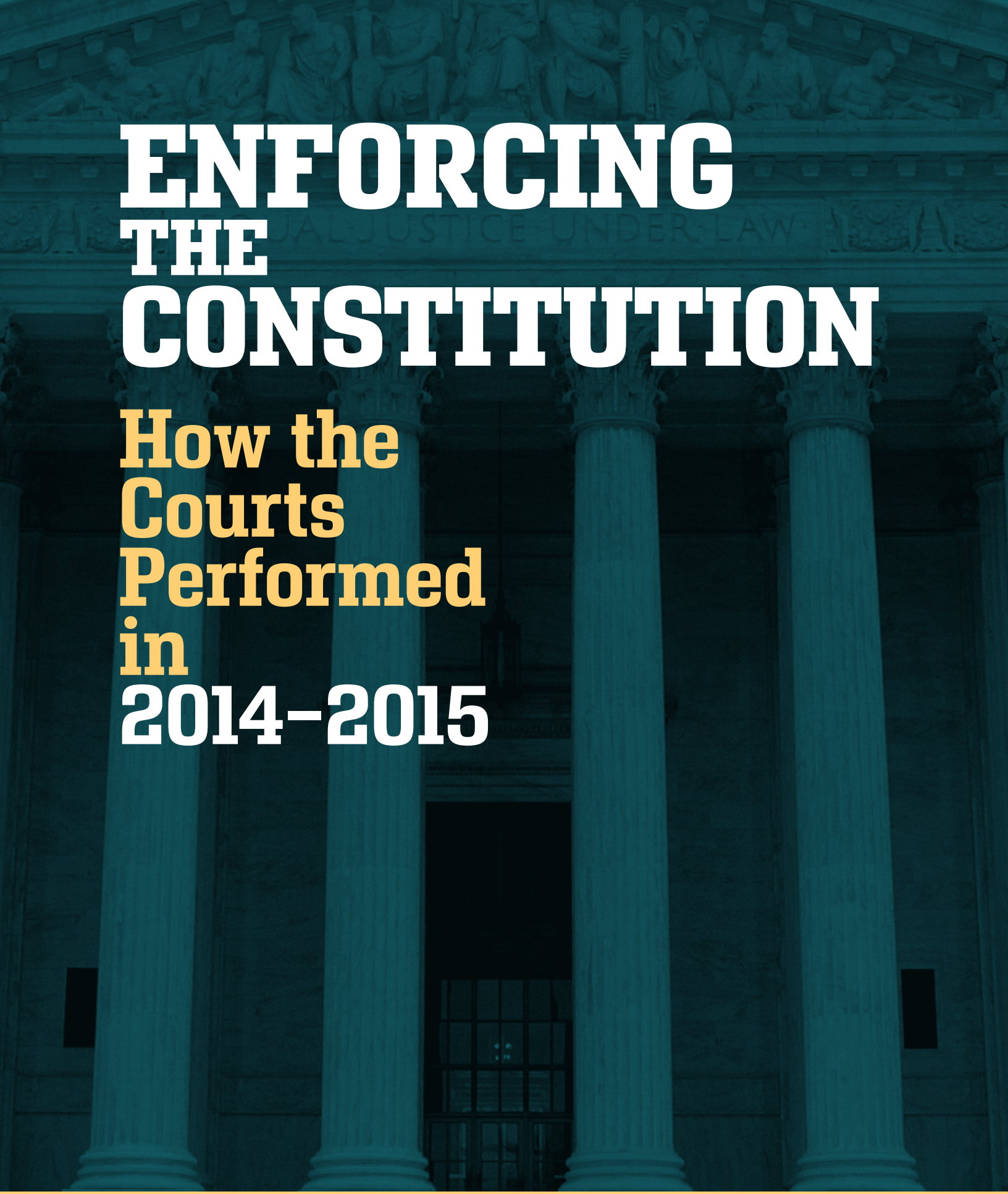


ENFORCING THE CONSTITUTION

How the Courts Performed in 2014–2015

By Clark Neily and Evan Bernick

September 2015

CENTER FOR JUDICIAL ENGAGEMENT

ENFORCING THE CONSTITUTION

How the Courts Performed in 2014–2015

By Clark Neily and Evan Bernick

September 2015

Table of Contents

"Merely asserting—and accepting—

'Because government says so'

is incompatible with individual freedom."

-Texas Supreme Court Justice Don Willett

Introduction

Does the government need to have a good reason for restricting your freedom? Most Americans would likely answer yes—"Because government says so" isn't good enough. But what is a "good reason?" And must the government's purportedly good reasons be supported with reliable evidence when its actions are challenged in court? Or should the government simply get the benefit of the doubt when it makes factual assertions for which it has no proof?

Judicial engagement is a cutting-edge approach to judicial review that provides a means of resolving these questions and ensuring that Americans receive an honest, reasoned explanation in court whenever they allege a plausible abuse of government power. Judicial engagement consists of a genuine, impartial search for the truth concerning the government's means and ends, grounded in reliable evidence. An engaged judge will insist that the government demonstrate that its actions are justified by a constitutionally-legitimate end.

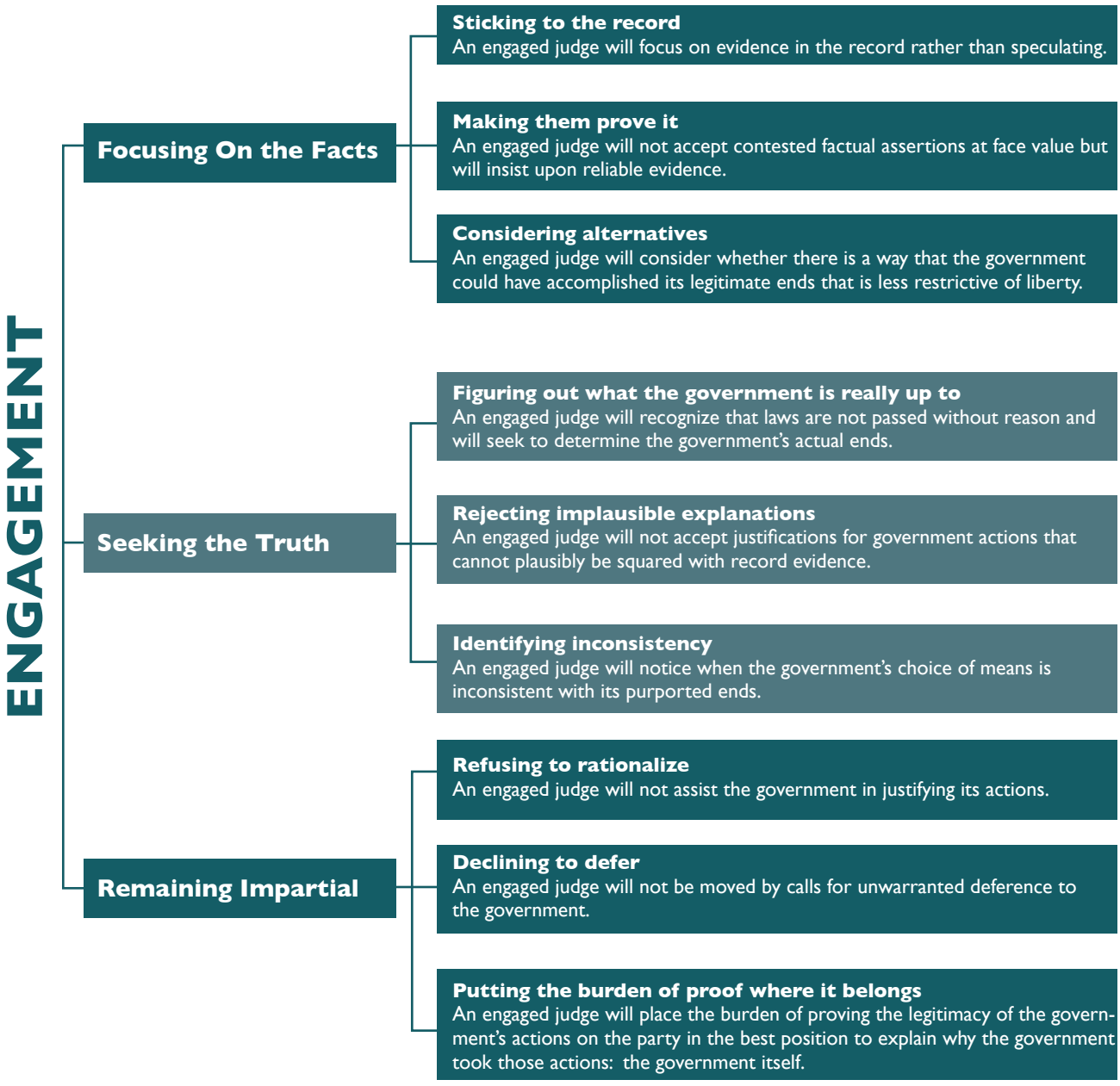
Judicial engagement sounds simple. It sounds like something that judges should already be doing. And in many areas of law, they provide engaged judging routinely. They do so in civil suits involving private parties, who must generally prove their claims by a preponderance of the evidence. They do so in criminal bench trials, in which convictions are not valid if the evidence does not establish the defendant's guilt beyond a reasonable doubt. And they do so in constitutional cases implicating so-called "fundamental rights," such as those expressly enumerated in the Bill of Rights and a handful of specially-favored unenumerated rights, like privacy, association and interstate travel. In all of these contexts, evidence and truth matter, and making challenging, fact-sensitive determinations are the order of the day—judicial bread and butter.

In the *vast majority* of constitutional settings, however, evidence and truth do not matter. The Supreme Court has held, and lower courts have understood, that the default standard in constitutional cases—the so-called "rational basis test"—requires reflexive judicial deference to the government. As a result, judges applying the rational basis test will generally credit unsupported factual assertions from the government that they would not accept from a private party and will even invent justifications for the government's actions if the government's lawyers cannot come up with plausible justifications on their own. Simply put, this is not adjudication; rather, it is an *abdication* of judicial responsibility, and it is incapable of preventing illegitimate assumptions of power by the political branches.

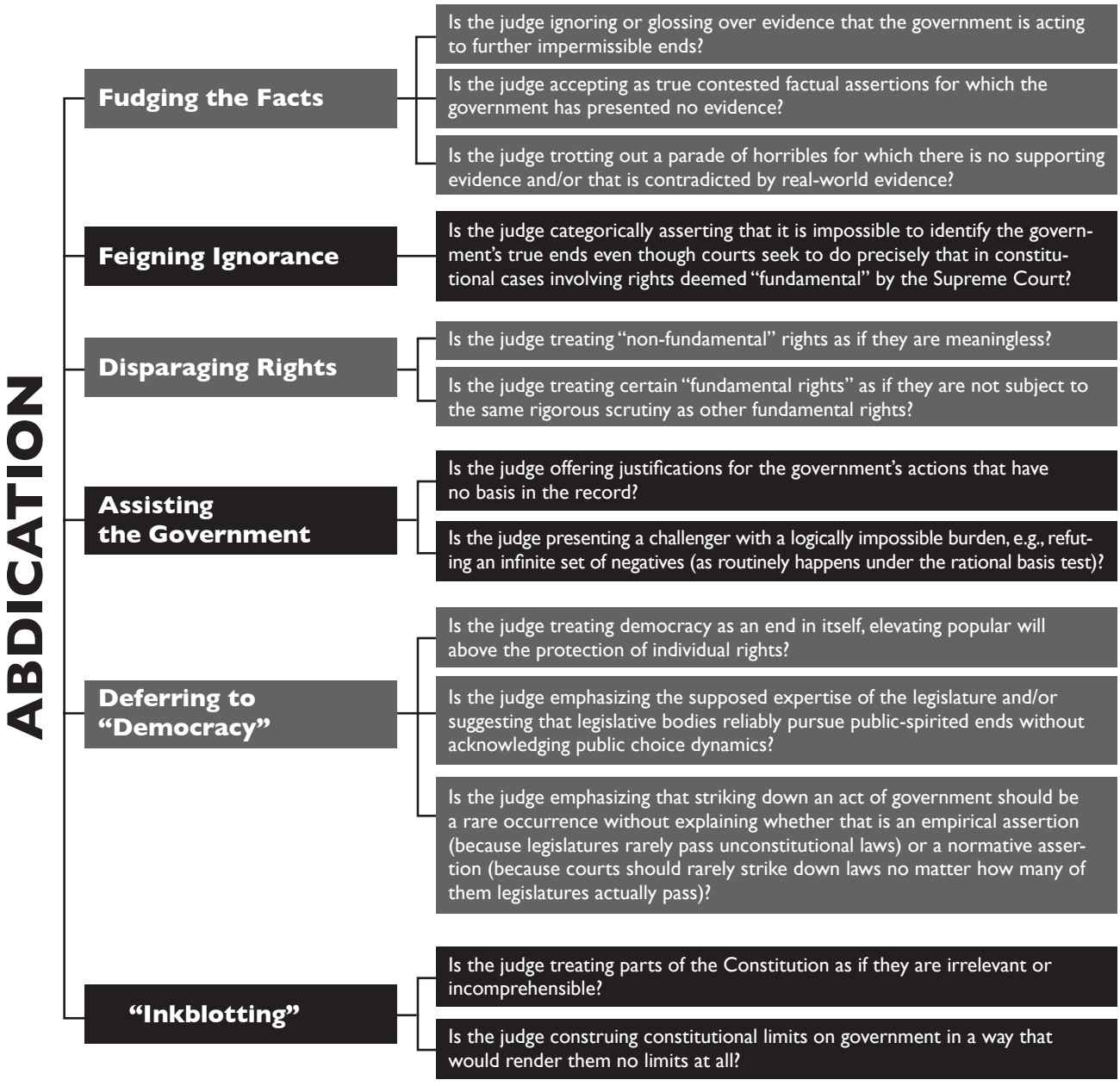
What follows is a guided tour of 20 notable examples of judicial engagement and abdication in 2014 and 2015. They come from state courts, federal district courts, federal appellate courts, and, of course, the U.S. Supreme Court. They involve SWAT raids on barbershops, licensing schemes for tour guides, gun rights, gay marriage, raisin pilfering by the government (yes) and the Affordable Care Act. Each case tells a story—some offer guidance and inspiration while others serve as cautionary tales. To prepare the reader for this journey, we have provided a taxonomy of engagement and abdication to help the reader determine when judges are performing their duty—or neglecting it.

