnote annuls all the oft-repeated language, from the May case in 1903 to Beach

78 The Court sometimes uses the language of rational basis in other areas of constitutional law. See, e.g., Gonzales v. Raich, 545 U.S. 1, 22 (2005) (commerce clause). It is clear that Justice Scalia did not have those uses of the terminology in mind in writing footnote 27.
Communications in 1993, describing rational basis as grounded in judicial respect for the legislature and legislative judgment. By deferring to any rational ground for the legislature’s decision, rather than deciding itself whether the classification or invasion of liberty was reasonable, the judiciary insures that it does not tread on legislative turf. Taken at face value, footnote 27 flatly rejects this familiar argument. According to the footnote, the Court’s application of rational basis is not, or at any rate should not be, a strategic act of deference to a legislature. To be sure, the Court upholds laws with flimsy or ex post facto rationales, with glaring inadequacies in the connection between asserted goals and actual means, with as undisguised an unsavory motive as the district court thought apparent in Williamson ... but not because the Court needs to leave a broad scope for the exercise of legislative discretion, or out of respect for the superior fact-finding or policy-making abilities or responsibilities of the legislature. The judicial decision is directly mandated by the Constitution because the Constitution itself permits such laws. It may be true, from the perspective announced by footnote 27, that the consequence of the Court enforcing all that the Constitution requires and nothing more is to leave room for legislative discretion and all the rest, but that consequence is not the reason, or even a reason, for the Court’s flaccid level of scrutiny. The explanation of the latter is that rational basis is “the very substance of the constitutional guarantee,” and that as a result there is nothing else for the Court to enforce. Apparent statements to the contrary from Justice Holmes to Justice Thomas were all mistakes.

The footnote, second, is enormously suggestive with respect to existing rational-basis precedents. The reader will recall the role that the existence of a doctrinal gap plays in constitutional stare decisis: doctrine that is understood, explicitly or not, to incorporate a
strategic element is in a sense more vulnerable. A justice can repudiate his or her adherence to it without admitting to a serious error in the interpretation of the Constitution itself. Justice Scalia’s abandonment of the congruence and proportionality test for congressional legislation under the fourteenth amendment is a good example. On the other hand, if there is little or no distance between the test the Court applies and the actual command of the Constitution, precedent applying the test is itself more straightforwardly right or wrong, a correct application of the Constitution or a flat misconstruction of it. According to footnote 27, the latter is the case with rational-basis precedents: those cases are direct applications of “the very substance of the constitutional guarantee” prohibiting “irrational laws.” There can be in principle no laws that the Court upheld, or at least that it should have upheld, that are “irrational” in the constitutional sense – whatever Scalia means by “irrational,” an issue to which we shall eventually turn.

Unless the Court decided *Williamson v. Lee Optical* wrongly, the law there, on the facts as found by the district court, satisfies the Constitution’s guarantees concerning equal protection and due process. Conversely, cases in which the Court invalidated a law using rational basis scrutiny were mistakes if the laws in question were not, constitutionally, irrational.

Footnote 27 could be, therefore, a powerful tool for sorting out the Court’s rational basis caselaw, a body of decisions that, on any fair reckoning, is in a fair state of disarray. If the Court is to accept any form of stare decisis, of course, the mere fact that a later justice thinks a decision wrong in principle does not require departure from it, but identifying error in principle is an obvious starting point for reconsideration of the precedential status of a decision. There is, I think, one set of rational-basis precedents where footnote 27 suggests reconsideration is in

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79 See *Central State University v. American Assoc. of Univ. Prof’s.*, 526 U.S. 124, 133 & n. 3 (1999) (Stevens, J., dissenting) (discussing implications of fact that “[c]ases applying the rational-basis test have described that standard in various ways” that are inconsistent).
order, even without delving into the precise meaning of “irrational:” the small and motley set of cases in which the Court invoked rational-basis scrutiny but then invalidated a law not because the law was literally without reason but because the Court thought the government’s reasons bad ones. These decisions are somewhat opaque procedurally since it hard to explain why in them the Court looked behind the sort of unconvincing rationalization it usually swallows. On an underenforcement understanding of rational-basis scrutiny, however, the decisions make perfect sense in substance. It is always the law of the Constitution that bad purposes render a classification (or a restriction on liberty) unconstitutional: constitutional rationality requires not only that the official action make sense as a means toward some governmental end but that the end itself be legitimate, which is a normative judgment.\(^80\) As the Court observed in an opinion joined by Justice Scalia, under “the usual rational-basis test if a statute is not rationally related to

\(^80\) See, e.g., *Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) (noting as a statement of an “unremarkable and widely acknowledged tenet of this Court’s equal protection jurisprudence” an earlier statement that “negative attitudes, or fear, unsubstantiated by factors which are properly cognizable ... are not permissible bases” for governmental discrimination) (quoting *Cleburne*, infra); *Romer*, 517 U.S. at 635 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting *Moreno*, infra); *Lyng v. International Union, United Auto., Aerospace and Agr. Implement Workers of America*, 485 U.S. 360, 370 n. 8 (1988) (quoting *Moreno*, infra); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-47 (1985) (“some objectives – such as a bare ... desire to harm a politically unpopular group,” – are not legitimate state interests”) (quoting *Moreno*, infra); *New York City Transit Auth’y v. Beazer*, 440 U.S. 568, 593 n. 40 (1979) (“classifications drawn ‘“with an evil eye and an unequal hand’ or motivated by ‘a feeling of antipathy’ against, a specific group” violate equal protection) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886)); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (“of course Congress may not invidiously discriminate ... on the basis of a ‘bare congressional desire to harm a politically unpopular group’” but must use “criteria” that have a rational relation to a “legitimate legislative goal”) (quoting *Moreno*, infra); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). In *Beazer*, 440 U.S. at 593 n. 40, the Court traced the requirement of a legitimate governmental purpose back to *Barbier v. Connolly*, 113 U.S. 27 (1884). See id. at 32 (equal protection prohibits “[c]lass legislation, discriminating against some and favoring others” but permits legislation which carr[ies] out a public purpose")
any legitimate governmental objective, it cannot be saved from constitutional challenge by a
defense that relates it to an illegitimate governmental interest.”

Most of the time, the value of judicial deference in preventing judicial overreaching
makes it inappropriate for the courts to engage in the sort of intrusive review of legislative action
necessary to catch badly-purposed legislation. But when a court, as it were, stumbles across a
bad legislative purpose, no strategic purpose would be served in ignoring the fact, and it becomes
the court’s constitutional duty to invalidate the law. The mistake the district court judges made
in Williamson was that the scrutiny they applied to the handiwork of the Oklahoma legislature
was insufficiently respectful of the latter’s constitutional dignity and role. On the constitutional
merits, the district court may have been entirely correct. In contrast, from the perspective
advanced by footnote 27, the district court judges in Williamson were simply wrong in principle
if the Oklahoma law was not “irrational” constitutionally – or they were right and the Supreme
Court made a mistake in reversing them. The bad-purpose cases in which the high Court has
invalidated official decisions on that ground were right only if those actions were irrational in a
sense that the many laws and other actions the Court has upheld were not. My suspicion is that
Justice Scalia’s underlying logic in footnote 27 leads to the conclusion that the bad-purpose cases
were all mistakes, because the category of “irrational laws” does not encompass them. More on
that shortly. In any event, without further explanation they are even more anomalous than
before.

