ENFORCING THE CONSTITUTION

How the Courts Performed in 2015–2016

By Evan Bernick

October 2016
Vol. 2

CENTER FOR JUDICIAL ENGAGEMENT

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Introduction

There are few areas of our lives in which we are not confronted by government power. Whether we are at work, enjoying our property, expressing ourselves artistically, expressing ourselves politically, on trial for our livelihoods (or even our lives), or simply out for a walk with our families, we are inevitably constrained by burdensome statutes; incomprehensible regulations passed by distant and unaccountable bureaucrats; or law enforcement officials with a tremendous amount of discretion to protect public safety—discretion that can be abused. To be secure in our enjoyment of our constitutional rights, we must have access to truly neutral tribunals, staffed by judges who are duty-bound to adjudicate—to apply (in James Wilson's words) "according to the principles of right and justice, the constitution and laws to facts and transactions in cases" and to do so in a manner that is "unbiased." And those judges must do their duty when assertions of government power are challenged.

Sadly, in many areas of law, genuine adjudication is the exception rather than the rule. For decades, the Supreme Court has held, and lower courts have understood, that the default standard of review in constitutional cases—the so-called "rational basis test"—requires systematic bias in favor of the government in most cases. 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. By contrast, in a handful of cases implicating rights deemed "fundamental" by the Court or involving discrimination against "discrete and insular minorities," judges place the burden on the government to demonstrate—with credible evidence—that its actions are calculated to achieve a constitutionally proper end.

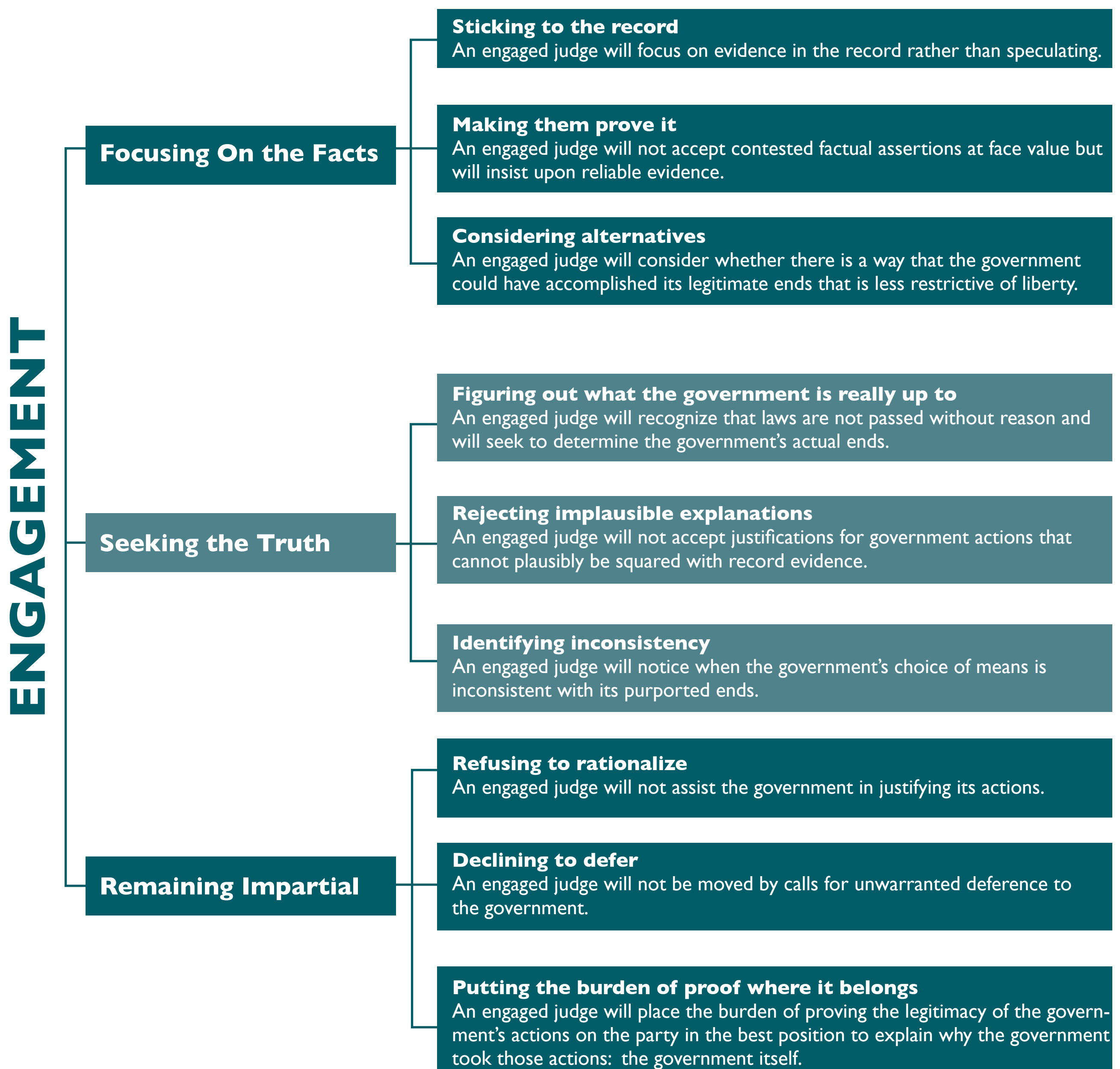
The habit of broadly deferring to the government is difficult for judges to shake. Thus, even in cases implicating "fundamental" rights, like the right to speak freely and the right to associate with others for lawful purposes, the Supreme Court and lower courts have often credulously accepted unsupported factual assertions by government

lawyers, as well as their assurances of public-spirited goals. The Court has created immunity doctrines that often prevent private citizens from holding government officials accountable in civil suits when they violate our constitutional rights. It has also created doctrines that require judges to defer to federal executive agencies' interpretations of "ambiguous" congressional statutes as well as to agencies' interpretations of regulations that the agencies themselves issue, thus creating systematic bias in favor of the government in cases involving challenges to assertions of administrative power over increasingly broad swaths of our lives.

Our jurisprudence is thus shaped by the institutionalized *abdication* of judicial duty. This status quo should be troubling to anyone who values constitutionally limited government. For all that has been written about courts' failure to defend our rights when the political stakes are high, the courts remain our last, best hope of relief from abuses of government power. Realizing that hope requires *judicial engagement*—truly impartial, evidence-based judicial inquiry into whether the government's actions are lawful. In constitutional cases, that means determining whether the government's actions are truly calculated to achieve constitutionally proper ends, without deference to government officials' beliefs or desires concerning the constitutionality of their actions, their professed good intentions, or their unsupported factual assertions. In statutory cases and cases involving the interpretation of regulations, that means seeking the *most accurate* understanding of the relevant law and determining whether the government's actions are legally authorized, rather than deferring to the government's understanding of the law or to facts found by federal agencies instead of by trial courts with juries. If judges fail to engage, we are left in a condition that is comparable to the "state of nature" absent government—a condition in which the mere will of the powerful carries the day.

This year's edition of *Enforcing the Constitution* showcases the importance of judicial engagement and the perils of judicial abdication in a variety of contexts. We begin close to home, with a family out for a summer walk. We end in a place where most do not expect to find themselves—prison. In all of these contexts, Americans are confronted by government power; in all of these contexts, judicial engagement maintains the rule of law and protects our freedom.

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 "faithful guardians of the Constitution" that the Framers envisioned and that Americans rightfully expect.

With Your Family

Northrup v. City of Toledo Police Dept.

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

What Happened?

Shawn Northrup, a resident of Toledo, Ohio, was enjoying a peaceful walk with his family when a passing motorcyclist, Alan Rose, caught sight of Northrup's firearm and yelled that Shawn could not "walk around with a gun like that." Shawn's wife, Denise, informed Rose (correctly) that it is perfectly legal to openly carry firearms in Ohio. Rose nonetheless called 911, stating that he had observed "a man carrying his gun out in the open." The dispatcher also told Rose that it is legal to openly carry firearms in Ohio but, apparently a bit uncertain, directed Officer David Bright of the Toledo Police Department to the scene, relating to Bright that Shawn was "walking his dog . . . carrying a handgun out in the open."

When Bright encountered Shawn, Shawn was still walking his dog, his gun secure in its holster. According to Shawn, Bright announced that he would shoot Shawn if he went for his weapon, refused to answer any questions about what was going on or whether Shawn was free to leave, and threatened to arrest Shawn for "inducing a panic." Ultimately, Bright disarmed Shawn, placed him in handcuffs, and put him in a squad car where he remained for half an hour. Upon discovering that Shawn had a concealed-carry permit (which he actually did not need in order to openly carry his gun), Bright released Shawn with a citation for "failure to disclose personal information." (The charge was later dropped.)

Shawn filed a civil suit against Bright and other members of the Toledo Police Department in federal court, alleging violations of his rights under the First, Second, and Fourth Amendments as well as state law. The district court rejected Shawn's First and Second Amendment claims but held that his Fourth Amendment and state-law claims against Bright could go to trial. Bright then appealed to the Sixth Circuit, asserting qualified immunity. Qualified immunity allows government officials to escape being held personally liable for damages unless their conduct violates "clearly established" statutory or constitutional rights.

What Did the Court Say?

The court denied Bright qualified immunity. Judge Jeffrey Sutton, writing for the panel, determined that if Shawn's account of the events was accurate, whatever suspicions Bright may have harbored of Shawn were not reasonable. The specific facts that Bright relied upon in stopping, disarming, and detaining Shawn consisted entirely in (1) Shawn's open possession of a firearm, and (2) the 911 call that informed Bright that Shawn was openly carrying a firearm. Neither of these facts suggested that Shawn was breaking the law or was dangerous. As Judge Sutton pointedly observed, "While the dispatcher and [911 caller] may not have known the details of Ohio's open-carry fire-arm law, the

police officer had no basis for such uncertainty." While Bright argued that he faced a difficult decision between "respond[ing] to the communities' [sic] fear and the appearance of the gunman" or "do[ing] nothing" and "hop[ing] that [Shawn] was not about to start shooting," Judge Sutton rejected this as a false choice. Absent any actual evidence that Shawn was "about to start shooting," Judge Sutton reasoned, "Bright's *hope* . . . remains another word for the trust that Ohioans have placed in their State's approach to gun licensure and gun possession."

Why Does it Matter?

No law-abiding American out for a walk with his family and his dog should end up in handcuffs. No officer responsible for slapping cuffs on him without justification should be able to escape responsibility for his misconduct. All too often, the judicially invented doctrine of qualified immunity allows government officials to escape liability for all but the most egregious and incompetent misconduct. The Sixth Circuit's decision provides a blueprint for mitigating qualified immunity's ill effects and ensuring that those who enforce our laws are held accountable under them when they betray our trust.

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 costitutionally valid reason. These are case studies in what judges should *not* do.

With Your Family

Gonzalez v. Huerta

(Fifth U.S. Circuit Court of Appeals, 2016)

What Happened?