Alexander Hamilton emphasized in Federalist 78 that the courts were designed to be "bulwarks of a limited Constitution." The Constitution was written to limit government power, but those limits are meaningless unless judges *enforce the Constitution* and restrain public officials when they overstep their bounds. Fulfilling the Constitution's promise of liberty requires judicial engagement. How did the judiciary do this past year? Read on.

Engagement Taxonomy



Abdication Taxonomy



Engagement

Judicial review is the process by which every person receives the genuine, reasoned explanation to which they are entitled before they are required to obey a law that restricts their freedom. These cases showcase what judicial review should always look like. They see the courts acting as the "bulwarks of liberty" that the Framers envisioned and that Americans rightfully expect.

Supreme Court Thwarts Brazen Raisin Robbery

"Raisins are not dangerous pesticides; they are a healthy snack."

Horne v. USDA

(U.S. Supreme Court, 2015)

What Were the Facts?

Thanks to a New-Deal-era scheme designed to raise agricultural prices by tightly controlling the amount of agricultural products that go to market, family farmers like Marvin and Laura Horne of California are required to turn over a certain percentage of their raisin crop to the federal Raisin Administrative Committee. If they do not, they must pay the government the dollar-equivalent of that allotment, plus additional fines.

In 2002-2003, the Hornes and other farmers were told to hand over 30 percent of their raisin crop (89,000 tons in total). The Hornes refused to hand over their portion, arguing that they were not legally bound to do so. The government then assessed the Hornes a $480,000 dollar fine equal to the market value of their raisins, as well as an additional civil penalty of over $200,000 for disobeying the order. The Hornes sued, arguing that the scheme was forbidden by the Takings Clause of the Fifth Amendment, which provides that "private property" may not be "taken for public use, without just compensation." The Ninth Circuit rejected their claims, reasoning that the Takings Clause offers less protection for personal property than for real property and finding that the Hornes "did not lose all economically valuable use of their personal property" because the Raisin Committee, after selling reserve raisins (and deducting expenses and subsidies for exporters) returned net proceeds to growers.

What Did the Court Say?

The Supreme Court held that there had been a taking demanding compensation. It began by roundly (and rightly) rejecting the Ninth Circuit's distinction between personal and real property. The language of the Takings Clause is broad and categorical, and reflects the Framers' appreciation of the centrality of *all* private property to a free and thriving civil society. It requires "just compensation" whenever the government appropriates "private property" for a "public use"—full stop. Thus, as Chief Justice John Roberts, writing for the majority, put it, "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."

The Court made short work of the government's efforts to avoid its duty to pay just compensation. The government, like the Ninth Circuit below, claimed that there had been no taking because the growers retained a "contingent interest" in the value of the property. The Court instead found that the Raisin Committee's deprivation of the growers' rights in their property was total—they lost the rights to possess, use and dispose of their raisins. Although the growers retained a hypothetical future interest of "indeterminate value," they had lost authority over how their property would be used and, as Chief Justice Roberts pointed out, "the value of the interest depends on the discretion of the taker." Thus, the Court held, there was a duty to pay just

compensation that the government could not evade.

Finally, in response to the government's argument that the Hornes could always avoid the reserve requirement by planting other crops, the Court affirmed an essential principle: Engaging in productive commerce is not a "special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." Although commercial activity can be subjected to "reasonable regulation" in the service of a legitimate end of government, such as public safety, Chief Justice Roberts pointedly observed, "Raisins are not dangerous pesticides; they are a healthy snack."

Why Does It Matter?

The Court's decision makes plain that personal property must receive the same level of protection as real property under the Takings Clause, and that the government cannot avoid takings liability by giving owners a small share of the proceeds at some later date.

In supporting the Court's pro-liberty decision, Chief Justice Roberts referred to the Magna Carta, which, as he points out, "specifically protected agricultural crops from uncompensated takings." The Framers of our Constitution understood the Magna Carta to be an affirmation that the government cannot act arbitrarily but must instead act pursuant to a rational principle consistent with individual rights that precede government, including property rights. Allowing the Raisin Committee to deprive people of the fruits of their labor by administrative fiat would be to acquiesce to a view of government power that the Constitution rejects.

The Hornes' decade-long resistance to the petty tyranny of the Raisin Committee has been nothing less than heroic. The Court fulfilled its duty in vindicating their claims. However, as Justice Clarence Thomas noted in concurrence, the Takings Clause will not be given its proper due until the Supreme Court revisits its decision in *Kelo v. City of New London* (2005), which effectively deleted the Fifth Amendment's textual requirement that any taking be for a truly "public use." Justice Thomas wrote separately to argue that because the program "takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments," the government may not have been able to justify taking the raisins on the grounds that they were "for public use" at all.

Fun Fact

Justice Sonia Sotomayor's was the lone dissent. Although she disagreed with the majority's analysis, she expressly stated that she "could not agree more" that raisins are, indeed, a healthy snack.

Equality Without Tiers

"If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification . . . . This Court has rejected that approach."

Obergefell v. Hodges
(U.S. Supreme Court, 2015)

What Were the Facts?

Kentucky, Michigan, Ohio and Tennessee issued marriage licenses to opposite-sex couples but not to same-sex couples, and did not recognize out-of-state marriages between same-sex couples. Same-sex couples in long-term, committed relationships brought suit under the Due Process of Law and Equal Protection Clauses of the 14th Amendment.

What Did the Court Say?

The Court held that the 14th Amendment's Due Process of Law and Equal Protection Clauses prohibit states from issuing marriage licenses only to opposite-sex couples or declining to recognize same-sex marriages validly performed out of state. Writing for the Court, Justice Anthony Kennedy sought to define the constitutional right to marry, first recognized by the Court in *Loving v. Virginia* (1967), by synthesizing the Court's case law. The Court acknowledged that its prior cases "presumed a relationship involving opposite-sex partners," but went on to consider whether gender differentiation was essential to civil marriage.

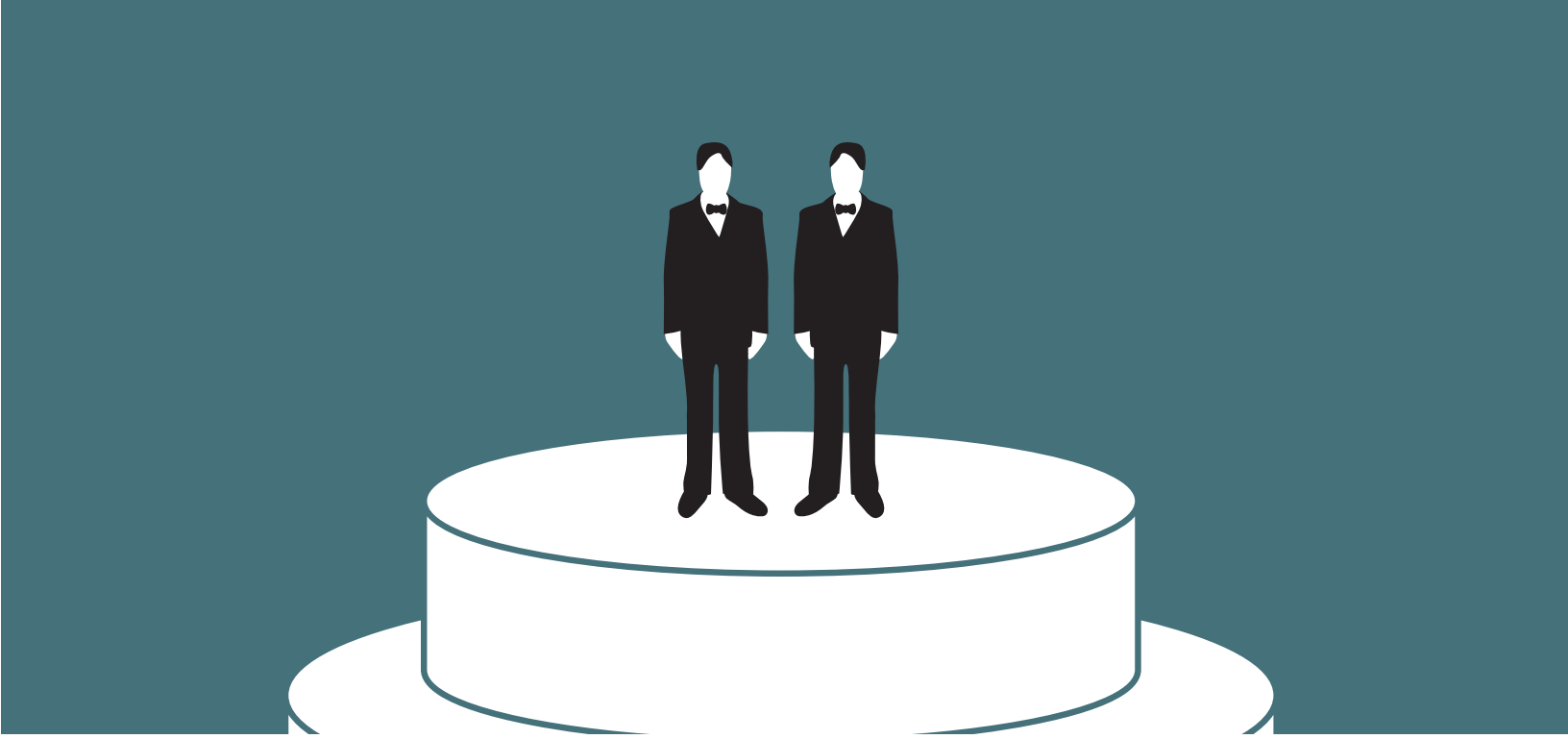
The Court found that all of the essential reasons that the right to marry has been recognized and protected apply with equal force to same-sex couples. First, the decision to marry the person of one's choice, regardless of whether that person is of the same sex, is an exercise of liberty that "shape[s] an individual's destiny" and allows people to "find other freedoms, such as expression, intimacy, and spirituality" together. Second, for both same-sex couples and opposite-sex couples, marriage supports a two-person union "unlike any other in its importance to the committed individuals." Third, both same-sex couples and opposite-sex couples raise children, and marriage "safeguards children and families" by giving "recognition and legal structure" to same-sex relationships and removing the stigma that children of same-sex couples suffer from "knowing their families are somehow lesser." Finally, both same-sex couples and opposite-sex couples participate in our legal and social order, and marriage is "at the center of . . . many facets of the legal and social order." To exclude same-sex couples from the institution of marriage not only deprives them of material benefits but "has the effect of teaching that gays and lesbians are unequal in important respects."

The Court then addressed the argument that states could rationally take a wait-and-see approach concerning the definition of marriage, even if the states could not demonstrate that any harm would result from recognizing same-sex marriages. The Court rejected this argument, affirming that, absent any "foundations for the conclusion that allowing same-sex marriage will cause . . . harmful outcomes," it could not approve the challenged laws as constitutional.

Why Does It Matter?

Obergefell is a monumental decision that will be debated for years to come. Even supporters of limited government who disagree with the outcome should be able to appreciate the value of the Court's approach, which placed the burden on the government to justify treating people differently rather than presuming the legitimacy of that differential treatment.

The 14th Amendment was designed to authorize the federal government (including the federal



judiciary in particular) to prevent the states from restricting natural rights and certain civil rights without any public-spirited justification, as well as to prohibit discrimination that serves no proper governmental end. Even if the government is not obliged to extend the protections, benefits and obligations of civil marriage to anyone, assessing whether allowing opposite-sex couples but not same-sex couples to have their marriages recognized by the state furthers any proper government end requires a disciplined, evidence-based effort to determine whether that choice is justified. The *Obergefell* Court was right to make that effort.

It is instructive to contrast *Obergefell* with the Sixth U.S. Circuit Court of Appeals' decision in *DeBoer v. Snyder*, the case below. The Sixth Circuit, applying the rational basis test, gave the government the benefit of an effectively irrebuttable presumption of constitutionality, ignored evidence introduced at trial and held that states could discriminate on the basis of sheer favoritism. Such an approach would allow public officials virtually unbridled discretion to grant favors to the politically powerful and burden the politically powerless. All supporters of limited government should be thankful that the *Obergefell* Court did not ratify the Sixth Circuit's application of the rational basis test.

Fun Fact

The *Obergefell* Court pointedly declined to apply the "two-step" requirement from *Washington v. Glucksberg* (1999) that any "liberty" protected by the Due Process of Law Clause must be "deeply rooted in the nation's history and tradition" and be given a "careful description" to receive meaningful judicial review. This is a welcome development, as *Glucksberg*'s easily-manipulated standard has facilitated dismaying acts of judicial abdication. In *Abigail Alliance for Better Access to Developmental Drugs v. Eisenbach* (2007), for instance, the District of Columbia Circuit Court of Appeals, sitting *en banc*, held that "the right of a terminally ill patient with no remaining approved treatment options" to have access to potentially life-saving drugs was not "deeply rooted in our Nation's history and traditions" and upheld the FDA's decision to deny access to a group of terminally-ill cancer patients.

You Don't Give Up Your Fourth Amendment Rights By Going Into Business

"[L]aws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches."

City of Los Angeles v. Patel
(U.S. Supreme Court, 2015)

What Were the Facts?