81 Lyng, 485 U.S. at 370 n. 8. My point is not to criticize Justice Scalia for inconsistency (Lyng
was long ago and decided early in his time on the Court) but to underline the ordinary and (one
would have thought) uncontroversial nature of the proposition that constitutional rationality,
which requires at least the hypothetical presence of a “legitimate” governmental interest or
purpose, has a normative component. The Court has not treated public rationality as limited to a
mere logical connection between means and ends.
Footnote 27, third, collapses entirely Dean Sager’s underenforcement thesis, with respect to rational-basis scrutiny and in doing so eviscerates the corollary he drew of a constitutional duty on the part of other governmental officials to implement constitutional norms that judicial doctrine left underenforced for strategic reasons. It would be quite wrong for a legislator to oppose a Williamson-like bill on the ground that she thought it a violation of equal protection, at least along the lines that I outlined earlier, or for that matter for a governor to veto the bill because he similarly thought it unconstitutional. If the bill would pass judicial rational-basis scrutiny, then there is no federal constitutional argument that it is nevertheless a violation of equal protection, because the whole substance of equal protection is a prohibition on irrational laws and irrational laws are those that fail rational basis examination. In the world of footnote 27, there is no normative gap between constitutional command and judicial doctrine that is to be filled, or even can be filled, by the conscientious application of constitutional norms by non-judicial officials. Footnote 27 leaves the domain of politics wider, in the sense that under it fewer possible laws would be unconstitutional in principle. But it does so by making the domain of politics much narrower in another way, stripped of any special role in constitutional implementation.

Implicit in footnote 27 is a vision of the relationship between politics and the Constitution that we have already considered: the Constitution as analogue to the Internal Revenue Code, with the political branches of government in the position of taxpayers “obligated” to obey the Constitution only in the sense of being subject to external sanctions for violations of the rules that the external authority (the courts in the case of the Constitution) enforces. For Justice Scalia, presumably, this is the arrangement that the Constitution itself ordains and that American
constitutional practice has traditionally respected. He is, I think, demonstrably in error about the
tradition. Whether he is nevertheless right about what the Constitution ordains when it is
properly interpreted depends on other considerations. I will state one such consideration, as I see
it: Madison was right when he said in the First Congress that “it is incontrovertibly of as much
importance to this branch of the Government as to any other, that the constitution should be
preserved entire. It is our duty.” The implementation of the Constitution is “the province and
duty” of the political branches just as much as it is that of the judiciary, even if they carry out
that responsibility through different means and, generally, with respect for the finality of judicial
decisions. By drawing a sharp line between the domain of political freedom and the domain of
constitutional principle, footnote 27 undermines Madison’s principle. 82

There is a fourth way in which footnote 27 is potentially far-reaching, although it is not
as clear to me as with the first three points that this implication is fairly attributable to the
footnote. As I noted earlier, Justice Scalia’s dissent in Dickerson appeared to reject altogether
the legitimacy of judge-made doctrine that imposes stricter limitations on political action than
the Constitution’s norms necessarily require, “in the sense” (as Chief Justice Rehnquist wrote)

82 I should note an ostensible exception. Justice Scalia appears to think, rightly I believe, that at
least some of the time, a decision that an issue poses a non-justiciable political question means
not that there is no legal rule applicable but that the Constitution leaves the implementation of
the rule to a non-judicial actor. See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality
opinion by Scalia, J.) (“Sometimes, however, the law is that the judicial department has no
business entertain[ing] the claim of unlawfulness – because the question is entrusted to one of the
political branches or involves no judicially enforceable rights.”) id. at 292 (“The issue we have
discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is
for the courts to say when a violation has occurred, and to design a remedy.”). This exception is
partial as well as rare: application of the political question doctrine means only that some non-
judicial decisionmaker has some small area of responsibility for making law-like decisions in
addition to its usual, political role.

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“that nothing else will suffice to satisfy constitutional requirements.” Footnote 27 does not address strategic, overenforcing or prophylactic judicial doctrine, of course, and Scalia has written or joined opinions in cases besides *Dickerson* that appear to take a somewhat less draconian position on overenforcing doctrines. Nevertheless, putting the *Dickerson* dissent (no overenforcing doctrine) together with footnote 27 (rational-basis, the usual paradigm of an underenforcing doctrine, is not that) is suggestive of a consistent, if intellectually radical, perspective. On its face, to be sure, judicial overenforcement, which narrows political action more than the Constitution does per se, is quite different from judicial underenforcement, which expands the range of possible political decisions. Both however are strategic in nature and create a doctrinal gap between judicial decision and constitutional command. Furthermore, both depend on an understanding of constitutional law that is inconsistent with the existence of a sharp-edged distinction between constitutional and political decision: underenforcement presupposes political-branch constitutional implementation while overenforcement assumes the legitimacy of judicial decisions that involve strategic considerations that are, at least in a broad sense, political in nature. Scalia’s extra-judicial writings indicate that he actually views all judicial doctrine in constitutional matters as in principle illegitimate. The Constitution, he appears to think, consists of rules, constitutional law should implement those rules, no more and no less, and all the rest of governmental action is subject to what we might call “aconstitutional” political decisionmaking – political choice unconstrained by constitutional considerations outside the judicially enforced rules.84

83 Compare *Dickerson*, 530 U.S. at 442 (Rehnquist, C.J., for the Court) with id. at 461 (Scalia, J., dissenting) (rejecting what he described as “the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States”).