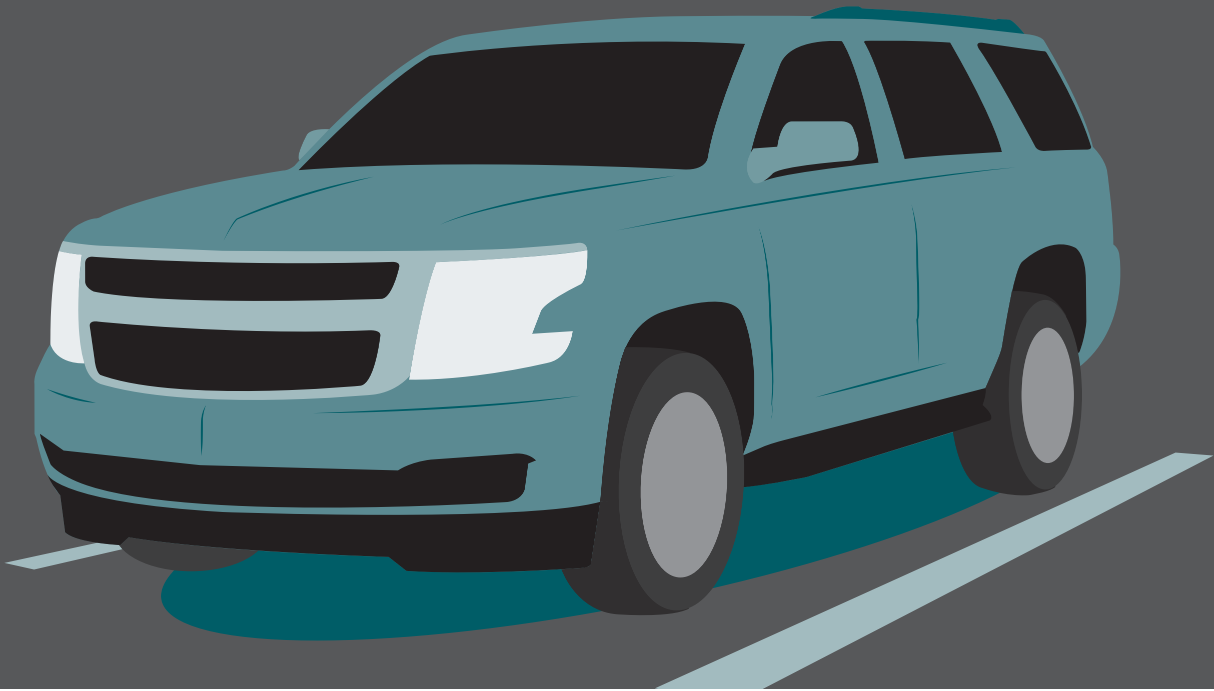
Late in the afternoon, Carlos Gonzalez drove to Bendwood Elementary School in Houston, Texas, to pick up his wife, a school employee. Gonzalez was accompanied by his 13-year-old daughter. Gonzalez backed into a space in the school parking lot and waited for his wife. Another employee noticed his vehicle, deemed it "suspicious," and contacted the school district police, who dispatched Officer Abel Huerta to investigate. While en route, Huerta received additional information about vehicle burglaries at the same location, although no evidence connected any of these prior incidents to a vehicle matching the description of Gonzalez's SUV.

Huerta arrived at the school, approached Gonzalez's SUV, and asked Gonzalez to produce his identification. Gonzalez asked for a justification for the request. Huerta repeated the request, and Gonzalez again asked for a justification. Huerta stated that he would provide a justification after Gonzalez provided his identification. Gonzalez produced a cell phone and stated that he was calling his attorney. Huerta then handcuffed Gonzalez, removed him from the vehicle and placed him in the back of the patrol car, holding him there for over 30 minutes. Gonzalez's wife eventually arrived, and once Huerta confirmed Gonzalez's identity and his purpose at the school, he released him.

Gonzalez filed a civil suit against Huerta for violating his Fourth Amendment rights. Huerta sought and received qualified immunity and moved for summary judgment. The motion was granted, and Gonzalez appealed.

What Did the Court Say?

The court found that Huerta was entitled to qualified immunity. Writing for a divided panel, Judge Edith Brown Clement expressed "serious doubts as to whether Huerta had a reasonable basis to detain [Gonzalez]." But, she went on, the Supreme Court has held that government officials are entitled to qualified immunity if their conduct is not "objectively unreasonable in light of clearly established law" and has "repeatedly told courts . . . not to define clearly established law at a high level of generality." Although Judge Clement acknowledged that "prior Supreme Court cases have held that police may not detain an individual solely for refusing to provide identification," she distinguished the case at hand on the grounds that it took place "on school property" and that the Court had "routinely reconsidered the scope of individual constitutional rights in a school setting." She thus concluded that a reasonable officer in Huerta's position would not be on notice that detaining Gonzalez would be "definitively unlawful."



What Went Wrong?

Judge Clement gave no persuasive reason why the fact that the Court had "routinely reconsidered the scope of individual constitutional rights in a school setting" warranted granting Huerta qualified immunity. The cases she cited all concerned the rights of students and held that those rights were circumscribed in important respects by the school setting. But this case did not involve the rights of students at all—a reasonable officer would not have thought cases concerning students' rights relevant to the question of whether he could lawfully detain an adult driver in a school parking lot for refusing to provide identification. As Judge James Graves put it in dissent, the majority "ma[de] the qualified immunity analysis so fact-specific that [a right] would never be clearly established." That the Court has consistently held that police may not detain people solely for refusing to provide identification should have been enough to allow the suit to go forward.

On the Road

U.S. v. Robinson

(Fourth U.S. Circuit Court of Appeals, 2016)

What Happened?

On March 24, 2014, the Ranson, West Virginia, police department received an anonymous tip that a black man had loaded a gun in a 7-Eleven parking lot and then concealed it in his pocket before leaving in a car. A few minutes later, the police stopped a car matching the description they had been given, citing a traffic violation. Shaquille Robinson, a black man, was a passenger in the car. Upon request, Robinson exited the car. As Robinson was exiting the car, an officer (Captain Robbie Roberts) asked him if he had any weapons. In response, Robinson gave what Roberts described as a "weird look." Roberts then ordered Robinson to put his hands on top of the car and began to frisk him for weapons, discovering a firearm in Robinson's pants pocket. At no point was Robinson uncooperative, and he made no move to reach for a weapon. Roberts recognized Robinson from prior criminal proceedings and confirmed that Robinson was a convicted felon.

Robinson was indicted on one count of being a felon in possession of a firearm and ammunition. Robinson moved to suppress the evidence against him—the gun recovered during the traffic stop—on the ground that the warrantless frisk violated the Fourth Amendment. Robinson argued that the search had been performed without reasonable suspicion that he was both armed *and* dangerous, as required to justify a warrantless frisk under the rule set forth by the Supreme Court in *Terry v. Ohio* (1968). The district court denied the motion, finding that Roberts' reasonable suspicion that Robinson was armed, combined with Robinson's failure to answer when asked if he was armed, made it reasonable for Roberts to suspect that Robinson was both armed and dangerous.

What Did the Court Say?

The court held that the frisk violated the Fourth Amendment. Judge Pamela Harris, writing for a divided panel, began by noting that "the carrying of a concealed weapon is not itself illegal in the state of West Virginia." She pointed out that at the time that the Court in *Terry* approved a warrantless frisk, handgun possession was generally illegal. But, she wrote, at a time and in a jurisdiction where it is legal to carry a gun in public, legal to carry a weapon with a permit, and permits are relatively easily to obtain, there is "no reason to think that public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities." Under such circumstances, holding that an armed person is necessarily a dangerous person would allow police to engage in warrantless frisks of gun owners who cannot reasonably be suspected of breaking any law.

Turning to the precise circumstances of the frisk, Judge Harris sought to determine whether there was anything about Robinson's conduct that would give rise to a reasonable suspicion of dangerousness. The government relied upon Robinson's "weird look," his non-answer to Roberts' question about gun possession, and his presence in a high-crime area. Judge Harris found nothing suspicious about Robinson's conduct. She drew attention

to the officers' testimony that Robinson had been "cooperative throughout his encounter with the police" and observed that there was "a very limited time window during which Robinson could have responded before the frisk made the question moot." She added that "[w]here a state has decided that gun owners have the right to carry concealed weapons without so informing the police, it would be inconsistent with that legislative judgment to subject gun owners to frisks because they stand on their rights." Judge Harris further found that Robinson's presence in a high-crime area "shed[] no light on the likelihood that [his] gun possession pose[d] a danger to the police." Because, she wrote, "there is more, not less, reason to arm oneself lawfully for self-defense in a high-crime area," one's presence in a high-crime area is "as likely an explanation for innocent and non-dangerous gun possession as it is an indication that gun possession is illegal or dangerous."

Why Does it Matter?

The meaning of the Constitution remains fixed until properly changed. Constitutional jurisprudence, however, does change, as the courts apply the Constitution's enduring principles to new facts, identify implications of those principles that had not previously been recognized, and evaluate novel assertions of government power. Law enforcement practices predicated upon the assumption that someone with a gun can be presumed to be a dangerous criminal must be revised to ensure that law-abiding gun owners' Fourth Amendment rights receive the same respect as those of everyone else. As Judge Harris determined, it is not reasonable to infer that someone is dangerous simply because he or she is present in a high-crime area with a concealed weapon in a jurisdiction in which it is legal to be present in a high-crime area with a concealed weapon. Making *Terry's* requirement of a reasonable suspicion meaningful today for law-abiding gun owners requires such judicial engagement.

On the Road

U.S. v. Pena-Gonzalez

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

What Happened?

On March 9, 2011, Kingsville, Texas, Police Department Officer Mike Tamez was patrolling a highway when he observed a Chevy Tahoe speeding. Tamez pulled alongside the Tahoe and saw three people—two adults (Ruben Pena-Gonzalez and his wife, Nohemi, who was driving) and a child. He also noticed air fresheners hanging throughout the car, several rosaries on the rearview mirror, Pancho Villa and St. Jude medallions on the key chain, and bumper stickers showing support for law enforcement.

Tamez turned on his patrol lights and pulled over the Tahoe for speeding two miles per hour over the limit. He requested Nohemi's driver's license, asked her to step out of the vehicle, and questioned her. Nohemi stated that she and Ruben had been in Houston to attend a car auction and that they had spent "one day" in Houston. When Tamez followed up about when they had left, she told him "the day before yesterday"—thus, the couple spent two nights in Houston.

Tamez told Nohemi that he would let her off with a warning. He then asked if he could talk to Ruben, and she agreed. Tamez and Ruben conversed for several minutes, during which time (according to Tamez) Ruben's face twitched and he was breathing heavily. Ultimately, Ruben agreed to allow Tamez to search the Tahoe. Tamez found dozens of bundles of cash wrapped in black trash bags hidden behind a panel in the back of the car. He arrested Ruben.

A grand jury indicted Ruben for money laundering and conspiracy to commit money laundering. Ruben moved to suppress the evidence, arguing that reasonable suspicion did not exist to extend the stop after Tamez issued a warning to Nohemi.

What Did the Court Say?

The court held that Ruben's Fourth Amendment rights had not been violated because reasonable suspicion existed to extend the stop. In a per curiam (short, unsigned) opinion, the panel explained that the Supreme Court recently held in *Rodriguez v. United States* (2015) that law enforcement officers may not "measurably extend the duration" of a routine traffic stop in order to pursue "matters unrelated to the justification for the traffic stop." Absent "specific and articulable facts indicating that criminal activity is occurring or is about to occur," the Court in *Rodriguez* held that an officer may not "prolong[]" a routine stop beyond the scope of its initial justifying purpose.

In determining that reasonable suspicion existed to prolong the Pena-Gonzalez stop, the panel relied upon Officer Tamez's testimony concerning "a number of things he observed and smelled during the course of the stop." These included:

> "[A]ir fresheners placed throughout the vehicle, which experience taught him is an attempt to mask the odor of drugs or drug money; Pancho Villa and St. Jude medallions on the key chain, both of which he characterized as icons commonly used by drug smugglers; . . . and three rosaries hanging from the rearview mirror, which his experience led him to believe are also used by drug traffickers."

Tamez also cited "inconsistencies and evasion in Ms. Pena's answers."