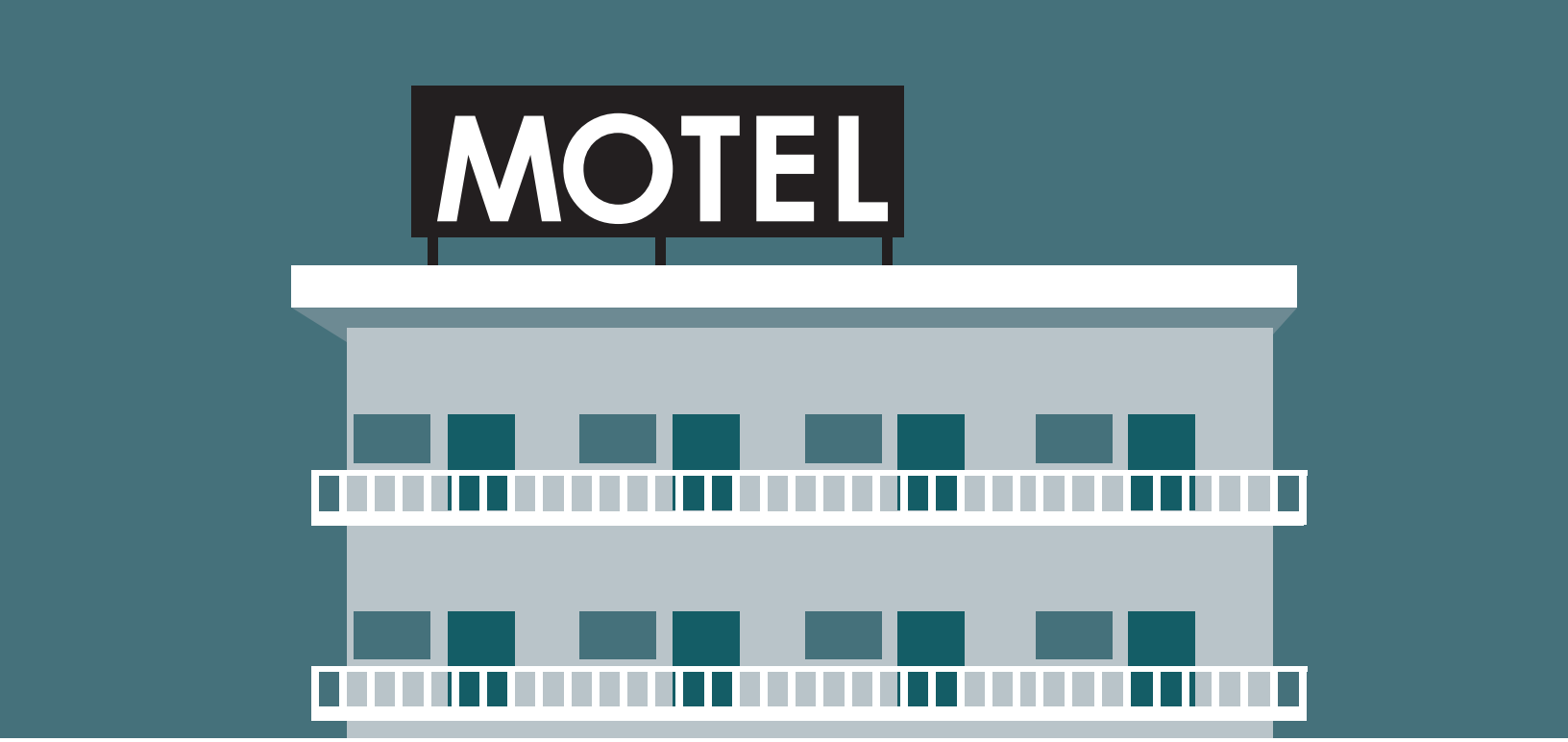
A Los Angeles ordinance required hotel owners to record information about their guests—including names and addresses; make, model, and license number of vehicles; rate charged (as well as method of payment); and credit card information of guests who checked in using an electronic kiosk. Hotel owners were required to make those records "available to any officer of the Los Angeles Police Department for inspection" without either a warrant or an opportunity for judicial review before being subjected to penalties for refusing to comply. Refusing to comply was a misdemeanor punishable by up to six months in jail and a $1,000 fine. Noncompliant hotel owners could be arrested on the spot. In 2003, a group of motel owners sued the city, arguing that that the ordinance was unconstitutional on its face—that although the ordinance had not yet been enforced, it authorized warrantless searches that unquestionably violated the Fourth Amendment.

What Did the Court Say?

In an opinion authored by Justice Sonia Sotomayor, the Court first held that plaintiffs can challenge laws authorizing warrantless searches before they are enforced. Justice Sotomayor recounted how the Court has not only allowed facial challenges to proceed "under a diverse array of constitutional provisions," but that it has done so under the Fourth Amendment specifically.

Although the Court has interpreted the Fourth Amendment to generally bar nonconsensual governmental searches of private property absent a warrant, it has carved out a set of exceptions to this rule, including one for "closely-regulated industries." Certain industries, the Court has held, "have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." The Court in *Patel* rightly refused to broaden this exception.

Justice Sotomayor pointed out that, unlike the handful of closely-regulated industries identified by the Court in the past, nothing "inherent in the operation of hotels poses a clear and significant risk to the public welfare." To the argument that "regulations requiring hotels to . . . maintain a license, collect taxes, conspicuously post their rates, and meet certain sanitary standards" are enough to make them "closely regulated," she responded, "If such general regulations were sufficient . . . it would be hard to imagine a type of business that would not qualify" as closely regulated. Responding to the claim that "[f]or a long time, [hotel] owners left their registers open to widespread inspection," Justice Sotomayor distinguished between private choice and government mandate: "[T]he fact that some hotels chose to make registries accessible



to the public has little bearing on whether government authorities could have viewed these documents on demand without a hotel's consent."

Why Does It Matter?

The Court showcased the fact-sensitive judicial engagement that is required to ensure that the Fourth Amendment does not become, in Justice Sotomayor's own words, "a useless piece of paper." No American should have to wait for an inspector to show up at his or her doorstep before challenging an unconstitutional regulation, nor should he or she, absent exigent circumstances, be subjected to unwanted governmental intrusions without any opportunity to appeal to an impartial adjudicator. In upholding the rights of the challengers in *Patel*, the Supreme Court sent an unmistakable message: You don't forfeit your Fourth Amendment rights when you go into business.

Fun Fact

As Justice Sotomayor noted, over the past 45 years, the Court has identified only four "closely regulated" industries: liquor sales, firearms dealing, mining, and running automobile junkyards.

Signs Point to a Stronger First Amendment

"Innocent motives do not eliminate the danger of censorship."

Reed v. Town of Gilbert
(U.S. Supreme Court, 2015)

What Were the Facts?

The Good News Community Church—a small, cash-strapped entity that owns no buildings—holds its services at elementary schools or other locations in or near the town of Gilbert, Ariz. It advertises those services through temporary signs. Under Gilbert's sign code, the Good News Community Church's temporary signs promoting church services were subjected to far greater restrictions than were temporary signs promoting political, ideological and various other messages. Gilbert's sign-code manager twice cited the church for violating the code and town officials confiscated one of the church's signs. After unsuccessfully trying to resolve the matter informally, the church's pastor, Clyde Reed, brought suit, arguing that the sign code violated the First Amendment's guarantee of freedom of speech.

The Supreme Court has long recognized the danger presented by laws that regulate speech based on its communicative content and has thus subjected them to strict scrutiny. Traditionally, a law was regarded as content-based if officials had to inspect the message being conveyed to determine how it should be regulated. But in *Ward v. Rock Against Racism* (1989), the Court added an additional test that asked whether the government enacted a law regulating speech "because of disagreement with the message" conveyed or to further some other non-speech related interest. Some lower courts interpreted *Ward* and subsequent cases to mean that laws are content-based (and therefore subject to strict scrutiny) *only* if their purpose is to squelch disfavored viewpoints. In the decision below, the Ninth Circuit held that Gilbert's sign code did not regulate speech on the basis of content because Gilbert claimed that it passed the law for traffic safety purposes, not because of disagreement with any message. Accordingly, the Court applied a lower level of scrutiny to the sign code and concluded that it did not violate the First Amendment.

What Did the Court Say?

The Supreme Court invalidated the sign code. It squarely held that strict scrutiny applies either when a law is content-based on its face *or* if its purpose and justification are content-based, and courts must inquire into each question. Writing for the Court, Justice Clarence Thomas explained, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus' toward the ideas contained in the regulated speech." The Court easily determined that the sign code at issue classified signs on the basis of their content because the answer to whether the restrictions applied to any given sign "depend[ed] entirely on the communicative content of the sign."

Gilbert's sign code could not withstand strict scrutiny—and it wasn't even close. The town baldly asserted that the sign code furthered the ends of "preserving the Town's aesthetic appeal" and "traffic safety" despite "allowing unlimited numbers of other types of signs that create the same problem[s]" and without providing any reliable evidence that "directional signs pose a greater threat to safety than do ideological or political signs." Simply put, the government's assertions were completely implausible.

Why Does It Matter?

Municipal sign codes don't often make the headlines, but *Reed* is one of the most important free speech decisions in decades and will have a sweeping impact. The Supreme Court clarified a pernicious ambiguity in its case law that made it easy for the government to burden speech so long as it professed public-spirited intentions. Following this decision, judicial engagement will be the rule in every case in which the government classifies speech based on its communicative content—not only through sign codes, but through occupational licensing schemes, panhandling bans [see p. 38–9] and noise ordinances that single out particular forms of constitutionally protected expression.

First Amendment scholar and advocate Alexander Miekeljohn described the Court's seminal decision in *New York Times v. Sullivan* (1964) as "an occasion for dancing in the streets." *Reed*'s fidelity to the broad command of the First Amendment provides similar cause for celebration.

Fun Fact

Justice Thomas cited *NAACP v. Button* (1963), a case involving a state's attempt to use a statute prohibiting "improper solicitation" to curtail the NAACP's advocacy of desegregation. In *Button*, the Court rejected Alabama's claim that its patently-pretextual stated interest in the "regulation of professional conduct" was sufficient for the ordinance to pass muster.

Segs in the City

"The District failed to present any evidence the problems it sought to thwart actually exist."

Edwards v. District of Columbia

(D.C. Circuit Court of Appeals, 2014)

What Were the Facts?

Bill Main and his wife, Tonia Edwards, operate Segs in the City, a company that takes District of Columbia tourists on Segway rides. Tourists listen to information about the District's monuments, embassies and other attractions through radio earpieces. The District of Columbia imposed licensing and testing requirements on tour guide employees who spoke about a particular subject matter: "places or points of interest in the District." Before they were permitted to talk about points of interest or the history of the city while escorting or guiding paying customers, tour guides were required to pay application, license and exam fees totaling $200 and pass a 100-question, multiple-choice exam "covering the applicant's knowledge of buildings and points of historical and general interest in the District." Operating as a paid, unlicensed tour guide was punishable by up to 90 days in jail or a fine of up to $300, or both. Believing the licensing scheme to be an unconstitutional restriction of their First Amendment rights, Edwards and Main refused to comply and filed suit.

What Did the Court Say?

The court invalidated the licensing scheme. Judge Janice Rogers Brown, joined by the other two judges on the panel, began by rejecting the notion that the tour-guide license, like licensing schemes that restrict the speech of lawyers and psychiatrists, was "merely an occupational license subject only to rational basis review." The court reasoned that Segs did not "take the affairs of . . . client[s] personally in hand and purport[] to exercise judgment on behalf of . . . client[s] in the light of the client's individual needs and circumstances," but rather, "provide[d] virtually identical information to each customer." The court went on to apply intermediate scrutiny, seeking to determine whether the scheme furthered a substantial government interest unrelated to the suppression of expression.

Ultimately, the court concluded that the record was "wholly devoid of evidence" that the licensing scheme actually furthered any substantial interest. The court found no evidence that ill-informed guides are a problem for the District's tourism industry or that, even assuming such harms existed, the exam regulation requirement would prevent them. As Judge Brown put it, "How

Tonia Edwards and Bill Main, owners of "Segs in the City"

does memorization of addresses and other, pettifogging data about the District's points of interest protect tourists from being swindled or harassed by charlatans? . . . [S]urely, success on the District's history exam cannot be thought to impart both knowledge and virtue."

Finally, the court determined that the scheme was both underinclusive and overinclusive, given the District's stated interests. It was underinclusive (too narrow) because exemptions allowed guides to "without a license, lecture at a single point of interest, i.e., stand in front of the White House and charge tourists a fee to audit the narration," and tour-bus drivers could, "without a license, escort and direct tourists to points of interest, provided the driver refrained from speaking and relied exclusively on any audio recording for narration"—even if the tour bus recruited a drunk off the street to prerecord the audio narration. The scheme was overinclusive (too broad) because it would "forbid an unlicensed person from lecturing to a tour group, even if that group is being escorted by a fully licensed guide." Nor did the District offer a "convincing explanation as to why a more finely tailored regulatory scheme would not work."

Why Does it Matter?

The court's careful scrutiny of the record in *Edwards* not only shows how judicial engagement protects occupational speech, but squarely presents a critical question for Supreme Court review. In a footnote, Judge Brown pointedly acknowledged and rejected the reasoning of a Fifth Circuit decision affirming the constitutionality of a similar tour guide licensing scheme in New Orleans, stating that "the opinion either did not discuss, or gave cursory treatment to, significant legal issues." *Edwards* creates a clean circuit split concerning whether such licensing schemes pass constitutional muster. It also makes for a wonderfully readable opinion, offering such choice lines as the following: "That the coal of self-interest often yields a gem-like consumer experience should come as no surprise."

Fun Fact

In a footnote, Judge Brown expressed her doubt that D.C.'s ludicrous licensing scheme "could survive even rational basis review."

Speech *is* Speech

"Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment."

King v. Governor of the State of New Jersey
(Third U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

A recently-enacted statute in New Jersey prohibited licensed counselors from engaging in "sexual orientation change efforts" (SOCE) with a client under the age of 18. These efforts consisted of "talk therapy" that was administered solely through verbal communication. Individuals and organizations seeking to provide such counseling filed suit, challenging the law as a violation of their First Amendment rights to free speech and free exercise of religion. The district court rejected these claims, relying heavily upon the Ninth Circuit's decision in a similar case, *Pickup v. Brown* (2013). Both courts determined that the statute challenges targeted *conduct*, not speech, and therefore applied minimal, rational-basis scrutiny.

What Did the Court Say?

The court upheld the ban but disagreed with important features of the district court's holding. Judge D. Brooks Smith, who wrote for the panel, expressly rejected the Ninth Circuit's determination in *Pickup* that verbal counseling is "conduct" subject only to rational basis scrutiny. Instead, the court followed the lead of the Supreme Court in *Holder v. Humanitarian Law Project* (2010). *Holder* involved a federal statute that "prohibited the provision of 'material support or resources' to certain foreign organizations that engage in terrorist activity." "Material support or resources" included "training" (defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge") and "expert advice or assistance." The *Holder* Court rejected the government's argument that the material-support prohibition was aimed at conduct, not speech. In *King*, the Third Circuit did the same: "Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment."