84 See, e.g., Antonin Scalia, *A Matter of Interpretation* 37-41 (1997); Scalia, The Rule of Law as
This view is, perhaps, a theoretically defensible position, and as a verbal matter at least, it has an illustrious pedigree. But it clearly does not represent the mainstream of American constitutional thought or practice, which is resolutely doctrinal. There is, I think, nothing surprising about finding Justice Scalia taking a radical stance toward some feature of contemporary constitutional law that he thinks wayward, but institutions tend to be conservative with respect to their practices. Whatever Scalia may think, it doesn’t follow that the rest of the justices in the


This observation probably doesn’t need support, but just in case, see generally Charles Fried, Saying What the Law Is (2004), an elegant account of and (in the main) apology for contemporary constitutional doctrine. Professor (and former Justice) Fried puts the inevitability of doctrine more strongly: “The Constitution’s text must be mediated by doctrine before it can yield decision.” Id. at 3. I think that there may be areas of justiciable constitutional controversy where the underlying norm can be implemented rather directly. See, e.g., David L. Lange & H. Jefferson Powell, No Law: Intellectual Property in the Image of an Absolute First Amendment (2009) (defending an absolutist approach to first amendment free speech). As a general matter, however, I think that anti-doctrinalism in the name of the constitutional text has been more a rhetorical trope (and a powerful one) for its most prominent proponents. See id. at 239-60 (reading Justice Black’s first amendment absolutism as based in fact on a structural vision of constitutional institutions rather than simply on the words of the provision); H. Jefferson Powell, A Community Built on Words 11-21 (2003) (discussing an example of Jefferson going beyond the text in answering a constitutional question).

Justice Scalia’s frequent invocation of tradition as a feature of constitutional thought, and perhaps the sense that he is, in the evening-news sense, a “conservative,” tend to obscure the fact that he often takes intellectually radical positions on legal and constitutional issues. Patrick Brennan’s analysis of Scalia’s overall constitutional approach, which Brennan calls “Scalia’s bid for radical reform,” is especially insightful. See Brennan, Locating Authority in Law, and Avoiding the Authoritarianism of “Textualism,” 83 Notre Dame L. Rev. 761, 797 (2008). The impulse to radical reform is a recurrent and, overall, beneficial element in American legal change and to observe that someone is taking a radical position in (or on) the law is not thereby to criticize him or her but only to identify the relationship of his or her position to those generally accepted, at the time or historically.
Heller majority intended to endorse a position that is, at most, only partially to be found in one of its footnotes, and that would mark a sea change from their existing practices. But nothing proves that they, or most of them, do not,88 and in any event the language in Supreme Court opinions takes on a life of its own, with consequences that are not delimited by the intentions of those who write them or join them.89

If footnote 27 proves to advance any of these four implications, it will turn to have been highly significant. There is yet another aspect of the footnote, I think, which is still more important, although at a still more fundamental level. Recall that according to the footnote, when the Court uses rational-basis scrutiny in enforcing constitutional “guarantees” – in implementing equal protection and substantive due process, at the least – the form of the Court’s scrutiny is conceptually identical to the substance of the constitutional guarantee itself. Rational basis is the test when the constitutional command is a prohibition on irrationality in government action. In Scalia’s view, only the irrational, as such, is the Constitution’s concern when the norms of equal protection and (substantive) due process are invoked, at least in the vast majority of cases where government treats someone differently than it does others, or restricts someone’s liberty.90 As we

88 Justice Kennedy is the only justice who joined the opinion of the Court in Dickerson who was also on the Court and in the majority in Heller. On the basis of Dickerson alone, it is hard to see how he could subscribe to the anti-doctrine approach to constitutional law that I believe Justice Scalia implied in footnote 27. As Kennedy’s opinions in Croson and City of Boerne show, he does not oppose the overt consideration of strategic factors in shaping doctrine.

89 As Professor Schauer pointed out years ago, the language of the Court’s opinions has an authoritative life of its own. See Schauer, Opinions as Rules, 53 U. Chi. L. Rev. 682, 684 (1986) (“the words of an opinion take on a canonical role not unlike that played by the words in a statute”).

90 Again, rational-basis scrutiny is the default test under both rubrics. Justice Scalia is, if anything, in favor of expanding the range of circumstances in which the Court applies rational basis rather than some other form of (heightened) scrutiny.
have seen, this is a very different explanation of the test than the strategic rationale that the Court has ordinarily invoked since 1937. If footnote 27 is correct, the courts ask only whether a law or other governmental action is irrational because it is the irrational action alone that violates the Constitution, not out of deference to a political actor who may properly have an independent view of what makes sense in terms of classification or regulation. Footnote 27 invites the reader to wonder what exactly is the concept of (ir)rationality that the footnote identifies as “the very substance” of two of the Constitution’s central commands. Fortunately, the footnote although brief, gives a big clue to what Justice Scalia means. We now turn to deciphering what he is telling us.

VI. Footnote 27 and the meaning of the Constitution’s requirement of rationality

A. Engquist v. Oregon Dept. of Agriculture as paradigm

Here, again, is the relevant part of the footnote, with a citation restored:

But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, e.g., Engquist v. Oregon Dept. of Agriculture, 553 U.S. ----, ----, 128 S.Ct. 2146, 2153 - 2154 (2008). In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee.
Engquist, which the Court decided seventeen days before it handed down Heller, is one of “those cases” that illustrate the “very substance of the constitutional guarantee.” It is, consequently, the key to footnote 27's interpretation of the Constitution’s ordinary or default norms with respect to substantive due process and equal protection.

Engquist was brought by a former state governmental employee who claimed that her discharge was unlawful for various reasons, among them an allegation that she was fired for “arbitrary, vindictive, and malicious reasons” (essentially personal animus), quite apart from animus toward her sex, race and national origin, which she also alleged.91 This allegation, Engquist argued, stated an equal protection “class of one” claim: the district court agreed, and she won a jury award based in part on the allegation, but the court of appeals reversed, holding that the class of one theory of equal protection liability does not apply to public employers.92 The theory, which the Court recognized as cognizable in an earlier decision, Village of Willowbrook v. Olech,93 identifies an equal protection problem in situations where government singles out an individual for arbitrary treatment not because of his membership in an identifiable class such as race or sex but on his own, as the unique object of official disfavor.94 Relying on cases stressing the unique factors relevant to the government’s actions in the capacity of employer, the Ninth Circuit concluded that the class of one theory was inapplicable in that context. Other federal appeals


92 See 478 F.3d 985 (9th Cir. 2007).


94 See, e.g., Engquist, 553 U.S. at 2153 (“when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a ‘rational basis for the difference in treatment’”), quoting Olech, 528 U.S. at 564.
courts had sustained class of one claims in cases arising out of public employment, and the Supreme Court granted certiorari to resolve the split among the circuits.

The high Court affirmed the decision below, holding that the class of one theory should not be allowed in challenges to governmental decisions involving public employees. Chief Justice Roberts, writing for the six-justice majority, identified a two-part reason for that conclusion: the Court’s “traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications” and the “unique considerations applicable when the government acts as employer as opposed to sovereign.” By “traditional view,” Roberts meant that equal protection claims usually arise when government “create[s] discrete and objectively identifiable classes” on the basis of which it discriminates: the use of class-based decisionmaking to subject individuals to discriminatory treatment poses the danger of arbitrary distinction between similarly situated individuals, what Roberts nicely calls “the specter of arbitrary classification.” In “traditional” analytical terms, therefore, a class of one is a figure of speech, but Roberts concluded that the theory Olech accepted “was not so much a departure from” tradition “as it was an application” of it, because in Olech, and the cases on which Olech relied, there was “a clear standard [for the government action] against which departures, even for a single plaintiff, could be readily assessed.”