Despite acknowledging "concerns that classifying pro-law enforcement and anti-drug or certain religious imagery as indicators of criminal activity risks putting drivers in a classic 'heads, I win, tails you lose'" position, the panel emphasized that "reasonable suspicion determinations are highly factbound." Although Ruben pointed out that every one of Tamez's observations "[were] consistent with innocent behavior," and that his wife's answers were not inconsistent, the panel stated that "the question is whether it was reasonable for [Tamez] to view [Nohemi's] answers as suspicious, not whether they are convincing proof that [she] was lying." Thus, the panel concluded that the "overall circumstances" were reasonably suspicious, even if particular observations, considered in isolation, admitted of innocent explanations.

What Went Wrong?

The Supreme Court's holding in *Rodriguez* that law enforcement officers cannot prolong routine traffic stops absent reasonable suspicion affirmed an important principle: Police cannot detain people longer than is warranted by observational evidence of wrongdoing. But if judges follow the lead of the Fifth Circuit in *Pena-Gonzalez* and broadly defer to police officers' determinations of what is suspicious, *Rodriguez* will have little impact in the real world. Innocent behavior does not become *reasonably* suspicious through aggregation—zero plus zero is still zero. Lest reasonable suspicion be reduced to judicial rationalization of law enforcement hunches in practice, judges must be more vigilant.

Providing a Service

Buehrle v. City of Key West

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

What Happened?

Brad Buehrle sought to open a tattoo shop in the historic district of Key West, Florida. After negotiating a lease to rent commercial space, he filed an application for a business license. The application was denied: Key West generally bans tattoo shops in the historic district, although it allows two existing tattoo shops to operate as lawful non-conforming uses. (They were *permitted* as part of the settlement of a prior lawsuit challenging the constitutionality of the ban.) Buehrle challenged the ban under the First Amendment.

What Did the Court Say?

The court held that the ban violated the First Amendment. Judge Jill Pryor, writing for the panel, began by explaining that the Supreme Court has "cast the [First] [A]mendment's protection over a variety of artistic media," including movies, music, and nude dancing. She adopted the reasoning of the Ninth Circuit's decision in *Anderson v. City of Hermosa Beach* (2010) in determining that tattooing was protected speech. In *Anderson*, the Ninth Circuit observed that "[t]he principal difference between a tattoo and . . . a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper," and concluded that "speech does not lose First Amendment protection based on the kind of surface it is applied to." To the city's argument that while "the act of wearing a tattoo is communicative, and consequently protected speech" the *process* of tattooing is not, Judge Pryor responded that "artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work," and that "[a] regulation limiting the creation of art curtails expression as effectively as a regulation limiting its display." After noting that "the craft of tattooing" has long since evolved "beyond the rote application of standardized designs" and finding "no meaningful basis on which to distinguish [Buehrle's] work from that of any other artist practicing in a visual medium," Judge Pryor concluded that Buehrle's work was protected by the First Amendment. Because Buehrle conceded that the ban was content-neutral, the court went on to apply intermediate scrutiny, seeking to determine whether the ban was substantially narrowly tailored to serve an important governmental interest.

The city's purported interests could not be taken seriously. The city's director of planning simply asserted that allowing tattoo shops would "impact the district's character and fabric," which could "impact tourism," if, say, tourists became drunk and received tattoos that they later came to regret. Judge Pryor noted that these reasons were given "in the context of Mr. Buehrle's lawsuit, well after the enactment of the ordinance," and that "[t]he closest the City came to presenting evidence on the impact of tourism was a passing reference to a few lines of a Jimmy Buffett song." (Judge Pryor pointed out that the song in question—"Margaritaville"—describes a tattoo that the singer *does not regret* but, on the contrary, considers a "real beauty.") The city "concede[d] the absence of any ill effect as a result of the two tattoo establishments

it currently allows to operate" and offered no study, conducted no investigation, and "failed to muster even anecdotal evidence supporting its claims." Judge Pryor concluded: "The First Amendment requires more."

Why Does it Matter?

Several years ago, an Eleventh Circuit panel upheld a Florida statute requiring interior designers seeking to practice in nonresidential, commercial settings to obtain a state license. Interior design, no less than tattooing, expresses a vision—not just to the designer's client but to all who experience the final product. And yet the court in *Locke v. Shore* (2011) held that the licensing statute merely "govern[ed] 'occupational conduct'" and "d[id] not implicate constitutionally protected activity under the First Amendment." The court thus applied rational basis review, making no effort to determine whether the statute actually served to protect public safety or was even designed to do so. By contrast, the Eleventh Circuit panel in *Buehrle* recognized the expressive components of the conduct at issue and applied heightened scrutiny, putting the government to its proof and finding it wanting.

The difference between *Locke* and *Buehrle* is the difference between judicial abdication and judicial engagement. In truth, the activities at issue in both cases were fundamentally expressive and should have been treated similarly by the reviewing courts. Both cases involved *occupational speech*—expression through which people earn their living. It is only because the Supreme Court has relegated economic activity to second-class constitutional status that lower courts must choose whether to brand a given exercise of liberty as either "speech" *or* "occupational conduct" and such disparate results are possible. *Buehrle* illustrates the value of judicial engagement in protecting both freedom of expression and the right to earn a living and highlights the need for the Court to correct a constitutionally unjustified dichotomy.

ABDICATION

Providing a Service

Colon Health Centers of America, LLC v. Hazel

(Fourth U.S. Circuit Court of Appeals, 2016)

What Happened?

Dr. Mark Baumel of Colon Health Centers of America (CHC) sought to fill an unmet need in Virginia for "virtual" colonoscopies that use non-invasive imaging technology. CHC helps gastroenterologists purchase CT scanners and set up offices where the scans can be conducted electronically and read by licensed radiologists working with CHC. The radiologists then report any abnormalities to the gastroenterologists, who can immediately perform any necessary procedure without the need for a second appointment. Dr. Mark Monteferrante, the head of Progressive Radiology, a practice group that has provided professional radiological services in Northern Virginia for 25 years, wanted to purchase an MRI machine for a new facility to use to diagnose injuries to the joints, bones, brain, and spine, serving an expected 400 patients per month.

But Virginia's "certificate of need" (CON) program requires that providers of medical services first prove that the new service or equipment is "necessary" before they are permitted to open up new offices or purchase new equipment. The CON process can take years to complete and may cost $100,000 or more. The commonwealth even invites existing hospitals and providers to intervene and oppose would-be competitors' applications to purchase new equipment or provide new services. Dr. Baumel and his partners were denied a certificate of need to purchase new CT scanners. Dr. Monteferrante and his partners, having previously spent five years and roughly $275,000 in filing fees, consulting fees, and attorney expenses in order to secure permission to purchase an MRI machine, were not willing to fight another costly, uncertain battle.

In a case litigated by IJ, CHC and Progressive Radiology contended that the CON scheme violated the Commerce Clause, which the Supreme Court has construed to limit the power of the states to erect barriers against interstate trade. The Court has held that state laws which on their face, in their practical effect, or in their purpose discriminate against interstate commerce "are virtually per se invalid." If the laws do not so discriminate, courts apply the test set forth in *Pike v. Bruce Church, Inc.* (1970), which asks whether the laws impose an incidental burden on interstate commerce that is "clearly excessive in relation to putative local benefits." The plaintiffs contended that the CON scheme provided no local benefits—that it did nothing to advance public health or safety, but, rather, served solely to protect in-state hospitals and providers from competition.

What Did the Court Say?

The court upheld the CON scheme. Judge J. Harvie Wilkinson, writing for the panel, took Virginia's proffered justification for the scheme—"prevent[ing] overinvestment in and maldistribution of health care facilities"—at face value, simply stating that "we cannot discern a sinister protectionist purpose in this straightforward effort to bring medical care to all . . . citizens in the most efficient

IJ Client Dr. Mark Baumel of Colon Health Centers of America

and professional manner." Turning to the question of discriminatory effect, Judge Wilkinson brushed aside the fact that "one-hundred percent of CT scanner and MRI machine manufacturers are located outside of the state," stating that "there can be no discrimination in favor of in-state manufacturers when there are no manufacturers in the state."

In determining whether the CON scheme's incidental burdens on interstate commerce were "clearly excessive in relation to [its] putative local benefits," Judge Wilkinson applied the rational basis test. His evaluation of Virginia's purportedly legitimate interests relied almost entirely on government officials' unsupported assertions. In response to the plaintiffs' efforts to draw attention to the lack of any expert testimony or other evidence to support the proposition that the scheme actually produces any local benefits, Judge Wilkinson dismissively stated that "empirical arguments are . . . more suited to a legislature than a court."

What Went Wrong?

Judges should not second-guess the *wisdom* of economic regulations. But it is an abdication of judicial duty to disregard evidence concerning the *constitutional impropriety* of the government's ends or to uncritically accept bald assertions of constitutionally proper governmental ends. The Supreme Court has repeatedly—and correctly—rejected interstate economic protectionism as an *improper* end. That counts for little, however, if judges do not engage in an evidence-based pursuit of the government's true ends. The Fourth Circuit failed to make that inquiry, and in doing so deprived Virginians of potentially life-saving services.

The Supreme Court made plain in *Kassel v. Consolidated Freightways Corp.* (1981) that "[t]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." In *Kassel*, the Court concluded that, while a state law restricting the length of tractor trailers was designed to benefit Iowa residents, it burdened interstate traffic too much and was therefore unconstitutional. In reaching that conclusion, the Court scrutinized the evidence in the record. And yet no fewer than four circuits have held that a bare assertion is sufficient to establish a local benefit, and Judge Wilkinson rejected "empirical arguments" as irrelevant to the Virginia CON scheme's constitutionality. The Supreme Court must resolve this fundamental conflict between multiple circuits—one that has balkanized the unified national market that the Commerce Clause is designed to protect.

Giving Advice

Serafine v. Branaman

(Fifth U.S. Circuit Court of Appeals, 2016)

What Happened?

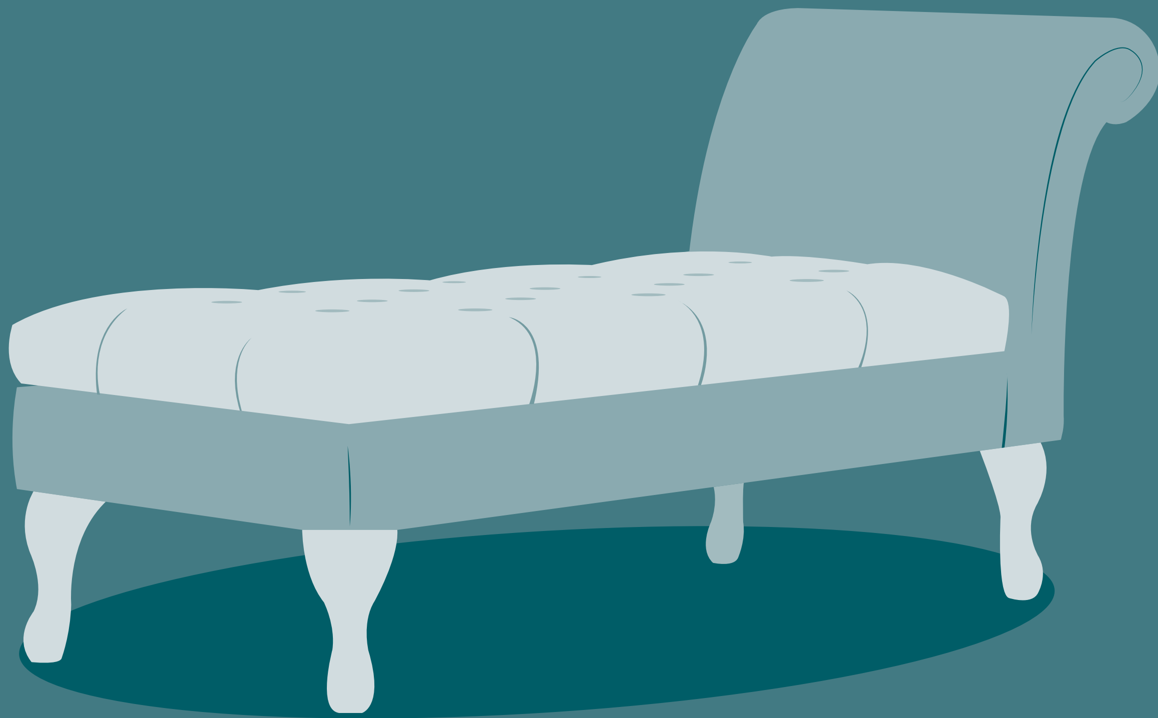
When Mary Lou Serafine ran for the Texas Senate in 2010, she described herself as an "attorney and psychologist" on her campaign website and on a form she filed with the Secretary of State in order to appear on the ballot. Although she does not have a degree in psychology, she completed a four-year post-doctoral fellowship in psychology at Yale, she was a professor in the psychology departments at Yale University and Vassar College, she studied under leading psychologists, and she was a member of the American Psychological Association for several years. Before running for office, Serafine taught seminars and provided one-on-one counseling sessions in Austin on personal growth and relationships. But she is not licensed to practice as a psychologist in Texas.