The court applied intermediate scrutiny, seeking to determine whether the purported harms targeted by the statute were "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Looking to the legislative record, the court found that "well-known, reputable professional and scientific organizations have publicly condemned the practice of sexual orientation change therapy, expressing serious concerns about its potential to inflict harm." That same record also contained evidence that nothing short of a ban would suitably protect minors. Thus, the court concluded that the ban was a "permissible prohibition of professional speech."

Why Does It Matter?

The court recognized that speech does not cease to be speech simply because it is delivered in a professional setting. Nor did the court simply defer to the legislature's determination that there was a public safety interest at stake—it required the government to support its assertions of a public safety interest with evidence. Upon finding that that interest was indeed supported by credible evidence, the court considered whether the government could have pursued it through a means less restrictive of speech. Only after determining that the government could not have accomplished its ends with anything short of a ban on SOCE aimed at minors did the court conclude its analysis.

Judicial engagement isn't just a tool that enables judges to find a way to say "no" to government. When the state can demonstrate with reliable evidence that it is pursuing a valid interest in protecting public safety that can't be achieved in a manner that's less restrictive of liberty, an engaged judge will uphold its actions.

Fun Fact

In *United States v. Stevens* (2010), the Supreme Court held that federal courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." Instead, the appropriate inquiry is whether the given category of speech has been historically treated as unprotected.

Curbing Policing for Profit

"In the end, the government's theory about a planned transaction relies on mere speculation rather than circumstantial evidence."

U.S. v. $48,100 in US Currency

(Eighth U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

John Nelson was driving his parents' RV from Colorado to their home in Wisconsin when he was stopped for a traffic violation in Nebraska. He consented to a search of the vehicle. A state trooper found a small amount of marijuana and $48,100.00 in currency. Nelson was cited for possession of marijuana and the government seized his money and his phone. The government sought forfeiture of his money on the grounds that it was substantially connected to drug trafficking. Both Nelson and his father testified that the currency had come from legitimate sources, and that Nelson was returning home after having unsuccessfully tried to relocate to Denver. The government conceded that the money came from legitimate sources but contended that Nelson intended to use the currency for a planned drug transaction—even though the government had no evidence concerning such a transaction. A magistrate judge issued an order directing forfeiture.

What Did the Court Say?

The Eighth Circuit reversed the forfeiture order. Writing for the panel, Judge Kermit Bye recognized that "[much] of the affirmative evidence . . . could support either party's position" and honed in carefully on each bit of evidence. The court found that none of the evidence favored the position that Nelson "planned to use [the money] to purchase narcotics in an unspecified transaction which for some unknown reason had not occurred," whereas each piece of evidence was consistent with his purpose "being a plan to relocate." The court concluded, "In the end, the government's theory about a planned transaction relies on mere speculation rather than circumstantial evidence."

Why Does It Matter?

Civil forfeiture enables law enforcement to seize property from innocent citizens on mere "probable cause" and without any proof of illegal behavior, and forcing them to fight an uphill battle to get their property back. In 26 states, law enforcement agencies are entitled to 100 percent of forfeiture proceeds, as are federal agencies forfeiting under federal law, which creates a toxic financial incentive for law enforcement to engage in "policing for profit." In vindicating Nelson's rights, the Eighth Circuit displayed the kind of context-sensitive judgment that is needed to protect Americans' property from the ravages of civil forfeiture.

The court acknowledged that there were aspects of Nelson's behavior that were suspicious. It might have ended the analysis there and upheld the forfeiture. But it did not. The court took seriously the burden of proof that the government must

carry in order to establish that someone can have his or her money forfeited without being convicted of any crime. It took a hard look at the facts, sought to determine whether the government's specific claims about Nelson's purpose were more-likely-than-not accurate and found that they were not. If every court were as vigilant, it would be far more difficult than it is at present for law enforcement to take people's property without ever proving that they actually committed a crime.

Fun Fact

"Preponderance of the evidence" is the most common standard of proof for civil forfeiture. This standard is substantially lower than the "beyond a reasonable doubt" standard required to prove that individuals are guilty of the criminal activity that supposedly justified the forfeiture.

Drop the Curlers!

"It has long been clearly established that a warrantless administrative inspection must be narrowly tailored to the administrative need that justifies it."

Berry v. Leslie

(Eleventh U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

Brian Berry, the sole owner of Strictly Skillz Barbershop, is a licensed barber and has been operating Strictly Skillz since 2007. On August 21, 2010, deputies from the Orange County Sheriff's Office (OCSO) descended on his barbershop, dressed in ballistic vests and masks, with guns drawn. They surrounded the building and blocked all of the exits, forced all of the children and other customers to leave, announced that the business was "closed down indefinitely" and handcuffed and conducted pat-down searches of the employees while the officers searched the premises. The OCSO, acting as the "muscle" of the Florida Department of Business and Professional Regulation (DBPR), was conducting planned sweeps of several barbershops, located in predominantly Hispanic and African-American neighborhoods, with the purported intent of discovering violations of state licensing laws. But all of the barbers at Strictly Skillz had valid licenses and the barbershop was in compliance with all safety and sanitation rules.

Berry and three licensed barbers who rent barbering chairs at Strictly Skillz for a weekly rental fee sued several OCSO officers, charging that the armed "inspection" violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The officers sought qualified immunity, arguing that the unconstitutionality of their conduct was not clearly established at the time and that they could not reasonably be expected to be aware of the unconstitutionality of their conduct even if it was in fact clearly established. Invented by the Supreme Court, qualified immunity helps protect police officers and other government officials from being held personally liable for constitutional violations.

What Did the Court Say?

The court denied qualified immunity. Judge Robin Rosenbaum, writing for the panel, determined that the "inspection" more closely resembled a raid. Inspectors had done a routine walkthrough two days earlier and determined that the barbershop and its employees were in compliance with state regulations. There was "no indication that the defendants had any reason to believe that the inspection would be met with violence." Further, the DBPR's implementing rules contemplate only biennial inspections, and no violation warranting a follow-up inspection had occurred. Finally, the statute authorizing administrative inspections of barbershops confers authority to conduct the inspections upon the DBPR alone, not upon police officers. Nonetheless, officers closed off the premises, opened drawers in barbers' workstations, and searched a storage closet in the back of Strictly Skillz. The court concluded: "Such a search . . . bears no resemblance to a routine inspection for barbering licenses."

The court went on to determine that the officers could not plausibly argue that the unconstitutionality of their conduct was not clearly established. The court noted that it had already held not once but *twice* that conducting criminal raids under the pretext of performing an administrative inspection is constitutionally unreasonable—and a previous case even involved the same sheriff's office! The court held that the officers were "not entitled to qualified immunity any more than an officer who enters and searches a person's home without a warrant or an applicable warrant exception."

Why Does It Matter?

Berry shows how courts can prevent the judicially-created doctrine of qualified immunity from morphing into a license to violate constitutional rights with impunity. In determining whether it was reasonable for public officials to believe that their conduct was constitutional, courts must remain grounded in reality and focus on the facts.

Fun Fact

The federal law that allows citizens to sue public officials for constitutional violations, 42 U.S.C. § 1983, unambiguously states that every person acting under color of law who causes a "deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured." But the Supreme Court has created several government-favoring exceptions out of whole cloth. It has held that public officials sued for constitutional violations can raise "qualified immunity" as a defense and thereby escape being held personally liable for damages, even if they violated a person's constitutional rights. Though initially modest in scope, qualified immunity has expanded over the years to the point where the Court has characterized it as protecting "all but the plainly incompetent or those who knowingly violate the law." In the landmark case of *Imbler v. Pachtman* (1976), the Court held that prosecutors are entitled to *absolute* immunity under § 1983. As a result, Innocent victims of even the most egregious prosecutorial misconduct are left without civil redress.

No, the Government Can't Force You to Do Useless Things

"Plaintiffs have successfully refuted every purported rational basis . . . and the Court can discern no other rational bases for the Minimums in light of the facts at hand."

Brantley v. Kuntz

(Western District of Texas, 2015)

What Were the Facts?

When the state of Texas created a "specialty" occupational license for hairbraiders in 2007, it simply wedged that licensing scheme into the state's barbering statutes, even though braiders are not barbers. As a result, would-be hairbraiding instructors had to spend thousands of dollars to create a fully-equipped barber college—with mandatory minimums of 2,000 square feet of floor space, at least ten barber workstations, and five sinks—just to teach the mandatory 35-hour curriculum to qualify for a braiding license.

Isis Brantley is a world-renowned African hairbraider who has made her living braiding hair for the past 32 years. She holds a Texas braiding license. For 20 years, she has offered instruction in African hair braiding to students who wish to learn to braid for a living. Because her salon did not meet Texas' completely arbitrary requirements to become a licensed "barber school," however, Brantley's students could not satisfy the coursework requirement necessary for their individual licensure. Isis brought suit under the Due Process of Law Clause of the 14th Amendment.

What Did the Court Say?

The court invalidated the three mandatory minimums on square footage, the number of workstations, and the quantity of sinks. Judge Sam Sparks declined an invitation by the government to apply a toothless standard of review that "proceed[s] with abstraction for hypothesized ends" and is premised on "post hoc hypothesized facts." The government invoked *Williamson v. Lee Optical* (1955), a rational basis case in which the Supreme Court upheld a law barring people who were not licensed optometrists or ophthalmologists from replacing broken lenses and preventing out-of-state eyeglass retailers from advertising—all in the name of public health and safety, of course. The court instead followed the lead of the Fifth U.S. Circuit Court of Appeals in *St. Joseph Abbey v. Castille* (2013), wherein the court (also applying rational basis review) struck down a Louisiana regulatory scheme targeting casket sales, rejecting Louisiana's "nonsensical explanations" for the scheme after finding them to be factually baseless.

Judge Sparks determined, for instance, that it made no sense for a braiding salon to be forced to install a minimum of five sinks when washing hair is not involved in the braiding process and may not legally be performed by a braider. He further noted that although Texas' scheme explicitly contemplates the existence of braiding schools that teach solely the 35-hour curriculum the state requires of all braiders, the state could not find a single braiding school that had been able to meet its onerous requirements.

Plaintiff Isis Brantley, owner of the Institute for Ancestral Braiding

Why Does It Matter?

All too often, the rational basis test is not a meaningful test of anything but judicial willingness to rationalize the government's actions. In *Brantley*, the court engaged in an inquiry that was *truly* rational—grounded in record evidence and focused on determining the legitimacy of the government's actual ends.

Protecting public health and safety falls within the scope of the states' legitimate police powers. But not every regulation issued in the name of public health and safety plausibly furthers that legitimate end. Here, the court scrutinized how the barber school licensing scheme was applied to the way hairbraiding schools actually operated and found an irrational mismatch. Such judicial engagement is necessary if the rational basis test is to act as any meaningful check on unconstitutional government action.

Fun Fact

Isis would have had to spend about $25,000 to comply with the licensing scheme and transform her natural hair salon into a barber college.

Don't Thread On Me

"Laws that impinge your constitutionally protected right to earn an honest living must not be preposterous."

Patel v. Texas Department of Licensing and Regulation

(Supreme Court of Texas, 2015)

What Were the Facts?

Eyebrow threading, a traditional South Asian practice, consists only in using cotton thread to remove eyebrow hair. Texas arbitrarily roped eyebrow threaders into the same licensing requirements that are applied to conventional cosmetologists who perform a wide variety of services such as waxing, makeup application and chemical peels.

The Texas Department of Licensing and Regulation issued $2,000 penalties to threaders across the state and ordered them to quit their jobs until they completed 750 hours of coursework (not a second of which is devoted to eyebrow threading) in private beauty schools, costing between $7,000 and $22,000, and passed two examinations (neither of which tests eyebrow threading).

In 2009, threaders Ashish Patel, Anverali Satani, Nazira Momin, Minaz Chamadia and Vijay Yogi challenged the requirements under the Due Course of Law Clause of the Texas Constitution. Like the Due Process of Law Clauses of the federal Constitution, Texas' Due Course of Law Clause prohibits deprivations of liberty that do not serve any legitimate, public-spirited end of government.

What Did the Court Say?

The court struck down the 750-hours requirement. Justice Phil Johnson, writing for the majority, drew from the history of the state's Due Course of Law Clause, which took its current form in 1875—at a time when the U.S. Supreme Court was reviewing legislation under the 14th Amendment's Due Process of Law Clause for a "real or substantial" relationship to public health and safety. From this history, the Texas Supreme Court determined that reviewing courts must "consider the whole record, including evidence offered by the parties" in evaluating laws rather than simply taking the government's professions of good intentions at face value.

The court went on to evaluate the 750-hour requirement, emphasizing that, by the state's own concession, "as many as 320 of the curriculum hours are not related to activities threaders actually perform." Breaking this down, the court explained that threaders are required to undergo "the equivalent of eight 40-hour weeks of training unrelated to health and safety as applied to threading." Combined with the fact that would-be threaders have to pay for the training and at the same time lose the opportunity to make money threading eyebrows, the court concluded that the regulations imposed an unconstitutionally oppressive burden.

Plaintiff Ashish Patel, owner of Perfect Browz

Why Does It Matter?

Thanks to this decision, both federal courts *and* state courts in Texas are committed to judicial engagement in economic liberty cases. Two years ago, in *St. Joseph Abbey v. Castille* (2013), the Fifth U.S. Circuit Court of Appeals (which also has jurisdiction over federal district courts in Texas) struck down a regulatory scheme targeting casket sales in Louisiana, rejecting the state's "nonsensical explanations" for the scheme after finding them to be factually baseless. In *Kuntz v. Brantley* [see p. 22], a federal district court in Texas, following *St. Joseph Abbey*, struck down a similarly nonsensical licensing scheme that required African hairbraiders to spend thousands of hours taking useless classes and thousands of dollars on useless equipment before they would be permitted to teach hairbraiding at their own schools.

As Justice Don Willett put it in an erudite, inspiring concurrence, "Laws that impinge your constitutionally protected right to earn an honest living must not be preposterous." Texans are now doubly blessed to have state courts and federal courts committed to ensuring that preposterous laws do not deprive them of that precious right.

Fun Fact

Justice Don Willett's 39-page concurrence provides a bracing affirmation of our Founding principles and a clarion call for judicial engagement in securing the right to earn an honest living. It actually includes the line, "I support the Court's 'Don't Thread on Me' approach." Don't miss it.