In the context of government employment, in contrast, the Chief Justice reasoned, there is no objective standard by which to determine if the government has acted arbitrarily, “for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.”

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To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship. A challenge that one has been treated individually in this context, instead of like everyone else, is a challenge to the underlying nature of the government action.

In other words, subjective and individualized decisions, which Roberts identifies with the exercise of broad discretion, simply can’t be cabined even by a requirement that they be rational. For this reason, the class of one theory is “a poor fit in the public employment context,” and the Court agreed with the Ninth Circuit that equal protection claims such as Engquist’s are not cognizable. “In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”

It is easy to imagine reading the Court’s holding in Engquist as a strategic decision, intended to keep the judiciary out of an area in which it would be extremely difficult for courts to vindicate the constitutional norm without undue interference in the functioning of the political branches. Without a “clear standard” to apply to personnel decisions, the courts would find themselves simply second-guessing the executive or administrative officials who made the decisions on a discretionary basis in the first place, thereby “undermin[ing] the very discretion that such state officials are entrusted to exercise.” The point of Engquist, on this reading, would not be that government is constitutionally free to make employment decisions based on whim or animus

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95 Engquist expressly reaffirmed the continuing viability of class-based claims about government employment decisions. See, e.g., id. at 2155.
toward an individual employee, but rather that given the difficulty of ascertaining or even articulating the basis for many such decisions, it is preferable for the courts to abstain. Such deliberate judicial underenforcement would leave implementation of the norm to the political branches, not decree that what would be an illegitimate basis for governmental action in any other circumstance is constitutionally acceptable in government personnel decisions.

As the reader knows, however, footnote 27 of Heller clearly rejects a strategic or doctrinal interpretation of Engquist, and I believe that the footnote’s view of Engquist is also the more natural reading of the Chief Justice’s opinion standing on its own. According to footnote 27, Engquist applied the very substance of the equal protection guarantee – “a prohibition on irrational laws” – in holding that the plaintiff’s allegations did not state an equal protection claim. Those allegations, in other words, did not describe a constitutionally cognizable form of irrational government action. That is, on the face of it, a surprising proposition. The plaintiff in Engquist alleged that “she was fired ... for ‘arbitrary, vindictive and malicious reasons.’” In class-based

96 There is language that could support a strategic understanding of Engquist, and without footnote 27 one might not be quite sure how to read the decision. See, e.g., id. at 2155, where the opinion’s reference to treating “seemingly similarly situated individuals differently in the employment context” at least allows the inference that the problem lies in the difficulty of judging decisions necessarily based in part on subjective or non-quantifiable factors. However, given the close temporal proximity between Engquist and Heller, and the fact that the two justices joined one another’s opinions, there is no reason to think that Justice Scalia misunderstood the Chief Justice’s slightly earlier opinion.

97 It is, for constitutional purposes, immaterial in itself that Engquist involved an administrative decision rather than a law or other general rule. As the Chief Justice noted, administrators are just as surely governed by equal protection as legislators. 128 S.Ct. at 2150. It is a familiar and very old feature of equal protection law, furthermore, that particular government decisions that violate the equal protection norm are unconstitutional even if the law under which they were taken is itself constitutional. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) The Constitution demands that equal protection be afforded not only by the rule governing a public decision but by decision itself as well.
equal protection cases, if the government’s purpose is to harm the disfavored group for such reasons, its action would be invalid even under rational-basis scrutiny, since that test asks whether the classification in question serves a *legitimate* governmental purpose, not simply *some* purpose.⁹⁸ Given the judicial willingness to entertain hypothetical and even implausible explanations for the government’s actions (see *Williamson!*), it is very difficult in a rational-basis case for a plaintiff to prevail on a claim of governmental purpose-to-harm, but that is a difficulty of proof and does not affect the underlying constitutional norm. Furthermore, in light of *Olech*’s recognition of the “class of one” theory, which *Engquist* did not question, it seems implausible to assert that it can be a legitimate governmental purpose to single out an individual for harm for “arbitrary, vindictive reasons” peculiar to that individual. Such a purpose is indistinguishable from the invidious race or gender-based animus that clearly is impermissible under equal protection except for the basis of the animus.⁹⁹

Despite all this, *Engquist* held that equal protection does not prohibit in the area of government employment decisions what would be constitutionally impermissible elsewhere: the constitutional “rule that people should be ‘treated alike, under like circumstances and conditions’

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⁹⁸ See, e.g., *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973) (“if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, ‘(a) purpose to discriminate against hippies’ cannot, in and of itself and without reference to (some independent) considerations in the public interest.’”).

⁹⁹ The Court asserted in *Olech* that “the number of individuals in a class is immaterial for equal protection analysis.” 528 U.S. at 564 n. *. In order to avoid the risk that recognizing the class of one theory would convert many garden-variety disputes over governmental decisions into constitutional cases (an overtly strategic reason), Justice Breyer thought it crucial that the plaintiff in *Olech* had alleged that the governmental defendants had acted out of “‘vindictive [motives],’ ‘illegitimate animus,’ or ‘ill will.’” Id. at 566 (Breyer, J., concurring in the result). The Court declined to include that as a requirement to state a “class of one” claim, but it clearly accepted the plaintiff’s allegation along those lines as adequately alleging that the government had “no rational basis for the difference in treatment.” Id. at 564.
is not violated when one person is treated differently from others” in the context of “an individualized, subjective personnel decision.” Such a decision cannot transgress the equal protection norm, even when it is, ex hypothesi, “an arbitrary or irrational” decision. Equal protection simply has no application to such decisions including those situations in which they are made “in a seemingly arbitrary or irrational manner.” The unavoidable implication is that the Constitution puts no equal protection constraint on the power of government to “treat[] an employee differently from others for a bad reason, or for no reason at all,” at least if it does not make use of a group-based classification in doing so.

B. The meaning of irrationality in Engquist

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100 Id. at 2154, 2155 (emphasis added).

101 Id. at 2155. The quoted language is the opinion’s summary of the at-will employment doctrine. The Chief Justice apparently assumed that a constitutional argument entailing modification of that common-law doctrine would be questionable on that ground alone. See id. at 2156 (“The Constitution does not require repudiating that familiar doctrine.”). His assumption is puzzling. There is no plausible argument that the Bill of Rights or the fourteenth amendment presuppose the doctrine’s application to government employees, since the doctrine did not become the general American rule until after 1868. See, e.g., Andrew P. Moriss, Exploding Myths: An Empirical and Economic Assessment of the Rise of Employment At-Will, 59 Mo. L. Rev. 679, 699 (1994) (only three states adopted the doctrine before 1870 and none before 1808). The supposed “historical understanding of the nature of government employment” is an innovation post-dating the constitutional provision at issue.