In September 2010, the Texas State Board of Examiners of Psychologists sent Serafine a letter informing her that she was violating the Psychologists' Licensing Act, which prohibits people from providing "psychological services to individuals, groups, organizations, or the public" or representing themselves as psychologists unless they are licensed to practice psychology in Texas. The Board ordered her to cease using the title "psychologist" on her campaign website (or in any other context) and to refrain from offering or providing "psychological services" in Texas. In January 2011, Serafine received a letter from the Attorney General's office threatening prosecution and referencing the Board's complaint and Serafine's use of the title "psychologist" in public records.

Serafine removed the word "psychologist" from her campaign website and requested that the title be deleted from her listing in *Who's Who in America.* She then sued, claiming that the whole Psychologists' Licensing Act violated her right to speak freely, denied her equal protection, and deprived her of her right to earn a living.

What Did the Court Say?

The court held Serafine's speech was entitled to full First Amendment protection and that the Act's restrictions on speech were unconstitutionally overbroad. Although protecting people against fraud falls within the scope of states' police powers, Judge Jerry Smith, writing for the panel, explained that "[a]ny interest the government can claim in protecting clients from manipulation or exploitation by a psychotherapist fails when the psychotherapist is no longer speaking to the client in her capacity as such." In this case, Serafine was not speaking to clients; she was "communicating with the voters at large." That is to say, she was engaging in "political speech of the highest form—a candidate seeking election to public office." The court therefore applied strict scrutiny, seeking to determine whether the state's actions were "narrowly tailored to serve an overriding state interest." It easily concluded that they were not, as the state's interest in preventing people from being misled could be adequately served by other means that were less speech-restrictive—specifically, by "the vigorous public debate and scrutiny that accompany political campaigns." Thus, the Act's prohibition on non-licensees representing themselves to the public as psychologists could not constitutionally be applied to Serafine's non-commercial, non-occupational speech.



The court went on to consider Serafine's claim that the Act's prohibition on providing unlicensed psychological services was overbroad—that it swept in too much constitutionally protected speech. Judge Smith examined the Act's definition of "the practice of psychology," which included "services to an individual or group . . . that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior." Judge Smith observed that this definition could "apply to a number of activities, such as Alcoholics Anonymous (AA), Weight-Watchers, various self-help groups, life coaches, yoga teachers, political consultants, and golf professionals." Central to all of these occupations, services, and programs is the communication of personalized advice. Such personalized advice "about the common problems of life," wrote Judge Smith, serves as a "foundation of human interaction and society" and "[t]here is no doubt that such speech is protected by the First Amendment." Because it "chills and prohibits protected speech," the court held that the Act's definition of psychological services was unconstitutionally overbroad.

Why Does it Matter?

The Fifth Circuit's emphatic statement that personalized advice is fully protected by the First Amendment is both correct and timely. In support of this statement, Judge Smith cited the Supreme Court's landmark decision in *Reed v. Town of Gilbert* (2015), in which the Court held that a law restricting speech is content-based—and therefore subject to strict scrutiny—if it either expressly classifies speech based on its communicative content *or* if its true purpose is to target communicative content. The logic of *Reed* commands strict scrutiny for restrictions on personalized advice, including personalized advice for which people are compensated. (The Court has repeatedly affirmed that speakers do not forfeit their First Amendment rights by receiving pay for their speech.) Licensing restrictions that require speakers to seek the government's permission before they can give personalized advice, and regulations that control what licensees may say about particular subjects, are necessarily content-based.

But lower courts have split on which standard of review to apply to burdens on occupational speech. Some federal courts of appeal have subjected restrictions on occupational speech to heightened scrutiny, on the grounds that "speech is speech, and it must be analyzed as such for purposes of the First Amendment"; but others have concluded that such restrictions only burden professional "conduct" and have applied rational basis review. In order to ensure that the "foundation of human interaction and society" is preserved, the Court must extend the logic of *Reed* to occupational speech and remove "any doubt that such speech is protected by the First Amendment."

ABDICATION

Giving Advice

Hines v. Aldridge

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

What Happened?

Ron Hines is a licensed Texas veterinarian who has provided care for animals since 1966. Since 2002, when age and disabilities led him to retire from clinical practice, Dr. Hines has provided individualized veterinary advice through a website to hundreds of people. Using the Internet, he has helped pet owners who had no other access to veterinary care due to either geography or poverty, from Scottish missionaries providing AIDS relief in Nigeria to a Turkish woman seeking a cat food recipe for her iodine-deficient cat. He has never been accused of incompetence.

In 2012 the Texas Board of Veterinary Medical Examiners fined Dr. Hines $500, suspended his veterinary license for a year, and forced him to retake the jurisprudence portion of the veterinarian-licensing exam, invoking a provision of Texas's Veterinary Practice Act that requires an initial physical examination of an animal before a veterinarian can provide advice concerning that animal and states that a "veterinarian-client-patient relationship may not be established solely by telephone or electronic means." In a case litigated by IJ, he challenged the physical exam requirement under the First and Fourteenth Amendments, arguing that it deprived him of his rights to speak freely and to earn an honest living.

What Did the Court Say?

The court upheld the requirement. Judge Patrick Higginbotham, writing for the panel, treated the requirement as "content-neutral regulation of the practice of a profession" that did not implicate the First Amendment and thus applied rational basis review. The panel concluded that the requirement was rational because "it is reasonable to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it." It cited no record evidence that providing veterinary advice online, as Dr. Hines does, without an initial physical exam, harms (or threatens to harm) animals in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar setting.

What Went Wrong?

Dr. Hines was engaging in pure speech, providing advice in private, personal emails between himself and individuals who sought his help. Texas law prevented him from doing so. The Fifth Circuit, however, characterized the physical exam requirement as an example of "state regulation of the practice of a profession," rather than a restriction on speech, ap-

IJ Client Ron Hines

plied rational basis review rather than heightened scrutiny, and upheld the requirement without any credible evidence *at all* that the requirement did anything to promote the health of animals in Texas or, indeed, did anything other than protect brick-and-mortar veterinarians from competition.

In *Holder v. Humanitarian Law Project* (2010), the Supreme Court held that specialized advice to a person or group is protected by the First Amendment and applied strict scrutiny to a statute that distinguished between communicating specialized knowledge and generalized advice to designated terrorist groups, allowing the latter and forbidding the former. In so doing, the Court rejected the government's arguments that the statute targeted mere "conduct," treating the statute as a content-based restriction on speech. *Hines* highlights the need for the Supreme Court to extend the logic of *Holder* to content-based restrictions on occupational speech. Government officials cannot be allowed to escape the strictures of the First Amendment by calling statutes that are triggered by what licensed professionals like Dr. Hines *say* mere regulations of "the practice of a profession."

Running a Business

Dana's RR Supply v. Florida Attorney General

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

What Happened?

Florida makes it a second-degree misdemeanor for businesses to impose a surcharge on credit-card users but expressly allows "the offering of a discount for the purpose of inducing payment by cash." As a result, a merchant who offers the same product at two prices—a lower price for customers paying cash and a higher price for those using credit cards—is allowed to offer a *discount* for cash but cannot call the same price difference a *surcharge* without running the risk of being fined and imprisoned. Four small businesses challenged the surcharges-are-fine-just-don't-call-them-that law under the First Amendment after receiving cease-and-desist letters from the Florida Attorney General demanding that they cease expressing the price difference to their customers as an additional amount for credit-card use rather than a lesser amount for paying in cash.

What Did the Court Say?

The court held the law unconstitutional. Writing for a divided panel, Judge Gerald Tjoflat explained that whether merchants face fines or imprisonment under the no-surcharge law turns not on what they *do* but on what they *say*: "In order to violate the statute, a defendant must communicate the price difference to a customer and that communication must denote the relevant price difference as a credit-card surcharge." This restriction is a burden not only on commercial speech but also on political expression. The law operates so as to deprive "the constituency most impacted by the no-surcharge law"—that is, merchants—of their "full rhetorical toolkit." Although content-based restrictions on speech generally (and political speech in particular) ordinarily trigger strict scrutiny, Judge Tjoflat noted a tension in the Supreme Court's jurisprudence between this rule—recently reaffirmed in *Reed v. Town of Gilbert* (2015)—and the Court's application of less-demanding inter-

mediate scrutiny to restrictions on commercial speech. Without deciding that any particular level of scrutiny was proper, the majority analyzed the law as if it were merely commercial speech because it would "fail under either possible standard."

Government regulations of commercial speech must be supported by a substantial government interest. The majority "struggle[d] to identify a plausible governmental interest that would be served by the no-surcharge law, much less one that could be considered substantial." Judge Tjoflat pointed out that Florida has exempted state agencies from its no-surcharge laws, and reasoned that "[i]f customers would be harmed by learning that they faced surcharges but not discounts from private merchants, creating an exception allowing the State to impose convenience fees betrays the frailty of any potential state interests." Further, he wrote, any of the state's asserted interests in "preventing bait-and-switch tactics, providing advance notice to customers, and levelling the playing field among merchants—would be better served by direct and focused regulation of actual pricing behavior."

Why Does it Matter?

Courts have struggled in applying the Constitution's protections for freedom of speech to restrictions on business operations. This is unsurprising—the Supreme Court has, after all, commanded broad judicial deference to the government in evaluating mere "economic" regulations, even as it has insisted upon careful scrutiny of restrictions on speech. The Eleventh Circuit properly recognized that Florida's no-surcharge law was directed at the content of merchants' speech—merchants that engage in precisely the same kind of pricing behavior are treated differently on the basis of how they *describe* that behavior to their customers—and the result was the kind of exacting review that should be the rule rather than the exception in *all* constitutional cases.

Running a Business

Indiana Petroleum Marketers v. Cook

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

What Happened?

Under Indiana law, drug, grocery, and convenience stores must secure a permit to sell beer, and they are prohibited from selling beer that is "iced or cooled . . . before or at the time of the sale." Package liquor stores, however, may sell cold beer. Indiana business owners have been fined hundreds of dollars for selling cold beer. An association of Indiana convenience store owners brought suit under the Equal Protection Clause of the Fourteenth Amendment, claiming that the cold-beer statute discriminated between grocery and convenience stores, on the one hand, and package liquor stores, on the other, for no constitutionally proper reason.

What Did the Court Say?

The court upheld the statute. Judge Diane Sykes, writing for the panel, recited the Supreme Court's formulation of the rational basis test in *FCC v. Beach Communications* (1993). Writing for the Court in *Beach Communications*, Justice Clarence Thomas stated that, under the rational basis test, statutory classifications enjoy "a strong presumption of [constitutional] validity," challengers must "negative every conceivable basis which might support [those classifications]," and it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."