All too often, we see the judiciary acting less as a co-equal branch than a handmaiden to the political branches. Experience has shown that reflexive "judicial restraint" gives rise to unrestrained government—and has allowed government at all levels to impede Americans' peaceful pursuit of happiness for no constitutionally valid reason. These are case studies in what judges should *not* do.

Some Laws are More Equal than Others

"[T]he [Obamacare] cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."

King v. Burwell

(U.S. Supreme Court, 2015)

What Were the Facts?

Wishing states to set up their own health insurance exchanges but lacking constitutional authority to force them to do so, Congress designed the Affordable Care Act (ACA) to authorize tax credits to help qualifying individuals purchase health insurance "through an Exchange established by the State." As a failsafe, the ACA required the Secretary of Health and Human Services to create federally-operated exchanges in states that declined to set up their own. "State" is defined in the ACA to mean "each of the 50 States and the District of Columbia." When, contrary to expectations, 34 states declined to set up their own exchanges, the Internal Revenue Service (IRS) interpreted the ACA to authorize the subsidy for insurance purchased on exchanges established by the federal government as well as those established by the states—subjecting millions to additional taxes, thanks to the ACA's individual and employer mandates. Individuals and employers who would face additional taxes challenged the IRS' interpretation.

What Did the Court Say?

The Court determined that the ACA authorized the subsidies. Chief Justice John Roberts, writing for the majority, departed from "what would otherwise be the most natural reading of the pertinent statutory phrase," emphasizing "inartful drafting" throughout the statute (which the Court attributed to the fact that the legislation had been rushed through Congress) to justify the departure. Concluding that the relevant text was ambiguous, the Court looked to the "broader structure of the Act." The Court ultimately decided that Congress could not have meant for tax credits to be unavailable given that the ACA was designed to "improve health insurance markets, not to destroy them."

What Went Wrong?

As Justice Antonin Scalia explained in dissent, "It is up to Congress to design laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility." The Court's job is not to save Congress from the political consequences of enacting poorly designed laws but to determine the meaning of and give effect to the law that Congress enacts. Despite professing deference to Congress, the Court in fact legislated from the bench, rewriting the ACA —for the second time—in order to preserve it.

The majority and the dissent agreed that the pertinent statutory text must be read in the context of, not in isolation from, the rest of the law. But reading the rest of the law reveals the weakness of

the majority's analysis. Surveying the statute, Justice Scalia noted that the majority's interpretation "clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say 'Exchange' and those that say 'Exchange established by the State,' [and] gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes," besides clashing with the ordinary meaning of the words "Established by the *State*." Further, Congress knew how to equate two different types of Exchanges when it wanted to do so, as demonstrated by the fact that it did so elsewhere in the statute.

Scalia concluded: "[The ACA] cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites." The Court's abdication of judicial responsibility in *King* discloses the urgent need for judges to impartially evaluate the government's actions rather than finding a way to facilitate them out of a misplaced sense of institutional responsibility.

Fun Fact

In his opinion for the Court in *NFIB v. Sebelius* (2012), upholding the ACA against a constitutional challenge, Chief Justice Roberts also departed from "the most natural interpretation" of the law in order to ensure a government-favoring result.

Ignorance of the Law is No Excuse—Unless You've Got a Badge

"There is nothing in our case law requiring us to hold that a reasonable mistake of law can justify a seizure under the Fourth Amendment, and quite a bit suggesting just the opposite. I also see nothing to be gained from such a holding, and much to be lost."

Heien v. North Carolina

(U.S. Supreme Court, 2014)

What Were the Facts?

While following a suspicious vehicle, Sergeant Matt Darisse noticed that only one of the vehicle's brake lights was working, and pulled the driver, Maynor Vasquez, over. In the course of issuing a warning ticket, Darisse noticed that Vasquez seemed "nervous" and both Vasquez and passenger Nicholas Heien (who was in the rear seat) gave "inconsistent" answers to his questions. Heien, the car's owner, gave Darisse consent to search the vehicle. Darisse found cocaine, and Heien was arrested and charged with attempted drug trafficking. The trial court denied Heien's motion to suppress the seized evidence on Fourth Amendment grounds, concluding that the vehicle's faulty brake light gave Darisse reasonable suspicion to initiate the stop. But the relevant code provision, which requires that a car be "equipped with a stop lamp," requires only a single lamp; Heien's vehicle had a single, working lamp, thus bringing it into compliance with the provision. The State Supreme Court nevertheless held that Darisse's mistaken understanding of the law was reasonable, and thus the stop was valid.

What Did the Court Say?

The Court held that there was reasonable suspicion justifying the stop. "To be reasonable is not to be perfect," Chief Justice John Roberts explained, citing precedent for the proposition that "searches and seizures based on mistakes of fact can be reasonable." As "reasonable men make mistakes of law, too," the Court concluded that "such mistakes are no less compatible with the concept of reasonable suspicion." In this case, because the provision was confusing and had never been construed by state appellate courts, the Court found that Sergeant Darisse had made an "objectively reasonable" mistake.

What Went Wrong?

In a vigorous dissent, Justice Sonia Sotomayor took the majority to task for "further eroding the Fourth Amendment's protection of civil liberties in a context where that protection has already been worn down."

Police cannot be infallible and must make quick decisions based on the factual information available to them. Thus, the Supreme Court has held that to satisfy the Fourth Amendment's reasonableness requirement, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." The Court has also recognized that police officers have the expertise to "dra[w] inferences and mak[e] deductions . . . that might well elude an untrained

person," and has extended leeway to officers' factual determinations on that basis.

Even if such leeway concerning factual determinations were justified, however, when it comes to the content of the law, the situation is very different. As Justice Sotomayor explained, "'the notion that the law is definite and knowable' sits at the foundation of our legal system" and "courts, not officers . . . are in the best position to interpret the laws." The considerations that have been used to justify deference to police officers' factual conclusions do not apply to their conclusions of law.

Finally, the majority's decision discourages legislative clarification of the law and makes innocent citizens bear the costs of legal ambiguity. So long as officers can cast their interpretations of the law as reasonable, courts need not determine what the actual meaning of the law is. The result: police and citizens alike lack clear understanding of what conduct may lead to a constitutionally permissible traffic stop. The rule of law as a stable source of commonly-understood norms of conduct suffers, and so do we.

Fun Fact

As Justice Sotomayor noted, a holding that an officer who made a mistake about the law has nonetheless violated the Fourth Amendment would not necessarily discourage officers from vigilantly enforcing the law. If the mistake were made in good faith, the evidence would not be excluded in a subsequent criminal trial. Further, thanks to the judge-made doctrine of qualified immunity, officers have a defense against civil suits arising from "reasonable but mistaken judgments" about open legal questions.

Anticompetitive Meat Mandate Labelled Constitutional

"[T]oday this court offers to facilitate blatant rent-seeking behavior by announcing its willingness to intuit the government's unspoken agendas . . . . By substantiating the government's nebulous interests, the court essentially permits the government to commandeer the speech of others."

American Meat Institute v. USDA

(D.C. Circuit Court of Appeals, 2014)

What Were the Facts?

A regulation issued by the Secretary of Agriculture requires country-of-origin labelling for meat and other food products. Livestock producers, feedlot operators and meat packers (together, the AMI) brought suit, arguing that these disclosure mandates constitute compelled speech and violate the First Amendment.

What Did the Court Say?

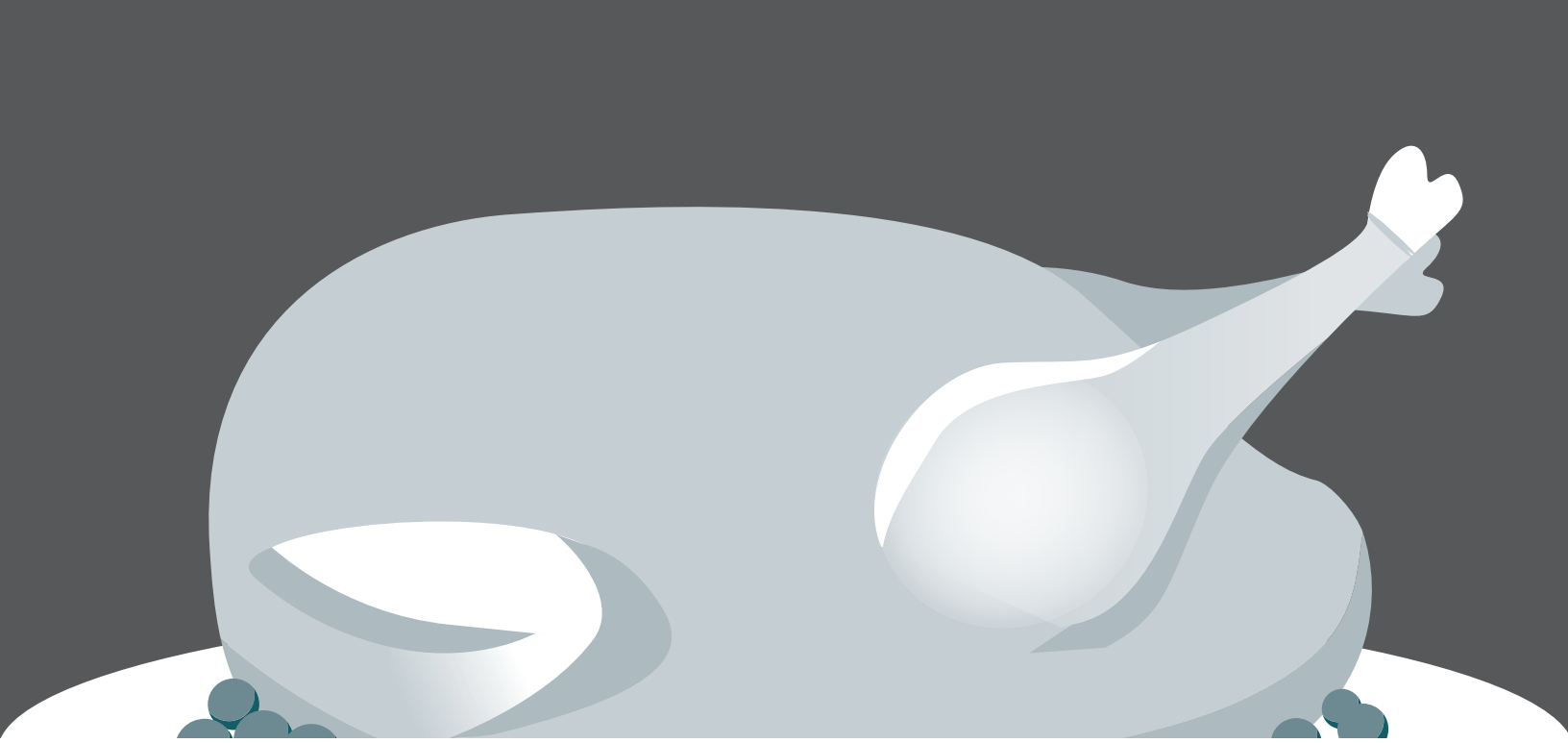
The court upheld the labelling requirements. It began by reading *Zauderer v. Office of Disciplinary Counsel* (1985) to hold that compelling companies to provide "purely factual and uncontroversial information to consumers" triggers only minimal scrutiny—even when such compelled disclosure is not "reasonably related to the State's interest in preventing deception of consumers," as was the case in *Zauderer*. Against the argument that the government did not have an interest in country-of-origin labelling, the majority cited the "context" and "long history of country-of-origin disclosures," the "demonstrated consumer interest" in such labelling and "the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak." The court did not require any proof of the mandate's effectiveness in actually preventing any particular harms; instead, it looked only to whether the mandate conveyed country-of-origin information to customers.

What Went Wrong?

In dissent, Judge Janice Rogers Brown criticized the majority opinion for misinterpreting *Zauderer* and simply rationalizing the government's actions rather than seeking to determine its true ends.

As Judge Brown explained in meticulous detail, the Supreme Court in commercial speech cases has held firm to the principle that "an adult human being, as a free moral agent, cannot be coerced without a good reason." Thus, in *Zauderer*, it granted protection to commercial speech *without* precluding regulation of false or deceptive advertising (deemed a "good reason"). But the AMI majority misunderstood the principle that the *Zauderer* Court was honoring—and thus proceeded to dishonor it.

Judge Brown pointed out that the majority ignored the record and ultimately upheld the government's actions on the basis of justifications that the government explicitly disavowed. For example, the majority cited health concerns as a justification for the labelling scheme even though "the government failed to raise or support any motive in consumer health and safety," and had, "in fact, consistently eschewed that interest as supporting the rule."



Ultimately, she found that none of the rationales articulated by the majority had any basis in credible evidence, and concluded that the scheme was in fact designed only to undermine the profits of those American businesses who rely on imported meat to serve their customers. Warned Judge Brown, "[T]he victors today will be the victims tomorrow."

Fun Fact

The Supreme Court first held that commercial speech is protected by the First Amendment in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976). The case was argued by Public Citizen Litigation Group, the litigating arm of a liberal consumer-rights advocacy group founded by Ralph Nader.

Nothing to Smile About

"The majority . . . essentially renders rational basis review a nullity in the context of economic regulation . . . . [I]t seems that we are not applying any review, but only disingenuously repeating a shibboleth."

Sensational Smiles, LLC v. Connecticut Dental Board

(Second U.S. Circuit Court of Appeals, 2015)

What Were the Facts?

In 2011, the Connecticut Dental Commission issued a ruling that only licensed dentists were permitted to provide certain teeth-whitening services. Non-dentist teeth whiteners were threatened with up to $25,000 in fines and five years in jail per customer. Tasos Kariofyllis and Steve Barraco, co-owners of Sensational Smiles, brought suit, arguing that this prohibition (like similar prohibitions in other states) did nothing to promote the state's legitimate interests in public health and safety, but rather is designed solely to protect dentists from having to compete with cheaper, more convenient non-dentist teeth whiteners. After the lawsuit was filed, the Dental Commission repeatedly narrowed its original ruling until only one prohibition applied to Sensational Smiles—a rule stating that only licensed dentists can shine an LED lamp into the mouth of a customer during a teeth-whitening procedure. These lights are no more powerful than a household flashlight, and the Commission conceded that it is perfectly legal to make these lights available for customers to position in front of their own mouths.

What did the Court Say?