As a contemporary matter, modern equal protection doctrine necessarily eliminates any power to terminate a public employee for reasons based on several class-based lines, and no doubt for reasons related to the exercise of at least some fundamental rights, so the at-will doctrine’s scope in government employment has unquestionably been sharply curtailed already, as the dissenters in Engquist correctly asserted. See 128 S.Ct. at 2160 (Stevens, J., dissenting) (“recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine”). It is difficult to see what relevance the further erosion of an almost defunct and clearly subconstitutional rule might have to a matter of constitutional interpretation.
This conclusion poses an immediate puzzle: *Engquist* apparently sanctions arbitrary or irrational personnel decisions as consistent with equal protection, while footnote 27 identifies the prohibition of “irrational laws” as the very substance of norms such as equal protection. If, as Chief Justice Roberts clearly affirms, the individual right to equal protection is offended by arbitrary or irrational treatment – which must mean arbitrary or irrational treatment of the individual – how can he also write that the Constitution permits government to make individual personnel decisions that are “seemingly arbitrary or irrational?” The *Engquist* opinion offers a hypothetical to address this puzzle.102

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself-the decision to ticket

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102 The *Engquist* hypothetical is similar to a hypothetical Judge Posner used in a pre-Engquist Seventh Circuit case, *Bell v. Dupperault*, 367 F.3d 703, 712 (2004) (Posner, Cir. J., concurring): “A police car is lurking on the shoulder of a highway in a 45 m.p.h. zone, a car streaks by at 65 m.p.h., and the police do nothing. Two minutes later a car streaks by at 60 m.p.h. and the police give that driver a ticket. Is it a denial of equal protection if the police cannot come up with a rational explanation for why they ticketed the slower speeder?” Posner, like Justice Breyer in *Olech*, would limit “class of one” equal protection claims to those in which the plaintiff alleges that the official action was “invidiously motivated,” which he later explained to mean an intentional act of “vicious or exploitative discrimination.” Id. at 712, 713.
speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

On its face this hypothetical might seem to create more problems than it solves.\(^{103}\)

What is the constitutional difference between being singled out for no reason and being singled out on the basis of race or sex? Why does the officer’s decision to choose which driver to ticket allegedly on the basis of the driver’s race or sex probably violate equal protection, while his decision to do so allegedly out of personal animus (recognizing an old personal enemy, the officer decided to get even a little) raises no equal protection concerns at all?\(^{104}\) The Chief Justice’s

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\(^{103}\) In dissent, Justice Stevens countered that under the circumstances hypothesized, the traffic officer’s decision to ticket a single driver would be perfectly rational: “[h]is inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators. ... a random choice among rational alternatives does not violate the Equal Protection Clause.” 128 S.Ct. at 2159-60. That seems correct, but I do not think it identifies the most fundamental problem with the Chief Justice’s argument.

\(^{104}\) Proving a race- or sex-based invidious intention, in an isolated instance, might be just as difficult as proving personal animus (or even harder), and race and sex are no more, and no less, related to any reason for choosing which driver to pull over than a private history of enmity. Race, of course, is of special equal protection concern because of constitutional history, and one might think the same of sex, at least by analogy, but if that were the answer, the Chief Justice would have has no explanation why class of one cases such as Olech (where there is no historical or originalist
frequent descriptions of the decisions in Engquist’s case and his traffic-officer hypothetical as “individualized,” paired with his references to the Court’s “traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications,” suggest one answer. Together, one might read these passages to imply that there is something especially problematic from an equal protection perspective about governmental thinking that uses conceptual groupings of people to make decisions. The only problem with this answer is that it cannot be what the Engquist opinion means if the opinion is to make good sense. There is no escape, in a governmental system based on the rule of law, from the use of classifications, and a great many possible classifications make perfectly good sense, even though they are applied to particular persons in particular situations. Neither the presence of a class-greater-than-one in official decisionmaking, nor the fact that the decision bears on an individual, can in itself make any constitutional difference. A decision to fire a particular employee, or ticket a particular driver, because of her race or sex – either of which, Roberts affirms, would raise very serious equal protection concerns – is just as “individualized” as a decision to fire or ticket her for no reason or because of personal dislike. Of course, the use of a broad classification (“African-American,” “female”) to make decisions about an individual may indicate or even prove that the decision in question fails to provide any good reason for treating the individual differently than others. However, it doesn’t make the decision any more irrational than reaching the same result for no argument for special solicitude) are cognizable while Engquist’s was not. More generally, it would be quite possible to build an understanding of equal protection law as built on the originalist proposition that the paradigm case underlying the fourteenth amendment clause was concern over discrimination against African Americans as a grouping of people. Equal protection would then apply to other discriminations by analogy, and to the extent that the non-originalist situation is analogous. Engquist makes no use of any such argument. Nor does footnote 27. On the concept of the paradigm case, see Jed Rubenfeld, Revolution by Judiciary: The Structure of American Constitutional Law (2005).
reason or because the decisionmaker is acting out of personal ill will. If (as the opinion repeatedly implies) the overarching concern of equal protection is irrationality – a governmental failure to act in a fashion that logically advances some “independent consideration in the public interest”105 – the use of race or sex in public decisions may be frequent (and heinous) offenders, but they are not ultimately different in kind.

The difference between “class-based” and other “individualized” decisions doesn’t provide a conceptual justification for the distinction Engquist attempts to draw. Furthermore, the effort seems to fly in the face of existing constitutional understandings. It is settled law that the equal protection right belongs to individuals, not to groups. It is equally settled that a classification that serves no purpose (“a classification of persons undertaken for its own sake” as the Court has put it) or the illegitimate purpose of harming people has no rational basis. Olech (unquestioned in Engquist) settled the law that it does not matter constitutionally how many people are affected negatively by a discriminatory decision. Unless the decision in Engquist unsettles one or more of these propositions, which the opinion of the Court denies it has done, the category of “improper government classifications” still encompasses those that have no purpose, those that have a well-known and established bad purpose (unjustified decisions based on race or sex), and those that have a bad purpose peculiar to the particular situation. The assertion that there is no equal protection issue in Engquist or in the traffic officer hypothetical cannot rest on there being something unique about the substance of the governmental decision under either set of facts. Unless both decision and hypothetical are simply confused, there must be some other characteristic common to them that differentiates them constitutionally from Olech (or a claim of intentional race or sex discrimination). That crucial, differentiating characteristic lies, I suggest, in another aspect

105 Moreno, 413 U.S. at 534-35.
of governmental decisionmaking, as the majority understands it, that is evident, if not quite totally explicit, in the opinion.