Taken literally, this "conceivable basis" test would impose an insurmountable burden upon litigants in constitutional cases. Unsurprisingly, the Seventh Circuit panel easily concluded that the convenience store owners could not carry that burden. Judge Sykes took note of what she referred to as the challengers' "policy arguments":

> "[B]eer is beer, and grocery and convenience stores already sell it, just not cold; grocery and convenience stores are permitted to sell chilled drinks with higher alcohol content (like wine coolers) so why not chilled beer; grocery and convenience stores have a better record of compliance with state alcohol laws than liquor stores; grocery and convenience stores are frequented by police officers and other adult customers, deterring underage persons from trying to buy alcohol there; and selling beer in refrigerators makes it less accessible than selling it warm."

But rather than consider whether the scheme actually served any constitutionally proper end, the panel simply stated that such arguments "are matters for the Indiana legislature, not the federal judiciary."

What Went Wrong?

The contrast between the Eleventh Circuit's analysis in *Dana's RR Supply* and that of the Seventh Circuit in *Indiana Petroleum Marketers* is—and ought to be—jarring. Both cases involved restrictions on business operations. In both cases, the challengers presented plausible arguments that the government's actions were not calculated to achieve any constitutionally proper end. Only the Eleventh Circuit carefully scrutinized the evidence presented and evaluated the fit between the government's means and its purported ends.

The Seventh Circuit's dismissal of the challengers' efforts to demonstrate the irrationality of the challenged scheme as mere "policy arguments" is not at all unusual in rational basis cases. Indeed, if in fact litigants had to "negative every conceivable basis" that might support a statutory classification, *every* argument litigants might make could be dismissed as a policy argument properly addressed to the legislature. No one could refute every *conceivable* justification for restricting their freedom—however unmoored that justification might be from reality.

The Constitution requires judges to exercise independent, unbiased judgment in constitutional cases and guarantees impartial adjudication. There is *no* context in which rubber-stamp review rather than genuine adjudication is appropriate. If indeed the rational basis test requires the impossible of constitutional challengers and thus ensures a victory for the government, it is flatly unconstitutional. Effective judicial enforcement of the Constitution requires the evidence-based pursuit of the government's *actual* ends and a context-sensitive assessment of whether those ends are constitutionally proper.

Expressing Yourself Politically

Coalition for Secular Government v. Williams
(Tenth U.S. Circuit Court of Appeals, 2016)

What Happened?

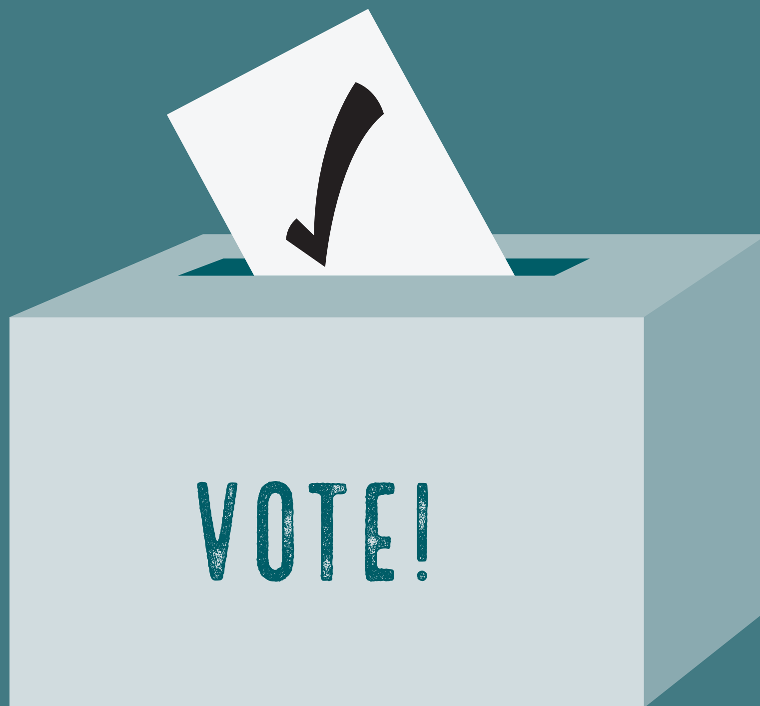
In 2008, Dr. Diana Hsieh founded a nonprofit corporation—the Coalition for Secular Government. In 2008, 2010, and 2014, the Coalition used contributed funds to publish policy papers urging "no" votes on ballot initiatives. Dr. Hsieh and a colleague co-authored each paper and distributed the papers by printing and mailing copies and later posting the papers online.

Under Colorado law, the Coalition must register as an "issue committee" because it raises and spends more than $200 when it opposes ballot initiatives. Dr. Hsieh's activities thus triggered a variety of complex registration and disclosure requirements, derived from the state's constitution, state statutes, and state regulations. Failure to comply can trigger fines of $50 per day for each day that any violation remains uncured.

Over the years, Dr. Hsieh struggled to navigate those requirements, registering as an issue committee, spending hours completing and filing bi-weekly reports detailing contributions received and expenditures made, and complying with reporting requirements that her contributors found intrusive, to the point that some reduced their contributions. In 2014, the Coalition sought an injunction in federal district court against the Colorado Secretary of State, contending that the issue-committee regulatory framework violated the Coalition's First Amendment right of free association. The district court granted the injunction, and the Secretary appealed.

What Did the Court Say?

The court held that the issue-committee framework violated the Coalition's First Amendment rights. Writing for the panel, Judge Gregory Phillips began by identifying the three justifications for reporting and disclosing campaign finances that the Supreme Court has recognized: detecting the violation of contribution limitations, quid pro quo corruption (i.e., trades of votes for money), and the public's informational interest. In a previous decision, *Sampson v. Buescher* (2010), the Tenth Circuit had concluded that the first two justifications were "irrelevant or inapplicable to issue committees," leaving the public's informational interest as the only potential justification for the issue-committee framework. The court proceeded to apply "exacting scrutiny," a test developed by the Supreme Court in the context of disclosure requirements. Exacting scrutiny requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest."



Judge Phillips stated that issue-committee disclosures can serve the public's interest by allowing voters to "identify those who (presumably) have a financial interest in the outcome of the election." But *Sampson* recognized that "this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight" and noted the "substantial" burdens that laws burdening issue committees place on citizens—hiring an attorney to help comply with laws and answer complaints can "often cost more than the total amount of contributions of small-scale committees." Looking to the record, Judge Phillips detailed how Dr. Hsieh was forced to "provide detailed information about the Coalition's most mundane, obvious, and unimportant expenditures" and how her requests for contributors' personal information caused the Coalition to "los[e] contributions it otherwise would have received." The panel concluded that whatever "minimal informational interest" the public might have in the Coalition's financial disclosures could not justify such "substantial burdens."

Why Does it Matter?

Dr. Hsieh's experience illustrates what empirical research has demonstrated: Mandatory reporting and disclosure requirements can needlessly raise the costs of political participation and even make those costs prohibitive. Further, the First Amendment does not permit the government to compel people to disclose private information without any credible evidence that such requirements are necessary to avert any harm to anyone. It is the government's job to justify its intrusion into the speech and associational rights of the citizens—and courts' job to ensure that the government is put to its proof. The Tenth Circuit panel's attention to the record enabled it to identify the "mismatch" between the substantial burdens that the Colorado law imposed upon Dr. Hsieh and the government's utterly insubstantial interests in her disclosures.

Expressing Yourself Politically

Delaware Strong Families v. Attorney Gen. of Delaware

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

What Happened?

Delaware Strong Families (DSF) is a 501(c)(3) educational nonprofit that in 2012 published a voter guide that reported candidates' policy positions and voting records on fifteen different issues. The voter guide did not support any candidate and conformed to IRS guidelines for nonprofits. DSF planned to publish a voter guide prior to the 2014 general election.

On January 1, 2013, the Delaware Elections Disclosure Act went into effect. The Act requires that any organization that spends more than $500 on "third-party advertisements" must file a report with the Delaware Election Commissioner. Third-party advertisements include "electioneering communications" that "[r]efer[] to a clearly identified candidate" and are "publicly distributed within 30 days before a primary election, or 60 days before a general election." Among other things, the report required by the Act must contain the full name and mailing address of all donors giving over $100 in total over the previous four calendar years. The requirements are similar to—and in some cases more burdensome than—disclosure requirements imposed on political committees in Delaware.

DSF planned to distribute its 2014 voter guide over the Internet within 60 days of Delaware's general election and planned to spend more than $500 on the creation and distribution of the guide. DSF brought suit, seeking a declaratory judgment that the disclosure provisions violated the First Amendment and a preliminary injunction preventing enforcement of the Act. The district court declared the Act unconstitutional and granted a preliminary injunction. It reasoned that because the "focus of the Act was actually on communications that are the functional equivalent of advocacy" and because DSF was not engaged in advocacy, the "relation between the personal information collected to the primary purpose of the Act is too tenuous to pass constitutional muster."

What Did the Court Say?

The court reversed. Writing for the panel, Judge Joseph Greenaway, Jr. reasoned that "[b]y selecting issues on which to focus, a voter guide that mentions candidate[s] by name and is distributed close to an election is, at a minimum, issue advocacy." Thus, it was not incongruous that the disclosure requirements reached DSF's voter guide. Judge Greenaway then applied "exacting scrutiny." Because DSF "acknowledge[d] that Delaware's interest in an informed electorate" is "sufficiently important," the court proceeded to evaluate whether the provisions setting the monetary threshold and the type of media covered by the Act (including non-broadcast media) were substantially related to that interest.

The panel answered both questions in the affirmative. Noting that the Supreme Court has upheld monetary thresholds after determining that they were not "wholly without rationality," the panel took a highly deferential approach in evaluating Delaware's monetary thresholds. Because Delaware is a small state "where direct mail makes up 80% of campaign expenditures," the panel considered it "unsurprising" that the thresholds were far lower than those in the federal Bipartisan Campaign Reform Act (which requires groups that spend in excess of $10,000 annually to report individual contributors of $1,000 or more). Turning to the sweeping definition of "electioneering communications," the panel observed that the Delaware Act was "not unique" in including non-broadcast media, and that broadcast media are not generally utilized by candidates for office in Delaware—thus, the panel found that the Act "reflects the media actually used" in Delaware elections.

Finally, the panel rejected DSF's argument that the Delaware requirements were overbroad in requiring disclosure of donor information going back four years. The court simply stated that the disclosures were "one-time" and "event-driven," being tied to the applicable "election period." Even if a limitation on donors who earmarked their donations to fund electioneering communications would be "more narrowly tailored," the panel concluded that Delaware's requirements were sufficiently tailored to satisfy exacting scrutiny.

What Went Wrong?

It is difficult to think of disclosure requirements that could not be found to serve an ill-defined interest in an "informed electorate." The Third Circuit panel never explained how a one-time donation by a single donor four years ago could provide information that is material to voters in an upcoming election—a donor who might have ceased contributing to an organization and indeed may no longer agree with the organization's message.

Delaware Strong Families highlights the need for the Supreme Court to revisit its jurisprudence concerning disclosure requirements. While it is proper for the government to ensure the integrity of elections, a mere desire on the part of government officials for information concerning expenditures related, however tenuously, to the political process does not justify forcing those who associate with one another for lawful purposes to make public information that they would prefer to keep private. Given that empirical studies have shown that disclosure does chill individuals from engaging in constitutionally protected political speech, the Court should examine disclosure with the same strict scrutiny that it has applied to other burdens on political speech. Disclosure requirements that are not calculated to prevent the corruption of the political process should be held unconstitutional.

At School

O'Brien v. Welty

(Ninth U.S. Circuit Court of Appeals, 2016)

What Happened?