The Second Circuit upheld the rule. Writing for himself and another judge on the Second Circuit panel, Judge Guido Calabresi conceded that the challengers "forcefully argue[d] that the true purpose of the Commission's LED restriction is to protect the monopoly on dental services enjoyed by licensed dentists." However, he concluded that a "simple preference for dentists over teeth-whiteners" would be a constitutionally-legitimate justification, even if the challenged rule did nothing to—and was not designed to—protect public health. "[E]ven if the only conceivable reason for the LED restriction was to shield licensed dentists from competition," explained Calabresi, the rule would stand.

What Went Wrong?

Judicial review of economic regulations is an empty charade under the Second Circuit's approach. As recited by Judge Calabresi, the default standard of review in constitutional cases—the so-called "rational basis test"—requires judges to determine whether there is a "rational relationship between. . . legislation and a legitimate legislative purpose." The test presupposes that some government purposes are not legitimate. As Judge Christopher Droney observed in his concurrence, to say that the court is inquiring into whether the government is pursuing a "legitimate" end is "disingenuous" if *any* reason—even one that is indistinguishable from pure political will—is sufficient.

There is a silver lining to this otherwise appalling decision. The Second Circuit's endorsement of naked economic protectionism deepens a "circuit split" ripe for Supreme Court review, touching upon a question of fundamental importance to ordinary Americans across the nation: whether their right to earn an honest living can be extinguished by entrenched incumbents whose lobbying power they cannot match. The Second Circuit followed the lead of the Tenth Circuit in *Powers v. Harris* (2004), which concluded that a state could impose arbitrary and irrelevant credentialing requirements on casket retailers for the sole purpose of protecting state-licensed funeral directors from competition. But in *St. Joseph Abbey v. Castille* (2013), *Craigmiles v. Giles* (2002) and *Merrifield v. Lockyer* (2008), the Fifth, Sixth and Ninth U.S. Circuit Courts of Appeals rejected the notion that naked economic protectionism is constitutionally legitimate.

Fun Fact

Even in its most deferential rational basis cases, the Supreme Court has never endorsed naked preferences for the politically powerful. It has always required some assertion of a public-spirited end for burdening the right to earn a living.

Insisting Upon Your Fourth Amendment Rights Is "Unorthodox"

"Government officials, like the defendants in this case, often contend that failure to conform is insubordination, but it is the courts that must draw the line between authority and rights of the individual."

Rynearson v. United States

(Fifth U.S. Circuit Court of Appeals, 2015)

What Were the Facts?

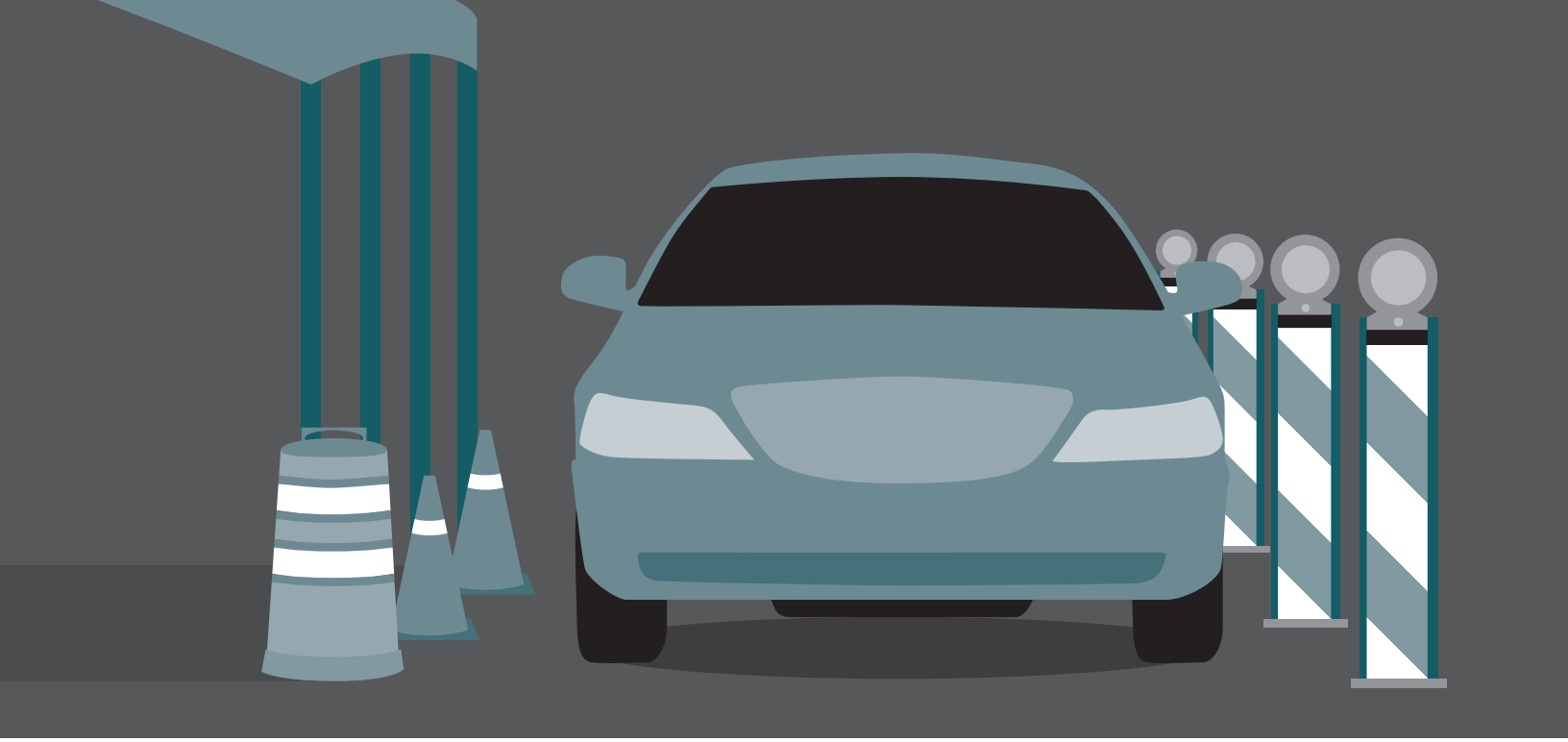
Richard Rynearson, a major in the United States Air Force, was stopped at a fixed interior immigration checkpoint in Uvalde County, Texas. When border patrol agents requested his identification, he held his driver's license and military identification up to the driver's side window where they could be read from the outside of the vehicle. The agents waited until approximately eleven minutes into the detention to inform Rynearson that those identification cards "don't mean anything." At that point, Rynearson immediately offered to show the agents his official and personal U.S. passports. The agents ignored the offer and, for the first time, asked Rynearson whether he was a U.S. citizen. Rynearson answered yes, but he was not then permitted to leave and was never asked to show his passport. When the agents asked him to get out of the car, he said that he would not do so unless the agents stated their reasonable suspicions. He was then made to wait while officials placed phone calls to Rynearson's base. In total, 34 minutes transpired. Rynearson sued the agents for violating his Fourth Amendment rights by detaining him longer than reasonably necessary to investigate his citizenship status. The agents raised the defense of qualified immunity, arguing that their actions did not violate clearly-established law.

What Did the Court Say?

The court granted the agents qualified immunity. It began by stating that "[a] routine interior immigration checkpoint stop conducted without reasonable suspicion does not violate the Fourth Amendment." It noted that, although the Supreme Court has held that officers cannot stop and detain people on the street without reasonable suspicion, the Court has granted agents at immigration checkpoints the right to stop and question a vehicle's occupants regarding their citizenship status without reasonable suspicion of any wrongdoing. There being no clearly-established right to refuse cooperation at checkpoints, the court concluded that the agents had "at worst, made reasonable but mistaken judgments when presented with an unusually uncooperative person" while "determining how to respond to his unorthodox tactics." The court did not reach the issue of whether "Rynearson actually had some limited Fourth Amendment right to refuse to cooperate."

What Went Wrong?

The majority glossed over facts that indicated that Ryerson had been unreasonably detained beyond the time necessary to determine his citizenship. Instead, it focused only on the fact that the initial stop was constitutional. Rynearson gave



proof of citizenship upon request and only became "uncooperative" when he was asked to step out of the vehicle. Even if border agents have the right to stop and question vehicle occupants without reasonable suspicion of wrongdoing, it does not follow that they can detain them beyond that time.

The Fifth Circuit has previously held that the permissible duration of an immigration stop is the "time reasonably necessary to determine the citizenship status of the persons stopped." It has also held that "when officers detain travelers after the legitimate justification for a stop has ended, the continued detention is unreasonable." From reading the majority opinion, one would think that this case law did not exist at all.

Looking at the facts, it is difficult to escape the conclusion that Rynearson was unreasonably detained in retaliation for his "unorthodox tactics." His detention time lasted approximately 34 minutes—and 23 minutes after he had produced all required documents. This delay occurred despite the fact that one of the agents stated in a declaration that such records checks generally take a "couple of minutes." As Judge Jennifer Elrod pointed out in dissent, "Firm assertions of one's rights are far from unorthodox in a Republic that insists that constitutional rights are worth insisting upon and that tasks the courts with protecting those rights." Failure to focus on the facts led this court to fail in that task.

Fun Fact

In *United States v. Martinez-Fuerte* (1976), the Supreme Court held that permanent or fixed checkpoints on public highways leading to or away from the Mexican border did not violate the Fourth Amendment, emphasizing that such stops "should not be frightening or offensive because of their public and relatively routine nature." Justice William Brennan, dissenting, observed, "To be singled out for referral and to be detained and interrogated must be upsetting to any motorist. One wonders what actual experience supports my Brethren's conclusion."

Thuggery Trumps Free Speech

"[The majority] provides a blueprint for the next police force that wants to silence speech without having to go through the burdensome process of law enforcement."

Bible Believers v. Wayne County

(Sixth U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

The Bible Believers, a group of Christian Evangelists, entered the Arab International Festival in Dearborn, Mich., bearing strongly-worded t-shirts and banners critical of Islam and preaching sermons using a megaphone. They were pelted with rocks, plastic bottles, garbage and a milk crate. The police insisted that the Bible Believers leave lest someone be injured, and the Bible Believers were told that they would be cited if they refused. The Bible Believers brought suit, charging violations of their First Amendment rights to free speech and free exercise of religion, as well as violations of the Equal Protection Clause of the 14th Amendment.

What Did the Court Say?

The court rejected the Bible Believers' claims. Gesturing vaguely at the Bible Believers' "conduct" and "extremely aggressive and offensive messages," the majority found that they had incited the crowd to violence. The court concluded that the officers had a reasonable, good-faith belief that the threat of violence was too high because the Bible Believers had already been subjected to actual violence. Thus, the court concluded that threatening to cite them for disorderly conduct if they refused to leave was appropriate.

What Went Wrong?

The majority misstated First Amendment law and slanted the factual record to legitimate a "heckler's veto"—the suppression of constitutionally-protected speech, justified by the violence or threatened violence of those who seek to suppress it. The Bible Believers' speech did not fall into any categories of "unprotected speech," being neither unlawful incitement nor fighting words. Thus, the officers should have made a good-faith effort to protect the speakers rather than simply threatening to arrest them if they did not leave.

As the Supreme Court held in *Brandenburg v. Ohio* (1969), speech cannot constitute unlawful incitement unless the speaker intends the speech to produce imminent lawlessness and the speech is likely to produce that result. The Bible Believers did not advocate violence, they did not instruct anyone on how to break the law, and they did not ask anyone to help them break the law.

Nor could the Bible Believers' speech be considered fighting words. In *Virginia v. Black* (2003), the Supreme Court defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." The Sixth Circuit, following this precedent, defined fighting words solely by their impact on the "average person." The Bible Believers' speech was not "inherently likely" to provoke an "aver-

age person" to respond with violence—defining "average person" down to the "average adherent to a given religion" would allow the state to punish people for blasphemous speech.

Finally, as Judge Eric Clay made plain in dissent, the majority's conclusion that the officers behaved "reasonably and with objective good faith" flew in the face of the facts. The majority accepted the city's claim that it did not have enough officers at the Festival to provide *any* security, even though the city claimed that it had dedicated more police to the Festival than it did to a presidential visit or to the World Series. Further, the video of the event showed that the officers only stepped in to inform the Bible Believers that the police were powerless and that the Bible Believers needed to leave under threat of arrest. The dissent thus concluded: "This is not good faith—it is manufacturing a crisis as an excuse to crack down on those exercising their First Amendment rights."

Fun Fact

Judge Clay observed that law enforcement officers have a track record of chilling the free speech rights of proselytizers at the Arab International Festival. In 2009, Dearborn police instituted a leafleting restriction for the Festival, permitting leafleting only from a stationary booth and not while walking around the Festival. In *Saieg v. City of Dearborn* (2011), a divided Sixth Circuit panel held that the restriction violated the First Amendment.

Speech *Isn't* Speech

"This conclusion is alien to our First Amendment jurisprudence."

Norton v. City of Springfield

(Seventh U.S. Circuit Court of Appeals, 2014)

What Were The Facts?

The City of Springfield prohibits panhandling in its "downtown historic district." The ordinance defines panhandling as an oral request for an immediate donation of money. Signs requesting money are allowed; so are oral pleas to send money later. Individuals who received citations for violating the ordinance brought suit, arguing that the ordinance is a content-based restriction on speech and violates the First Amendment.