Chief Justice Roberts repeatedly characterizes decisions such as those of Engquist’s superiors and of his imaginary traffic officer as “subjective” and “discretionary.”106 “There are,” he remarks, “some forms of state action ... which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.” Where a decision “rest[s] on a wide array of factors that are difficult to articulate and quantify,” “treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.” Discretionary decisions of this kind differ entirely from governmental decisions that officials make in the presence of “a clear standard, against which departures, even for a single plaintiff, could be readily assessed.” The reason that a challenge does lie where the claim is that “the arbitrary singling out of a particular person” was based on race or sex is that there is a clear standard applicable in that situation, notwithstanding all that other “wide array of factors:” except in extraordinary circumstances, government is not to discriminate on the basis of race or sex. Public action, in short, can be discretionary, or it can be governed by rules. If it is the latter, equal protection requires, at the least, a rational basis for treating one person different than others, but if the action is discretionary, it is a matter of constitutional insignificance that the individual was singled out in a “seemingly arbitrary or irrational manner” or “for no discernible or articulable reason.” There is a domain of rule-governed official behavior and a domain where, as far as the Constitution is concerned,

106 The Chief Justice also frequently describes them as “individualized,” but that seems to me a misstep in light of the individual nature of the equal protection right,
officials may do as they will.

We can now see why Chief Justice Roberts concluded that Engquist had not even stated an equal protection claim by alleging she was fired arbitrarily and maliciously, in contrast to the plaintiff in Olech and Engquist herself insofar as she alleged race and sex discrimination. Her “class of one” claim assailed a public decision within the realm of discretion and politics, and that realm lies by definition outside the orderly legal domain governed by equal protection. As I noted earlier, in any given case it might be as difficult to prove that a public employee was fired or a driver ticketed on the basis of race or sex as it would be to prove the discriminatory treatment had no basis or was motivated by individual animus: ferreting out bad motives is a tricky business, and we can grant, arguendo, the Chief Justice’s claim that a well-motivated official might find it difficult to articulate just why he fired (or ticketed) X rather than Y. But such difficulties do not exist when the question is whether the official acted intentionally on the basis of race or sex, or for no reason at all or because he personally disliked his victim – and regardless of which of these it is. Such reasons are not among Roberts’s “vast array of subjective, individualized assessments” that we ordinarily think officials are “entrusted” to make and act upon. The official will know the truth of the matter whether any of them explain his action. He will know, to put it another way, if he acted in constitutional bad faith, on the basis of considerations that the Court has defined as illegitimate, which is true not just of race and sex but of malice and meaninglessness as well. It follows that if the constitutional norm that “people should be ‘treated alike, under like

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107 The Engquist opinion seems to me to make more of the difficulty of explaining personnel decisions than is entirely plausible, particularly given the enormous amount of time and energy American public and private institutions expend attempting to regularize and explain such decisions.

108 The question of officials’ unconscious motivations, while extremely interesting, is not generally relevant under existing constitutional law.
circumstances and conditions’ is not violated” when an official exercises his discretion regardless of whether he does so for “a ‘good reason, bad reason, or no reason at all,’” the only explanation can be that the norm is, from the official’s perspective, entirely external to his own thinking, not a basis on which he has a duty to guide his exercise of discretion. His liability to judicial correction if he acts on the basis of race or sex only confirms this: in those circumstances there is an external rule, externally enforced, that sets an outer bound to his domain of discretion. Within that domain, equal protection is silent. The Constitution’s apparent purpose of securing equal protection to all persons is as irrelevant to official discretion in such circumstances as the Internal Revenue Code’s purpose of securing revenue is to taxpayers who do not engage in tax evasion. Taxpayers have no duty of good faith to maximize the government’s goals, and political officials, after Engquist, apparently have no duty of good faith to make discretionary decisions conform to the Constitution’s goals.

We have seen this line of reasoning before: Engquist’s account of discretion is isomorphic with footnote 27’s understanding of politics. It is easy to understand why Justice Scalia would join the opinion in Engquist and even more to the point for present purposes why he would cite it in Heller. The distinction Chief Justice Roberts draws there between official conduct that is subject to rules and public actions that are entirely a matter of the official (or the officials’) will is central to Scalia’s own jurisprudential thought. To be sure, the footnote’s “see, e.g.,” citation to

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109 Footnote 27 provides a pinpoint citation to the section of the Engquist opinion that includes the traffic-officer hypothetical. There can no real doubt that Justice Scalia intends the footnote to endorse the concept of constitutional irrationality that Engquist presents.

110 See the citations in note 86, supra. Justice Scalia has sometimes expressed his jurisprudential preference for hard-edged rules as itself a strategic one, intended to restrain what he views as judicial overreaching and thus much like the New Deal Court’s reason for adopting rational basis. If so, there is a serious internal tension in his thinking on the whole subject, since footnote 27 and other entries in the Scalia ouevre seem to reject a strategic approach categorically.
Engquist, given in support of a statement about how “we have used” rational-basis scrutiny, glosses over the novelty of Engquist’s reasoning, and the extent to which Scalia’s views are a controversial and contestable position in contemporary legal debate rather than common wisdom. That is, of course, a common rhetorical strategy in doctrinally novel opinions, and not in constitutional law alone, but it should not mislead us into missing the radical nature of what Scalia and Roberts are proposing.

C. The implications of Engquist

The Engquist opinion makes internal sense, but the Chief Justice has purchased coherence at the cost of moving dramatically away from traditional constitutional thought. The distinction between rule-governed and discretionary decisionmaking by the political branches is of course at least as old as Marbury v. Madison, but its historical role has been to demarcate those decisions where the courts may properly review the lawfulness of political action from those in which the law provides no justiciable standard of review.111 The point of talking about official discretion has not been that the officials should feel free to act whimsically, maliciously or without regard to constitutional norms.112 There is no reason to assume that all exercises of discretion, or even all those that involve the consideration of factors that are subjective or difficult to articulate, stand in the same relationship to constitutional norms: it is difficult to believe that a president making a cabinet nomination has the same duties under equal protection with respect to race and sex that

112 Cf. Engquist, 128 S.Ct. at 2159 (Stevens, J., dissenting) (“there is a clear distinction between an exercise of discretion and an arbitrary decision”).
Roberts’s traffic officer does in deciding whom to ticket. Official discretion, furthermore, has traditionally been understood to heighten, if anything, the official’s duty to act in good faith. As we have seen, however, *Engquist* must logically reject the possibility that there is any duty of good faith that can establish a legal norm relevant to personnel decisions or traffic citations: if there were, the distinction Roberts draws between the equal protection claim at issue in *Engquist* and the one in *Olech* (or a race or sex discrimination claim) would collapse.\(^{113}\)

What is at stake here is the very meaning of rationality – and its opposite – in constitutional law. Although the Constitution’s text does not demand, in so many words, that government act rationally, the dominant assumption has long been that irrational official decisions are inconsistent with the constitutional norms of due process and equal protection. Furthermore, both before and after the 1937 shift in constitutional doctrine, it was clear that the rationality necessary to the validity of a law or other public action turns on the presence in official decisions of “independent considerations in the public interest,” independent that is of sheer caprice or the desire to use public authority to pursue private or malicious ends.\(^{114}\) Before *Engquist* and *Heller*, therefore, constitutional irrationality was a concept encompassing more than the occasional case of a complete breakdown in official reasoning.\(^{115}\) The judicial rational-basis test, as the Court has

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\(^{113}\) As I argued earlier, there is no reason that the subjective and hard-to-articulate factors potentially involved in personnel decisions would make it any more difficult for officials to make personnel decisions consistently with a constitutional duty of good faith than it is for them to abide by the rules regarding race or sex – or any more difficult for courts to measure deviations from the duty.