Neil O'Brien, an outspoken conservative student at California State University Fresno, confronted and videotaped two professors in the Chicano and Latin American Studies (CLS) Department in their offices, questioning them about a poem that described the United States as "America, the land robbed by the white savage." The poem had been included as a supplement to the student newspaper published by the CLS department. The professors called campus police and subsequently filed complaints against O'Brien. The police determined that O'Brien was not threatening or intimidating, and although they reported the matter to the Fresno County District Attorney, the District Attorney declined to prosecute.

After a disciplinary hearing that O'Brien's attorney was not permitted to attend and O'Brien was not permitted to record, Vice President for the Division of Student Affairs and Dean of Students Dr. Paul Oliaro imposed two sanctions. First, O'Brien was prohibited from coming within 100 feet of CLS faculty, staff, offices, or classrooms, or from coming onto the second floor of the social sciences building, "unless [he had] prescheduled business, a class, or an appointment." Second, he was placed on "disciplinary probation" through the spring 2012 semester. Notably, the hearing officer had not recommended the second sanction. As a consequence of the probationary status imposed by Oliaro, O'Brien was prohibited by university rule from being president or treasurer of the campus chapter of Young Americans for Liberty and from holding any position in student government.

O'Brien brought suit, claiming, among other things, that school officials had retaliated against him for constitutionally protected speech activities. Specifically, he alleged that officials had singled him out and imposed sanctions on him because of his political activities and his criticism of university faculty and administration. The district court dismissed O'Brien's suit for failure to state a plausible claim. O'Brien appealed.

What Did the Court Say?

The court held that O'Brien had stated a plausible retaliation claim. Writing for the panel, Judge William Fletcher detailed O'Brien's factual allegations. O'Brien alleged that as a result of his political activities and his criticism of university faculty and administration, Assistant Dean of Student Affairs Dr. Carolyn Coon "requested that students and other faculty members gather information and complaints to use against" him; that the director of alumni relations sent emails to other administrators, including the university's communications director, requesting that they "do something" about O'Brien and his website; that he was not given a full and fair opportunity at the hearing to present his side of the story; that he received sanctions that were above and beyond those recommended by the hearing officer and took direct aim at his political activities; and

that even after sanctions were imposed, school officials continued to make his life on campus difficult. *If* these allegations were true, the charge of retaliation would not be "mere speculation." Importantly, Judge Fletcher emphasized that even if O'Brien could properly have been sanctioned because his "speech or conduct may reasonably [have] been seen as threatening or constituting a danger to members of the university community," school officials could not discipline him because of *disagreement* with his speech.

Why Does it Matter?

Under our Constitution, government officials are our agents—they are entrusted with legal power to act on our behalf for limited purposes. As such, they are duty-bound to act in good faith and treat us impartially. That includes officials at public universities.

As Justice Oliver Wendell Holmes, Jr. once observed, "[e]ven a dog distinguishes between being stumbled over and being kicked." While judges cannot read minds, they can identify the reasons driving officials' actions by drawing inferences from officials' conduct and statements and from the sequences of events that precede their actions. Judge Fletcher's disciplined parsing of the record in *O'Brien* makes that plain.

At School

Bell v. Itawamba County School Board

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

What Happened?

Taylor Bell, a student at Itawamba Agricultural High School in Itawamba County, Mississippi, posted a profane rap recording with violent imagery. He did so from his home computer during non-school hours. The subject of the rap: alleged sexual misconduct by two male coaches. The Itawamba County School Board found that Bell "threatened, harassed and intimidated school employees" and suspended him for seven days. Bell brought suit, claiming that the suspension violated his First Amendment rights.

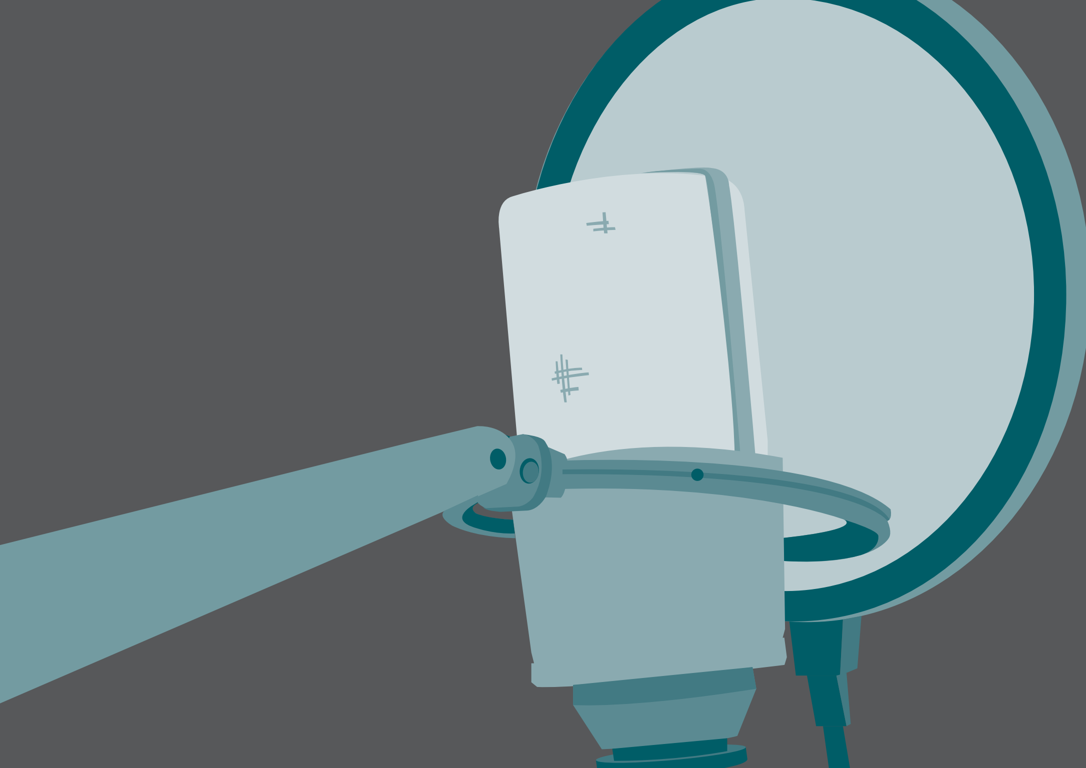
What did the Court Say?

The Fifth Circuit Court of Appeals, sitting *en banc*, upheld the suspension. Judge Rhesa Barksdale, writing for the majority, applied the rule articulated by the Supreme Court in *Tinker v. Des Moines* (1969), which held unconstitutional the suspension of students for wearing black arm-bands in protest of the Vietnam War. The *Tinker* Court stated that the Constitution's guarantees extend to public-school students and that a student "may express his opinions . . . if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." Judge Barksdale considered and rejected the possibility that *Tinker* did not apply to off-campus speech, observing that "students now have the ability to disseminate instantaneously and communicate widely from any location via the Internet" and emphasizing the "need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community."

The majority went on to conclude that Bell's rap "reasonably could have been forecast to cause a substantial disruption." It highlighted the need for "deference" to the school board's decision and noted that the school district's policy "demonstrate[d] an awareness of *Tinker's* substantial-disruption standard." The majority considered "the policy's violation" to be "evidence supporting the reasonable forecast of a future substantial disruption."

What Went Wrong?

The Supreme Court has long held that speech on matters of public concern—including in particular speech about the conduct of public officials—lies at the core of "the freedom of speech." Bell's speech, inspired by the alleged misconduct of school officials, plainly fell into that category. Given that Bell's



speech was of a kind protected by the First Amendment, the court's deference to the school board's determinations was inappropriate.

As Judge James Dennis explained in a powerful dissent, the court "either ignore[d] or glosse[d] over . . . evidence tending to show that school officials did not consider Bell's song threatening but instead punished him merely because they did not like the content of his speech." For instance, at the disciplinary committee meeting, Bell was told to "censor [his] material" and that he could "make emotions with big words, not bad words." The school never contacted law enforcement about the song, and even after his suspension, he was allowed to remain unattended in the school commons for the rest of the day. Further, Judge Dennis pointed out, using the school's determination that Bell had violated school policy as evidence of compliance with *Tinker* was "entirely circular"—the "very task before [the] court [was] determining whether the School Board's decision to discipline Bell under a school policy comported with constitutional dictates."

The Supreme Court will eventually have to resolve the question whether *Tinker* applies to off-campus speech. When it does so, it should reaffirm Tinker's central holding—that students do not "shed their constitutional rights to freedom of expression at the schoolhouse gate"—and make plain that self-serving factual assertions by school officials are not to be taken at face value.

ENGAGEMENT

Navigating Federal Regulations

U.S. Army Corps of Engineers v. Hawkes Co., Inc.
(U.S. Supreme Court, 2016)

What Happened?

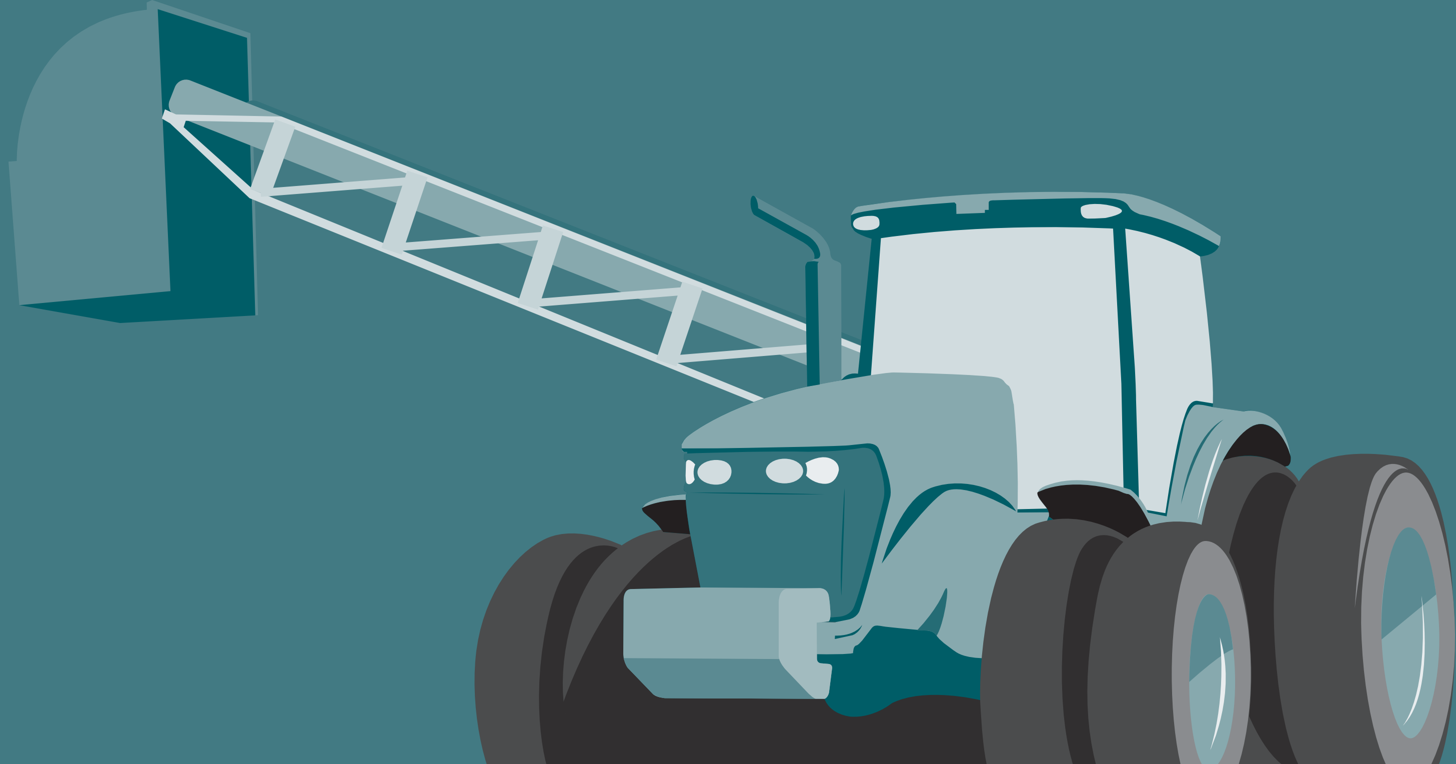
The federal Clean Water Act makes it illegal to "discharge" a "pollutant" into the "waters of the United States" without a federal permit. The federal government has defined every one of these terms broadly—the deposit of soil, dirt, or clean fill may constitute the "discharge" of a pollutant, and "waters of the United States" includes not only rivers and streams but wetlands that are *sufficiently connected* to rivers and streams. Prohibited discharges carry substantial civil and criminal penalties—unless one secures a permit from the U.S. Army Corps of Engineers (Corps).