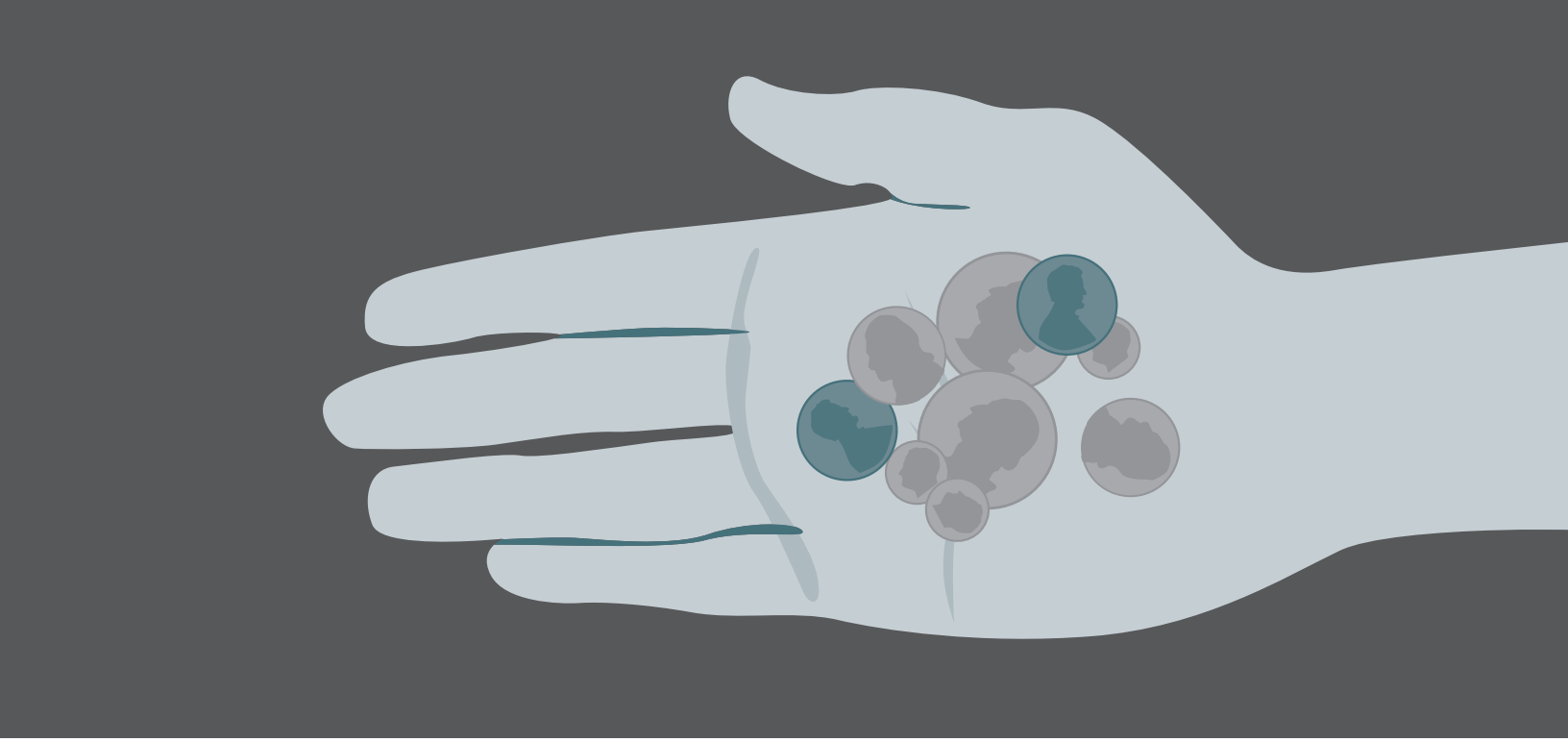
What Did the Court Say?

The court upheld the ordinance. Judge Frank Easterbrook, writing for a divided panel, determined that the ordinance was not content based and therefore the court did not apply strict scrutiny. The court denied that all laws that classify speech based on its content and impose content-based restrictions on speech demand strict scrutiny. It identified two kinds of content-based regulations: "regulation that restricts speech because of the ideas it conveys" and "regulation that restricts speech because the government disapproves of its message." The court found that this regulation did not qualify: "'Give me money right now' does not express an idea or message about politics, the arts, or any other topic on which the government may seek to throttle expression in order to protect itself or a favored group of speakers." Because it considered that the city had not "meddled with the marketplace of ideas," the court concluded that the city's actions were permissible.

What Went Wrong?

By focusing on whether the ordinance was designed to keep a viewpoint out of the marketplace of ideas, the majority misapplied the Supreme Court's content-based regulation jurisprudence.

As Judge Daniel Manion explained in dissent, a regulation is content based "if it require[s] enforcement authorities to examine the content of the message conveyed to determine whether a violation has occurred." In this case, a police officer would have to listen to what the speaker is saying—that is, to the *content* of the speaker's message—in order to determine whether the speaker has violated the ordinance. A request for a charitable donation might be impermissible, but a request for a commercial transaction would be allowed. Without listening to and understanding the speech, the officer would not be able to reach a conclusion. It makes no sense to distinguish, as the majority did, between what a speaker says and the speaker's message when both equally concern the content of the speech.



Fun Fact

In *Reed v. Town of Gilbert* [p. 12], the Supreme Court made plain that ordinances that either facially classify speech on the basis of its communicative content or have the purpose of targeting speech based on its communicative content must survive strict scrutiny. The Seventh Circuit subsequently accepted a petition for rehearing in *Norton* and a unanimous panel invalidated the Springfield ordinance. Judge Easterbrook, writing again for the panel, recognized the broad scope of *Reed*'s holding: "Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."

Second-Class Second Amendment?

"The court is not empowered to uphold a regulation as constitutional based solely on its ability to divine public sentiment about the matter."

Friedman v. City of Highland Park

(Seventh U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

The City of Highland Park has an ordinance that prohibits the possession of "assault weapons" and large-capacity magazines (those that can accept more than ten rounds). The ordinance defines an assault weapon as any semi-automatic gun that can accept a large-capacity magazine and has one of five other features. Arie Friedman, a resident of Highland Park who keeps an AR rifle and large-capacity weapons in his home for the defense of his family, challenged the ordinance as a violation of the Second Amendment.

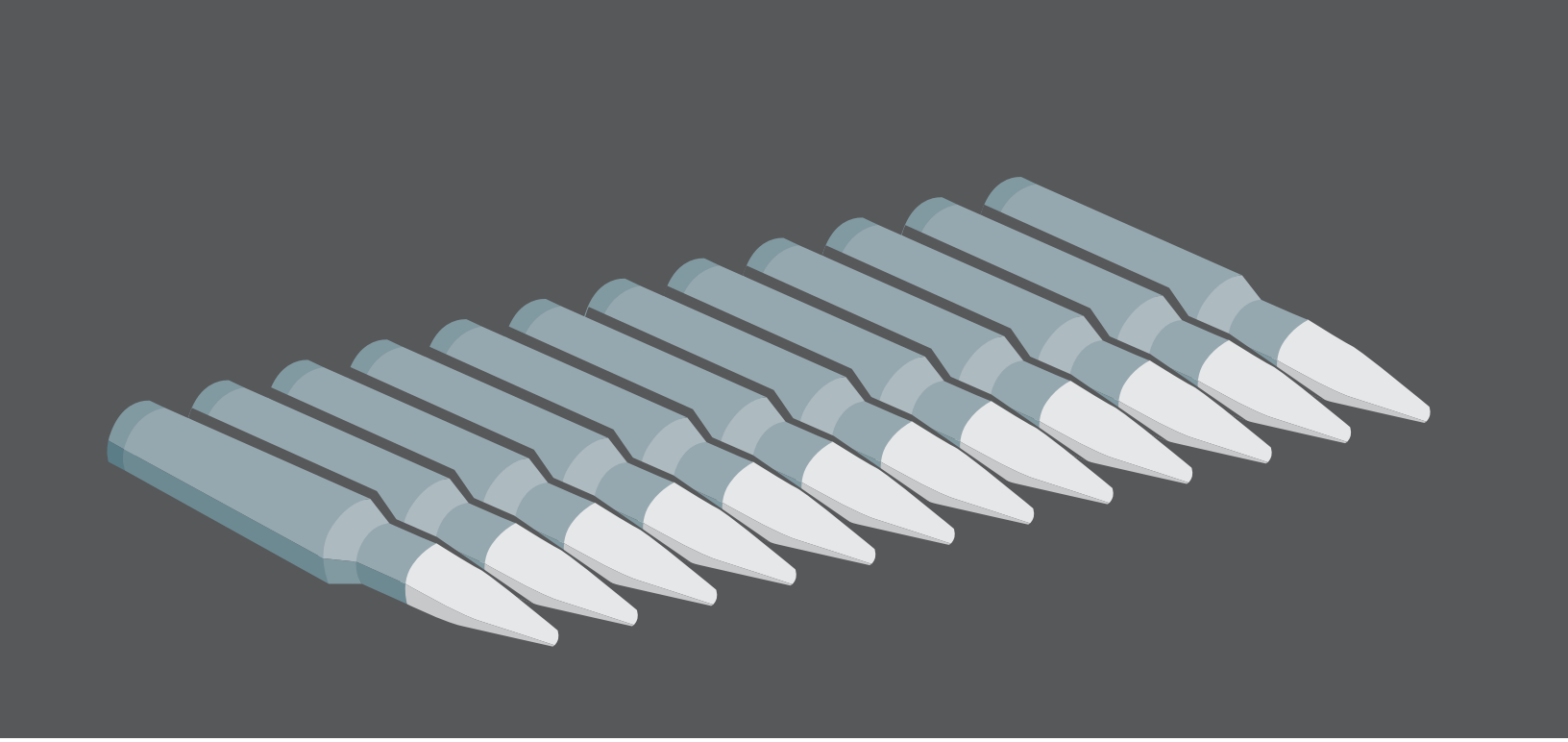
What Did the Court Say?

The court upheld the ordinance. Despite acknowledging that "assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers," Judge Frank Easterbrook, writing for a divided panel, determined that this city's ban "leaves residents with many self-defense options." The court reasoned that, because "assault weapons with large-capacity magazines can fire more shots, faster," they can thus be "more dangerous in the aggregate." Even if banning assault weapons "won't eliminate gun violence in Highland Park," the court speculated that it "may reduce the overall dangerousness of crime that does occur." And even if it did not do so, such a ban may "increase the public's sense of safety." The court gestured at the "problems that would be created by treating such empirical issues as for the judiciary rather than the legislature," emphasizing the "central role of representative democracy" which, the court asserted, is "no less part of the Constitution than is the Second Amendment."

What Went Wrong?

The majority essentially ignored central features of the Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (2008), leaving a right of central importance to ordinary Americans with no meaningful judicial protection. In both cases, the Court explicitly rejected the use of ad hoc "interest-balancing" by courts whenever the right to keep arms in one's home for self-defense is burdened. *Heller* in particular made plain that courts are to engage in exacting review that "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

The majority abdicated its truth-seeking responsibility in an area of law in which the Supreme Court has specifically instructed judges to fulfill that responsibility. Engaged judging requires a genuine effort to determine whether the government's actions are supported by reliable evidence. Here,



the court did not require the government to justify its claims with evidence—in fact, it disclaimed the need for doing so, concluding that the ban conferred a "substantial benefit" because it might "increase the public's sense of safety."

As Judge Daniel Manion noted in dissent, "The right to self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself." In *Friedman*, the Seventh Circuit allowed Highland Park to trample upon this vital right in defiance of controlling precedent.

Fun Fact

Judge Easterbrook's statement that assault weapons are "the weapon of choice in mass shootings" is not accurate. As of this date, the vast majority of mass shootings since the Columbine shooting in 1999 have involved handguns.

If He's Still Moving, It's Not a "Seizure"

United States v. Beamon
(10th U.S. Circuit Court of Appeals, 2014)

What Were the Facts?

A DEA agent and a police officer boarded a train to speak to passengers and to look for signs of drug trafficking. They interviewed George Beamon and asked to search his bag. He refused their request and attempted to leave. When he did, the agent grabbed him, and both men fell down a stairwell, landing next to each other. During the scuffle, the strap of Beamon's backpack became wrapped around the agent's leg. Beamon grabbed a vacuum-sealed envelope from the backpack and continued to flee. The agent drew his gun, ordered Beamon to stop, and arrested him. The envelope contained cocaine. Before his trial for drug crimes, Beamon sought to have the envelope suppressed on the grounds that he had been seized without reasonable suspicion in violation of the Fourth Amendment.

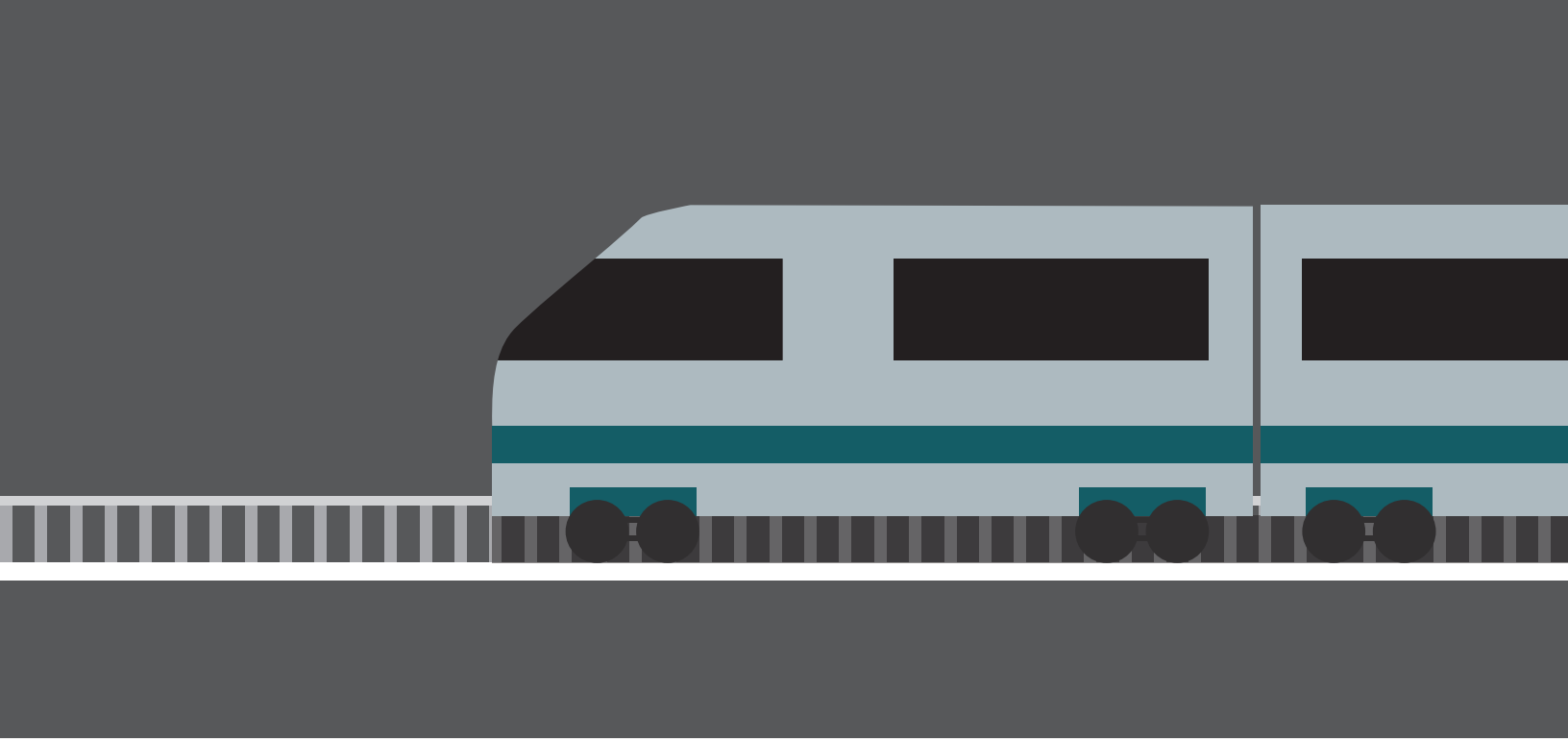
What Did the Court Say?