\(^{114}\) See, e.g., *Bell v. Dupperault*, 367 F.3d at 711 (Posner, Cir. J., concurring) (“unequal treatment due solely to animus is a subset of irrational and arbitrary conduct”).

\(^{115}\) See *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336 (1989) (holding unconstitutional a local tax assessment policy as presenting “the rare case where the facts precluded any plausible inference” that it carried out the government’s stated purpose).
consistently described it, reflects this underlying view of what the Constitution demands: the test requires not simply a logical connection between governmental action and governmental purpose but the presence, at least as a matter of hypothesis, of a constitutionally permissible “legitimate” purpose. A law or other governmental action, on this view, is irrational for constitutional purposes not only when it is senseless but equally when it fails to meet a legal requirement of legitimacy in purpose.

This requirement of legitimate purpose is logically independent of the extraordinarily deferential method by which cases such as Williamson enforce it. A court following Williamson will entertain any plausible legitimate purpose that will sustain the validity of the official action, ordinarily without regard to whether the purpose was in fact the ground for the decision. Unless the exercise is entirely a charade, however, even a hypothetical inquiry into purpose presupposes the normative requirement that government act for some legitimate reason: as we have seen, the Court has traditionally viewed Williamson’s indulgence in hypothesizing a form of deference to a legislature or other decisionmaker that itself is supposed to have determined, non-hypothetically, that there are “independent considerations in the public interest” that support the decision. The admittedly rare cases in which a public action is held invalid because it actually was senseless or solely motivated by an impermissible purpose show as much.\textsuperscript{116} The Court’s employment of rational-basis scrutiny, before footnote 27, was confirmation that the Constitution demands of public decisions not merely logic but equally respect for an understanding (no doubt largely implicit) about what it is legitimate and illegitimate to do in the exercise of official power. The

\textsuperscript{116} The Court described one of those cases as “[a]pplying the basic principles of rationality review” to invalidate a city ordinance because “the city's purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects.” Board of Trustees v. Garrett, 531 U.S. 356, 366 n.4 (2001), discussing City of Cleburne, 473 U.S., at 447-450.
baseline of the American constitutional order is a government that acts rationally not only in the sense that it has reasons for what it does, but that its actions are undertaken in good faith and for reasons are that are generally seen to be appropriate.¹¹⁷

Footnote 27 and Engquist rest on a very different understanding of constitutional rationality. Engquist flatly denies that legitimacy in purpose or even any purpose at all is constitutionally required when the official action involves a discretionary decision of the sort Engquist classed as “subjective.” By citing Engquist to exemplify what the Constitution means by “irrational laws,” footnote 27 implies that Engquist’s reasoning is generalizable beyond the specifics of government employment. More particularly, in light of Engquist’s unavoidable rejection of a general duty to act in good faith for legitimate (or at least not for illegitimate) purposes, footnote 27's invocation of Engquist suggests that there is no normative element to rationality. Rationality and legitimacy have no necessary or essential relationship in constitutional law generally. The irrational, as far as the Constitution is concerned, is that which makes no sense at all, and the Constitution permits governmental authority to be structured, at least much of the time, so as to license official actions undertaken for no reason or bad ones. There are, to be sure, constitutional rules forbidding certain specific governmental purposes but no general norm that government must have good reasons for acting. The rational-basis test “makes of our courts lunacy commissions sitting in judgment on the mental capacity of legislators and, occasionally, of

¹¹⁷ Cf. Bell v. Duperault, 367 F.3d at 710 (Posner, Cir. J., concurring) (equal protection is violated if an official engages in discrimination for “‘reasons of a personal nature unrelated to the duties of the defendant's position,’” these “go beyond personal hostility to the plaintiff (i.e., animus) [and] larceny, or a desire to find a scapegoat in order to avoid adverse publicity and the threat of a lawsuit—improper motives for a public official (scapegoating is not a legitimate tactic of public officials any more than stealing is), but different from personal hostility”) (citations omitted).
judicial brethren,” as the great Legal Realist Felix Cohen wrote long ago, but not as the byproduct of “transcendental nonsense,” an arid legal conceptualism (a captivity to “transcendental nonsense” – Cohen’s diagnosis in his day). The courts are lunacy commissions because lunacy is all that the underlying constitutional command prohibits. Even that prohibition, trivial as it surely is, has no application when the government is exercising what Engquist calls discretion, for decisions that can be made for any reason or none can not rightly be said to be crazy (or rational, for that matter): the very concept of rationality has no application. Perhaps there are other, non-constitutional modes of evaluation that can be applied in such circumstances, but the constitutional baseline makes no necessary demands that government follow either logic or legitimacy except insofar as it is subject to the external compulsion of judicial review. The irrational is, as a constitutional matter, perfectly thinkable.

VII. Footnote 27’s reworking of the distinction between law and politics and the Roberts Court

Supreme Court justices and scholars interested in the Court talk endlessly about the relationship between constitutional law and politics. The justices accuse one another of making political rather than properly legal decisions; some of the scholars attempt to prove that in fact all the justices play politics while others provide theories about how the Court can avoid politics and stick to law. Footnote 27, like any other serious assertion about constitutional law, has a location


119 Recall that the conclusion in Engquist – never put so bluntly – was that her superiors had not violated the Constitution regardless of what senseless or malicious factors led to her selection for discharge.
amidst these debates.  