Hawkes Co., a mining company, sought to mine peat—an organic material that forms in waterlogged grounds and is used for soil improvement and burned as fuel—on a 530-acre tract of land owned by two affiliated companies. The tract included wetlands believed to contain peat suitable for use in golf greens. After obtaining an option to purchase the property subject to regulatory approval, Hawkes applied to the Corps for a specialized "individual" permit that authorized "the discharge of dredged or fill material into the navigable waters at specified disposal sites." In the course of the application process, Hawkes received an approved (as distinct from preliminary) "jurisdictional determination" (JD) that the property contained "waters of the United States" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away. One study found that the average applicant for the individualized permit sought by Hawkes "spends 788 days and $271,596 in completing the process," without "counting costs of mitigation or design changes." (During a site visit, a Corps representative helpfully told a Hawkes employee that "he should start looking for another job," given the likely delays, costs, and uncertainty involved.)

But when Hawkes and the other two companies sought judicial review of the JD, the district court dismissed their claims, holding that the JD was not "final agency action for which there is no other adequate remedy in a court, as required by the Administrative Procedure Act prior to judicial review."

What Did the Court Say?

The Supreme Court unanimously held that the companies could *immediately* challenge the JD in federal court. Applying a two-pronged approach to assessing finality set forth in *Bennett v. Spear* (1997), Chief Justice John Roberts explained that the JD "marked the consummation" of the Corps' decision making process and had "direct and appreciable legal consequences." As to the former, he noted



that approved JDs like the one Hawkes received are issued after "extensive fact-finding" and are "typically not revisited." Thus, he concluded, an approved JD that states that someone's property *does not* contain jurisdictional waters "creat[es] a five-year safe harbor from such proceedings for a property owner." By contrast, failure to conform to a JD that *does* state that property contains jurisdictional waters "not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties."

The Court took a similarly fact-sensitive and realistic approach to the question whether adequate alternatives existed to the Administrative Procedure Act (APA) review in court. Roberts forcefully rejected the government's proffered alternatives—"discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results"—as inadequate, highlighting the nature of the risks and the associated costs and uncertainty involved in each alternative. To the Corps' argument that property owners should consider themselves fortunate, since "[i]f the Corps had never adopted its practice of issuing standalone jurisdictional determinations upon request," property owners could only seek review "in an enforcement action or at the end of the permitting process," Roberts responded: "True enough. But such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA."

Why Does it Matter?

Federal executive agencies *routinely* exercise powers over private citizens of a kind that the Constitution delegates exclusively to the legislative and judicial branches of government. The Supreme Court bears a strong measure of responsibility for this unconstitutional status quo, having (among other things) fashioned doctrines of judicial deference to federal regulatory power. In such circumstances, proponents of limited government must, to borrow the Chief's words, count their blessings.

In *Hawkes*, they have received such a blessing. Thanks to the Court's decision, landowners everywhere will be able to avoid a choice between going through a costly, time-consuming permitting process with an unknown outcome or facing civil and criminal penalties for pursuing their development projects.

Navigating Federal Regulations

Boch Imports, Inc. v. National Labor Relations Board

(First U.S. Circuit Court of Appeals, 2016)

What Happened?

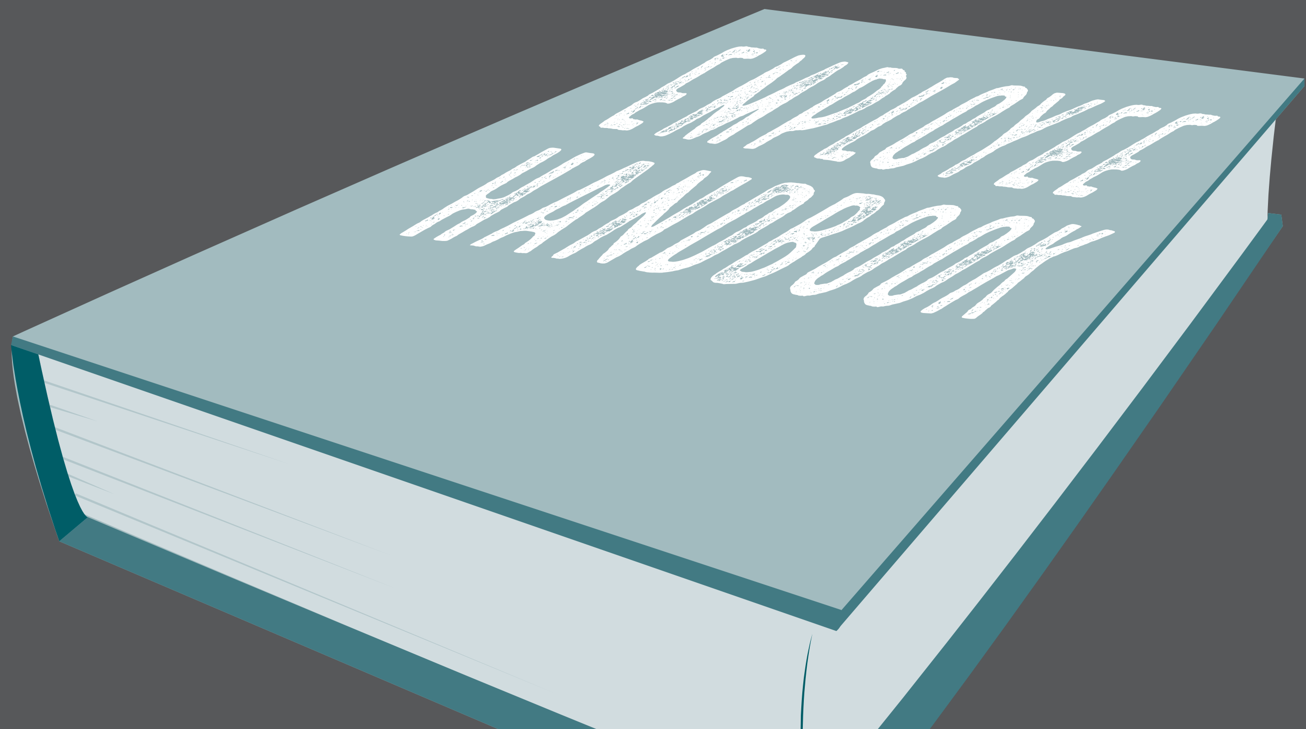
Boch Honda, a car dealership located in Norwood, Massachusetts, published an employee handbook in 2010 that vexed employees' collective bargaining representative. The union representative asserted that some of the workplace policies infringed upon employees' right to organize in violation of the National Labor Relations Act (NLRA). In the course of the ensuing discussions between Boch and the union, the union filed a formal charge against Boch with the National Labor Relations Board (NLRB). In 2011, Boch's collective bargaining unit decertified the union and discussions came to an end. While Boch began to explore revising the policies in the handbook with the NLRB's regional office, before any revisions took place, the NLRB in 2012 issued a formal complaint against Boch stemming from the (now-decertified) union's charge. Among other things, the complaint identified as problematic a dress code that banned employees who have contact with the public from wearing pins, insignias, or clothing bearing messages.

Before the NLRB made any ruling on the complaint, Boch published and issued to all employees a revised employee handbook that altered the workplace policies. Nonetheless, on June 17, 2013 the NLRB issued an amended complaint against Boch that stated that the publication of the revised handbook did not suffice to relieve Boch of liability for the 2010 policy provisions because Boch had failed to adequately "repudiate" them and that the challenged dress ban was not justified by Boch's interest in maintaining its public image. An administrative law judge (ALJ) determined that the language of the 2010 policy provisions would be reasonably construed by employees as impinging upon their rights under the NLRA; that the provisions were not adequately repudiated; and that Boch's interest in maintaining its public image did not justify its dress ban, save for the ban on pins. The NLRB, acting in its adjudicative capacity, largely agreed with the ALJ but determined that even the ban on pins was unjustified. Boch petitioned for judicial review in federal court, arguing that the NLRB's findings were not supported by substantial evidence and that the NLRB applied its precedents arbitrarily and capriciously, in violation of the Administrative Procedure Act (APA).

What Did the Court Say?

The court upheld the NLRB's ruling. Writing for a divided panel, Judge David Barron first addressed the question whether the NLRB's determination that Boch had failed to adequately repudiate its policy provisions was supported by substantial evidence. He examined the record compiled by the ALJ and found that Boch "did nothing more in terms of notification than to provide copies of the revised handbook to employees." Examining the relevant repudiation precedents, which require "unambiguous" and "specific" notice, he concluded that the NLRB's finding was "perfectly in accord with these precedents."

Judge Barron then turned to the dress ban. Drawing upon precedent holding that employees are "presumptively entitled . . . to wear union insignia and other attire" during work hours, he wrote that the "burden is on the employer to establish" that "special circumstances" exist to



justify limitations on such activity. He rejected as unpersuasive Boch's arguments that the dress ban would "further its interest in promoting its public image and that the Board had no basis for requiring Boch to show anything more," distinguishing a case in which the NLRB found "special circumstances" to justify an employer's specific enforcement of a general ban on uniform adornments on the grounds that the employer in that case sought to create "a specific and unique environment," as distinct from a "general, professional environment." Thus, the panel concluded that the NLRB had not "acted unreasonably" in finding that Boch failed to demonstrate special circumstances that justified the dress ban.

What Went Wrong?

Article III of the Constitution vests the judicial power in courts that are separated from either the legislative or executive branches and that are staffed by judges who are bound to exercise independent, unbiased judgment. The APA, however, has been interpreted to require federal judges to defer to facts found in administrative tribunals that do not use juries and are not bound by the standard rules of evidence (among other things, administrative rules of evidence allow hearsay), and to conclusions of law reached by administrative law "judges" who are themselves *members of the executive branch*. The (entirely predictable) result of such deference: systematic bias in favor of the executive branch.

How did that systematic bias manifest itself in *Boch*? Start with the fact that the ALJ at first removed the challenges to Boch's 2010 policies from the table altogether during the initial hearing on the complaint. The NLRB itself—in its capacity as adjudicator—then revived its challenges to those policies. Without giving Boch an opportunity to add to the record in order to present evidence that it had repudiated those policies, the ALJ went on to determine that Boch had not repudiated them. Thus, as Judge Norman Stahl explained, the record had been "improperly truncated."

Turning to the NLRB's decision, Judge Stahl conceded that the majority had correctly distinguished the cases on which Boch sought to rely but contended that those precedents were neither "coherent or tenable in the first place." By "tacitly encouraging employers to adopt narrower policies" targeting specific messages rather than general policies designed to "maintain a decent image," Judge Stahl explained, the "Board and the courts have lured business into a legal bog"—they risk liability "every time human resources of in-house counsel" determines that a particular message in a particular context is unacceptable. "One might be left," wrote Judge Stahl, "wondering why the Board has any authority whatsoever to second-guess Boch's style choices."