The court allowed the evidence. The court concluded that Beamon had not been seized until after he had actually surrendered to the DEA agent. It relied upon *California v. Hodari D.* (1991), in which the Supreme Court held that a show of authority with which the suspect does not comply and which consequently does not restrain the suspect is merely an attempted seizure and does not implicate the Fourth Amendment. Although the court acknowledged that the DEA agent had "exercised physical force" when he first grabbed Beamon, it reasoned that because Beamon did not submit to the agent's authority and his movement was not terminated, he had not been seized. The court explained, "A momentary seizure requires some brief submission to police authority or termination of movement, neither of which occurred here until Mr. Beamon surrendered to Agent Small on the train platform."

What Went Wrong?

The court's narrow definition of "seizure" is unpersuasive and creates perverse incentives for police officers. If people either needed to submit to police or have their movement terminated before being considered seized, the Fourth Amendment would offer little protection against the use of force by police. As the Court in *Hodari* stated, "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." Certainly, Beamon was subject to "a laying on of hands or application of physical force" when the DEA agent first grabbed him.

In any future case, a law enforcement officer can rest assured that he may, on the basis of a hunch, tackle someone whom he suspects of possessing



drugs, confident that, so long as that person continues to resist, he has not yet been "seized." By then, of course, the officer will have his probable cause. Officers thus have an incentive to initiate force rather than go through the trouble of getting either consent or a warrant.

Fun Fact

In *Florida v. Bostick* (1991), the Supreme Court held that suspicionless police sweeps of buses in interstate or intrastate travel do not amount to Fourth Amendment seizures, reasoning that passengers approached during such sweeps "would feel free to decline the officers' requests or otherwise terminate the encounter." Stressing the limited options available to travelers who are approached by police—refusing to answer (and potentially arousing suspicion), cooperating or exiting their buses and possibly being stranded in an unfamiliar location—Justice Thurgood Marshall, in dissent, expressed incredulity at the majority's conclusion: "I agree that the appropriate question is whether a passenger who is approached during such a sweep 'would feel free to decline the officers' requests or otherwise terminate the encounter.' What I cannot understand is how the majority can possibly suggest an affirmative answer to this question."

Shut Up, Doc

"[The majority] diminishes the First Amendment protection afforded to professionals by permitting the State to silence professionals on whatever topic the State sees fit. That is not what the Constitution commands."

Wollschlager v. Governor of Florida

(Eleventh U.S. Circuit Court of Appeals, 2015)

What Were the Facts?

Florida's Firearm Owners Privacy Act threatens doctors with professional discipline if they ask patients whether they own guns or record the resulting information in a patient's file when doing so is not "relevant" to the patient's medical care. Physicians and physician advocacy groups challenged the law, arguing that the law violates physicians' rights to express their views about firearms in violation of the First and 14th Amendments.

What Did the Court Say?

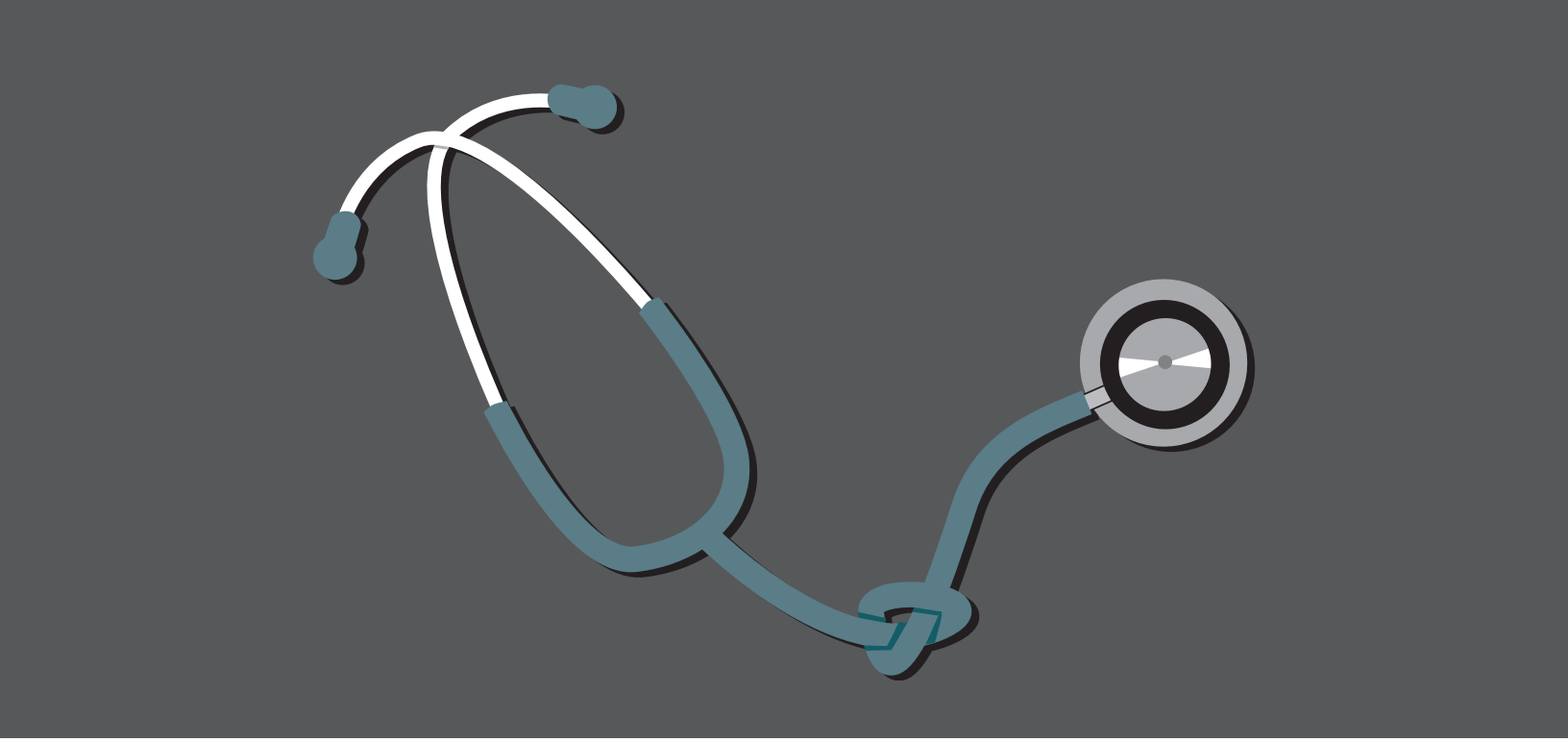
The court upheld the Act. Although the Supreme Court has held that laws that restrict speech based on its communicative content or on the basis of the speaker's status must satisfy strict scrutiny, the panel majority applied intermediate scrutiny, noting that Florida's stated interests have "deep regulatory roots" and that "[s]tates commonly enact laws touching on what professionals may say." Pointing to "a number of anecdotes and references to constituent complaints regarding unwelcome questioning about firearm ownership from physicians" and emphasizing the "highly disparate power balance of the physician-patient relationship," the majority went on to conclude that the laws "directly advance[d] the State's substantial interest in regulating the medical profession to prevent harmful or ineffective medical care and safeguard patient privacy."

What Went Wrong?

The majority not only failed to apply the correct standard of review but misapplied the standard of review that it settled upon.

Because the law at issue directly prohibited firearm-related inquiries and record keeping, as well as persistent discussions on the topic, it targeted speech with a particular content and disfavored specific speakers, namely, doctors. Accordingly, the court should have applied strict scrutiny and required the government to demonstrate, with reliable evidence, that the law served a compelling interest and was narrowly tailored to further that interest.

But the law at issue in *Wollschlager* should not have survived intermediate scrutiny. In *Florida Bar v. Went For It* (1995), the Supreme Court made plain that in order for a restriction on speech to survive intermediate scrutiny, the government may not rely on "mere speculation or conjecture." Instead, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." In a thorough



and well-reasoned dissent, Judge Charles Wilson explained that the state had offered no reliable evidence that any genuine threats to privacy rights, rights to be free from harassment or access to medical care actually existed; or that the laws at issue materially advanced the state's interest in protecting citizens against those threats.

The poor fit between what the law actually did and the state's asserted interests suggested that Florida's true end was "silencing doctors who advance an anti-firearm—not an anti-firearm owner—viewpoint with which the State disagrees." Silencing disfavored speech is not a legitimate end of government, let alone a compelling interest.

Fun Fact

Although both the majority in *Wollschlager* and the Third Circuit in *King v. Governor of the State of New Jersey* [p. 16] claimed to be applying intermediate scrutiny and concluded that the respective restrictions on occupational speech pass constitutional muster, the contrast between the two courts' applications of that standard is stark. The Third Circuit scrutinized the record for reliable evidence, whereas the Eleventh Circuit rested its conclusion on a few anecdotes.

Conclusion

Judicial engagement is a levelling force. It ensures that the say-so of the politically powerful does not carry the day when Americans seek justice in our courts of law. It ensures that every one of us receives the honest, reasoned explanation to which we are entitled as (to borrow Judge Janice Rogers Brown's phrase) "free moral agent[s]" for any restrictions on the freedom that is ours by right, not by grace of government. It ensures that government exercises only just powers and does not arbitrarily impede our peaceful pursuit of happiness.

The victories of Isis Brantley, Ashish Patel, Bill Main and Tonia Edwards, Marvin and Laura Horne, Clyde Reed and others this past year demonstrate what real judging can do for real people.

But there is much work to be done. So long as judges endorse the constitutionality of naked protectionism; so long as judges fail to seek out the government's true ends and gloss over facts; so long as judges bend over backwards to avoid saying "no" to the political branches; so long as rights central to Americans' lives are relegated to second-class status; the blessings of liberty will be denied to many.

The American Founding put government in its proper place as servant, rather than master, of the individual. But keeping government in its place requires constant judicial vigilance. Constitutional limits on government are, as James Madison put it, mere "parchment barriers" if they are not consistently enforced. Judicial engagement is the key to ensuring that the Constitution's unparallelled promise of freedom is honored.

About the Authors

Clark Neily joined the Institute for Justice as a senior attorney in 2000. He litigates economic liberty, property rights, school choice, First Amendment, and other constitutional cases in both federal and state courts.

Clark has represented entrepreneurs and property owners in more than twenty states across the country. He served as counsel in a successful challenge to Nevada's monopolistic limousine licensing practices and led IJ's opposition to a nationwide effort to cartelize the interior design industry through anticompetitive licensing laws. In his private capacity, Clark represented the plaintiffs in *District of Columbia v. Heller*, the historic case in which the Supreme Court announced for the first time that the Second Amendment protects an individual right to own a gun for self-defense.

Clark is also the Director of IJ's Center for Judicial Engagement, which was created to challenge the unconstitutional expansion of government by articulating a principled vision of judicial review, educating the public about the importance of a properly engaged judiciary, and advocating the Constitution as a charter of liberty and a bulwark against the illegitimate assumption of government power. Clark has written a book about judicial engagement, titled Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government.

Before joining the Institute for Justice, Clark spent four years as a litigator at the Dallas-based firm Thompson & Knight, where he worked on a wide variety of matters including professional malpractice, First Amendment and media law, complex commercial cases, and intellectual property litigation. Clark received his undergraduate and law degrees from the University of Texas, where he was Chief Articles Editor of the Texas Law Review. After law school, he clerked for Judge Royce Lamberth on the U.S. District Court for the District of Columbia.

Clark Neily is a member of the DC and Texas bars.

Evan Bernick is the Assistant Director of the Center for Judicial Engagement at the Institute for Justice, the national law firm for liberty. He works to educate the public and persuade judges about the need to enforce all of the Constitution's limits on government in every case.

Before joining IJ, Evan was a Visiting Legal Fellow at the Heritage Foundation, where he focused on the problem of overcriminalization—the use of the criminal law to target conduct that most people wouldn't expect to be illegal in the first place. He chronicled stories of victims of overcriminalization and wrote op-eds, issue briefs, and legal memoranda about constitutional law, sentencing policy, and police militarization, among other subjects.

Evan's work has appeared in such places as *Time*, *USA Today*, Fox News.com, *The Washington Times*, *The Chicago-Sun Times*, *National Review Online*, and *The Daily Signal*.

Evan received his J.D. from the University of Chicago Law School in 2011. He graduated with honors from the University of Chicago in 2008.

THE INSTITUTE FOR JUSTICE'S CENTER FOR JUDICIAL ENGAGEMENT

The Institute for Justice's Center for Judicial Engagement seeks to restore constitutional limits on the size and scope of government by advocating the Constitution as a charter of liberty and educating the public about the proper role of judges in enforcing constitutional limits on government power. Today, America has more government at every level than the Constitution authorizes. This is because many judges are either unwilling or feel unable to keep legislators and executive branch officials within the proper bounds of their authority. The Center seeks to change that by articulating a principled vision of judicial review and the importance of constitutionally limited government.

The Institute for Justice is a nonprofit, public interest law firm that litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government. Founded in 1991, IJ is the nation's only libertarian public interest law firm, pursuing cutting-edge litigation in the courts of law and in the court of public opinion on behalf of individuals whose most basic rights are denied by the government.

CENTER FOR
JUDICIAL ENGAGEMENT
More Constitution, Less Government

901 N. Glebe Road
Suite 900
Arlington, VA 22203

www.ij.org/cje

p 703.682.9320
f 703.682.9321