Justice Scalia, both a scholar and a judge, subscribes unequivocally to the proposition that the Court ought to steer clear of politics – but then no justice ever says the reverse. More interestingly, he believes that law and politics can be distinguished quite clearly, and that it is only willfulness or (self-)obfuscation that leads anyone to pretend otherwise. The justices, he argues, can and ought to be “doing essentially lawyers’ work up here – reading text and discerning our society's traditional understanding of that text,” and lawyers’ work, as he sees it, is an intellectual process of dealing with rules external to the lawyer’s own reason and judgment: “Texts and traditions are facts to study.” Law is a matter of the reasoned explication and implementation of values, to be sure, but they are values that others than the lawyer-as-judge dictate. Normative judgments about what values govern in the public sphere can only be the product of choice and will, not of reasoning in common, and as such they lie by definition beyond the competence of the lawyer-as-judge in a democracy. “Value judgments, after all, should be voted on, not dictated”

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120 One can locate the footnote, and Justice Scalia’s views as a whole, in other debates as well. Jurisprudentially, for example, Scalia’s textualist approach to constitutional and statutory interpretation is usually seen as a form of legal positivism and/or formalism. See, e.g., Brian Leiter, Positivism, Formalism, Realism, 99 Colum. L. Rev. 1138, 1150 (1999) (distinguishing Scalia’s formalism from legal positivism); George Kannar, The Constitutional Catechism of Antonin Scalia, 99 Yale L.J. 1297, 1307 (1990) (classing Scalia as both a positivist and a formalist).

121 See Planned Parenthood v. Casey, 503 U.S. 833, 981 (Scalia, J., concurring in part and dissenting in part) (“the Court does not wish to be fettered by any such limitations on its preferences”).


123 Justice Scalia’s trademark opposition to the judicial use of legislative history, a matter on which I believe that he is largely right, is also rooted in part in his conviction that value judgments are not, in the end, amenable to reasoned debate.
and therefore it is in politics that the function of “making value judgments” must rest.\textsuperscript{124} That is true if one understands democracy to entail the principle that anything requiring a normative judgment “should be voted on” because such decisions can never be determined by “reasoned judgment,” but must always be choices that express “only personal predilection.”\textsuperscript{125} Footnote 27 embodies that understanding: the idea that men and women can reason in secular society about the normative is for Justice Scalia a fantasy.

In the world of footnote 27, constitutional law ratifies this subordination of legal reason to political will. Constitutional review by the courts is limited to the enforcement of specific constitutional value judgments which are themselves the product of political choice by the people (the highest political decisionmaker). Beyond the scope of whatever clear rules the people have chosen to mandate, public decisions are simply public choices, and the Court should not pretend otherwise, or suggest the existence of constitutional obligations that cannot be reduced to such rules.\textsuperscript{126} For Justice Scalia, the idea that the Constitution requires public decisions to be rational in the traditional sense, involving as it does judgments about the legitimate ends of public action, makes no sense. Footnote 27 accordingly rejects the traditional understanding of rational-basis scrutiny, but its full implications go much further. Rationality as a normative requirement has been a feature of American constitutional law from the beginning, in large measure because the

\textsuperscript{124} \textit{Casey}, 503 U.S. 833 at 1000-1001 (Scalia, J., concurring in part and dissenting in part).

\textsuperscript{125} Id. at 984 (Scalia, J., concurring in part and dissenting in part). Cf. Scalia, \textit{Originalism: The Lesser Evil}, 57 U. Cin. L. Rev. 849, 863 (1989) (“the main danger in judicial interpretation of the Constitution – or, for that matter, in judicial interpretation of any law – is that the judges will mistake their own predilections for the law”).

\textsuperscript{126} See, e.g., \textit{Vieth v. Jubelirer}, 541 U.S. at 278 (plurality opinion by Scalia, J.) (“judicial action must be governed by standard, by rule” whereas “[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc”); \textit{Michael H.}, 491 U.S. at 127 n. 6 (“a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all”).
early Republic created constitutional law in the image, and using the tools, of the common law.
The Court’s self-conscious creation and application of doctrine reflects constitutional law’s
inheritance of the common law’s robust confidence in the meaningfulness of reasoned legal debate
over normative issues. Since Scalia believes that confidence misplaced, he unsurprisingly rejects,
at least in principle, much of the common law structure of constitutional law as a whole.

Justice Scalia is, of course, only one person on a nine-member Court. But there are good
reasons to think that in footnote 27 he has given us an important clue to the future direction of the
Roberts Court as an institution. Scalia’s energy and his strong convictions about constitutional
theory have long made him one of the intellectual driving forces on the Court: a recent biography
observed that “Scalia m[ay] be at the apex of his influence[, w]ith conservatives holding the
balance of power and still being among the younger members of the nine.”¹²⁷ Footnote 27 cited,
and on examination is of a piece with, Chief Justice Roberts’s opinion in the little-remarked
Engquist decision, suggesting a deep congruity between Scalia’s views and those of Roberts.
Roberts is a notoriously skillful chief justice,¹²⁸ and Justice Holmes pointed out long ago that it is
“little decisions which the common run of selectors would pass by” that often “have in them the
germ of some wider theory, and therefore of some profound interstitial change in the very tissue of
the law.”¹²⁹ Scalia’s footnote and Roberts’s opinion contain between them, I have argued, just
such a wider theory. The exchange between Justices Alito and Breyer in McDonald is not the only

¹²⁷ Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice
Antonin Scalia 364 (2009).

¹²⁸ See Adam Liptak, Court under Roberts is Most Conservative in Decades (July 24, 2010),
Justice Roberts is certainly widely viewed as a canny tactician”).

¹²⁹ Holmes, John Marshall (1901), in 3 The Collected Works of Justice Holmes 500, 501 (Sheldon
indication from the Court’s October Term 2009 that the footnote 27 understanding of constitutional irrationality commands the allegiance of at least a plurality of the justices.\textsuperscript{130} If it should become the general assumption, that would indeed work a profound change in the tissue of constitutional law.

Footnote 27 opens a window onto a brave new world of constitutional realism in which it is irrationality rather than reason that lies at the heart of our constitutional order. In that world there are constitutional rules, and where they apply judges (usually) can enforce them even as to political actors. And there is the exercise of discretionary political power, with which judges cannot meddle in the Constitution’s name even if the power is exercised in ways that contravene the Constitution’s norms. Mystifications – transcendental nonsense – such as reasoned judgment and good faith are to be swept aside. The footnote’s world is brilliantly lit, with razor-sharp edges between light and darkness, sense and nonsense. It is also a cold world, and (for me at any rate) a little frightening.

\textsuperscript{130} See the debate between Justices Scalia and Kennedy in \textit{Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection}, 130 S.Ct. 2592 (June 17, 2010). Kennedy argued that the Court should not reach the question whether a judicial decision can effect a taking of property within the meaning of the takings clause, in part because substantive due process principles already render invalid judicial decisions that are “‘arbitrary or irrational,’” a concept that Kennedy took to include considerations of the “‘legitimacy’ of ... the court’s judgment” and its effect on the reasonable expectations of the property-holder. Id. at 2614-15 (Kennedy, J., concurring in part and concurring in the judgment) (citations omitted). Scalia responded that this understanding of substantive due process is “such a wonderfully malleable concept” that “even a firm commitment to apply it would be a firm commitment to nothing in particular.” Id. at 2608 (plurality opinion).