On Trial

Foster v. Chatman
(U.S. Supreme Court, 2016)

What Happened?

Timothy Foster, an 18-year-old African-American, was accused of robbing, sexually assaulting, and brutally killing an elderly white woman. The prosecution used peremptory challenges, which permit parties in criminal or civil trials to remove potential jurors during jury selection, to eliminate every black prospective juror from Foster's trial. Foster was convicted and sentenced to death.

Foster subsequently sought a writ of habeas corpus, claiming that the prosecution had violated the rule set forth by the Supreme Court in *Batson v. Kentucky* (1986), which held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from removing potential jurors during jury selection because of their race. Foster filed a series of requests under the Georgia Open Records Act, seeking access to the prosecution's file from his trial. The prosecution disclosed documents related to jury selection and the state habeas court admitted them into evidence. Among them: four different copies of the jury list in which black jurors names' were highlighted in green and marked with a "B"; six prospective jurors' questionnaires in which the word "BLACK" was circled; notes in which three prospective jurors were referred to as "B #1," "B #2," and "B #3"; and a handwritten document titled "definite NO's," which listed six names, the first five of which were those of the qualified black prospective jurors.

Despite this compelling evidence of intentional racial discrimination, the state habeas court accepted the prosecution's race-neutral justifications for their strikes, and the Georgia Supreme Court affirmed the decision.

What Did the Court Say?

In a thorough and persuasive opinion for the Supreme Court, Chief Justice Roberts served notice to prosecutors that the Court will not uncritically accept their race-neutral reasons for striking jurors. Foster's *Batson* claims centered upon the exclusion of two jurors: Marilyn Garrett and Eddie Hood. Roberts considered the proffered reasons for the exclusion of each juror in turn.

The district attorney, Stephen Lanier, put forth a number of reasons for striking Garrett, all of which (as Roberts put it) "seem[ed] reasonable enough." But close attention to the record disclosed a number of inconsistencies that undermined their plausibility. For example, Lanier claimed that Garrett was "less than truthful" because she said that she was not familiar with the neighborhood in which the crime had been committed, even though Garrett in fact lived in that neighborhood. But the prosecution accepted a white juror who gave a virtually identical answer to the same question, despite living half a mile from the murder scene.

The prosecution's stated reasons for the decision to strike Hood were even less convincing. Roberts noted that the prosecution's "principal reasons for the strike shifted over time." Initially, Lanier stated that the "'only thing'" he was concerned about was the fact that Hood had "an eighteen year old son which is about the same age as the defendant" and who had been convicted of "'basically the same thing that [Foster] is charged with.'" But Lanier later said that "'the bottom line'" on Hood was that Hood was a member of the Church of Christ and "'[t]he Church of Christ people . . . are very, very reluctant to vote for the death penalty.'" As Roberts wrote, Lanier's claim

that Hood's son had been convicted for "'basically the same thing'" as Foster was "nonsense": "Hood's son had received a 12-month suspended sentence for stealing hubcaps . . . Foster was charged with capital murder of a 79 year-old widow after a brutal sexual assault."

Why Does it Matter?

As Supreme Court Justice George Sutherland once put it, prosecutors are "representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." Accordingly, prosecutors are bound by ethical rules to act with candor towards judicial tribunals and constitutionally prohibited from acting in ways that undermine the impartiality of judicial proceedings. The heinous nature of a defendant's alleged crimes do not relieve prosecutors of their ethical and constitutional duties.

Owing to the immense power wielded by prosecutors and the grim reality that prosecutors do not always wield that power responsibly, judicial engagement can be life-saving. In Foster, the Court not only breathed life into *Batson*—it modeled the kind of adjudication that is necessary to ensure that those whose lives hang in the balance are not deprived of what is rightfully theirs.

ABDICATION

On Trial

Bianchi v. McQueen

(Seventh U.S. Circuit Court of Appeals, 2016)

What Happened?

In 2004, Louis Bianchi was elected to the office of state's attorney in McHenry County, Illinois, and promptly pursued a number of reforms that earned him political enemies. In 2006, one of the secretaries in Bianchi's office resigned and took sensitive documents with her. Working with a disgruntled assistant state's attorney whom Bianchi had demoted, the secretary delivered the documents to the media and to Bianchi's opponent in the next election.

Bianchi's opponent—aided by the secretary and other political enemies of Bianchi—sought the appointment of a special prosecutor to investigate Bianchi for (among other things) engaging in political activity at the public's expense. A special prosecutor was appointed, a grand jury was convened, and Bianchi and three of his colleagues were indicted on multiple counts of official misconduct. All were later acquitted at trial.

Bianchi and his colleagues then filed a suit for damages under Section 1983 against Henry Tonigan, the court-appointed special prosecutor; Thomas McQueen, the court-appointed assistant special prosecutor; and Quest Consultants International, Ltd., a firm of private investigators hired by the special prosecutors to assist in the prosecution. The plaintiffs claimed that the defendants fabricated evidence and withheld exculpatory evidence in violation of their rights under the Due Process of Law Clause of the Fourteenth Amendment. The district court dismissed the claims, based on the combined effect of absolute prosecutorial immunity and qualified immunity.

What Did the Court Say?

The court affirmed the ruling below. Judge Diane Sykes, writing for the panel, traced the contours of prosecutorial immunity, explaining that while prosecutors are immune from civil suit for "strictly prosecutorial acts" like preparing witness testimony, a prosecutor is not immune for acts that "go beyond the strictly prosecutorial to include investigation." Thus, Judge Sykes found that absolute prosecutorial immunity barred "claims premised on allegations that McQueen presented false statements to the grand jury and at trial" but not those based on "allegations of evidence fabrication and other chicanery months before the grand jury was empaneled."

Judge Sykes went on, however, to determine that qualified immunity barred the latter claims. As she explained, qualified immunity insulates government officials from civil liability for violating citizens' constitutional rights unless "the right at issue was clearly established at the time and under the

circumstances presented." Because the Seventh Circuit had held in previous cases that "[an] act of evidence fabrication doesn't implicate due process rights unless the fabricated evidence is later used to deprive the [criminal] defendant of her liberty in some way," the panel concluded that the right at issue was not "clearly established."

What Went Wrong?

The panel's description of the relevant precedent was accurate. The Supreme Court has held that prosecutors are *absolutely immune* from civil suits arising from the performance of "prosecutorial functions." The Court has held that *all* government officials are entitled to qualified immunity from civil suits. And the Seventh Circuit has repeatedly held that evidence-fabrication, standing alone, does not implicate due process rights.

But *every* judge is duty-bound to exercise independent judgment in determining what the law of the land is and to state the law accurately and honestly, and judges should do what they can to call for the reevaluation of erroneous decisions. The Supreme Court is not infallible—far from it—and lower court judges can and should criticize its errors. For an illustration of how judges can adhere to the Court's precedents while exposing them as profoundly flawed, one can do no better than DC Circuit Judge Janice Rogers Brown's concurrence in *Hettinga v. US* (2012). In that concurrence, Judge Brown provides an historical overview and thorough criticism of the Court's reflexive deference to the government in rational basis cases involving economic liberty, explaining how rational basis review has left "legislature[s] free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions."

Both qualified immunity and absolute immunity are not merely erroneous—they actively undermine the rule of law established by the Constitution. Where they apply, they make the Constitution less than the "Supreme Law of the Land" by rendering constitutional rights unenforceable against government officials who violate them, and they prevent judges from doing their duty to interpret and enforce the Constitution without bias in favor of the government.

Bianchi involved plausible claims of outrageous betrayals of public trust by public officials that resulted in people being arrested and forced to defend themselves against what may have been entirely meritless allegations. By simply following precedent without critical reflection upon it, the Seventh Circuit panel helped to perpetuate a status quo of institutionalized judicial abdication.

In Prison

Rowe v. Gibson

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

What Happened?

Jeffrey Rowe was diagnosed with gastroesophageal reflux disease (GERD) in 2009, while an inmate at Indiana's Pendleton Correctional Facility. The prison physician initially gave him 150-mg Zantac pills to alleviate his pain; Rowe was permitted to take the pills in his cell and to take them anytime. In January 2011, Rowe's pills were confiscated, and he was told that he could take pills only when a nurse gave them to him at 9:30 a.m. and 9:30 p.m., unless he bought pills at a prison commissary, which he could not afford to do. Rowe complained that he needed to take Zantac with his meals, scheduled by the prison for 4 a.m. and 4 p.m., in order to alleviate severe pain. He was denied permission to do so unless he purchased the pills himself.

In July 2011, Rowe's prescription lapsed, and his requests for a renewed prescription were denied. Dr. William Wolfe, a prison physician who had been prescribing Rowe Zantac for six months, reviewed his records and (without examining Rowe) decided that Rowe did not require Zantac *at all*. In August, Dr. Wolfe changed his mind and began prescribing it again. Rowe was still not allowed to take Zantac at meal times, leaving him in severe pain for hours between meals. He sued prison administrators and staff, including Dr. Wolfe, charging, among other things, that allowing him to take Zantac only at 9:30 a.m. and 9:30 p.m., despite his complaints that doing so failed to control his acid reflux at meal times, constituted deliberate indifference to his medical needs and thus violated the Eighth Amendment. The Supreme Court has held that deliberate indifference to serious medical needs amounts to cruel and unusual punishment.

The district judge granted summary judgment in favor of the defendants, relying in substantial part upon the "expert" testimony of Dr. Wolfe, who was not a gastroenterologist, had never physically examined Rowe, and was himself a *defendant* in the case. As an indigent prisoner, Rowe had nothing to offer in response to Dr. Wolfe's statements except his own claims of extreme pain during those periods of time when he was not allowed to take Zantac with or shortly before his meals. Rowe was denied requests for appointment of counsel and for an expert witness to assist him during litigation, and he did not have the resources to secure either without the assistance of the court.

What Did the Court Say?

The court reversed and sent Rowe's case back down for further fact-finding. Judge Richard Posner, writing for a divided panel, thoroughly examined the record. He noted that Dr. Wolfe's testimony was contradicted by Rowe's own personal experience with the timing of his medication and that Wolfe's testimony was "highly vulnerable." Given that Dr. Wolfe was a defendant in the case, was not a gastroenterologist, and did not offer any basis for his "off the cuff medical opinion," Posner suggested that Dr. Wolfe should not have been treated as an expert at all. Posner further noted that physicians had prescribed Zantac to Rowe for two years. Given that "the Indiana Department of Correction permits such continuous treatment only to treat a serious health condition," Judge Posner reasoned, "presumably the prescribing physicians thought Rowe's condition serious."

Emphasizing "the profound handicaps under which the plaintiff is litigating and the fact that his claim is far from frivolous," Judge Posner urged the district judge on remand to give "serious consideration to recruiting a lawyer to represent Rowe . . . appointing a neutral expert witness . . . to address the medical issues in the case; or doing both."

Why Does it Matter?

The adversarial process that is central to our legal system is not an end in itself—it is a means of arriving at truth. The process Jeffrey Rowe received in the district court was not adversarial in any meaningful sense. A prisoner who cannot afford to hire, and has been denied requests for the appointment of, both a lawyer and an expert witness necessary to support his highly plausible claim of medical indifference has no realistic prospect of securing relief, even if he has genuinely suffered a constitutional wrong.

Rowe's treatment by the district court left the Seventh Circuit with a fundamental question, captured nicely by Judge Posner: "Must our system of justice allow the muddled affidavit of a defendant who may well be unqualified to be an expert witness . . . to carry the day against a pro se plaintiff helpless to contest the affidavit?" The panel majority did its duty by answering this question in the negative.

ABDICATION

In Prison

Glisson v. Indiana Dept. of Corrections

(Seventh U.S. Circuit Court of Appeals, 2016)

What Happened?

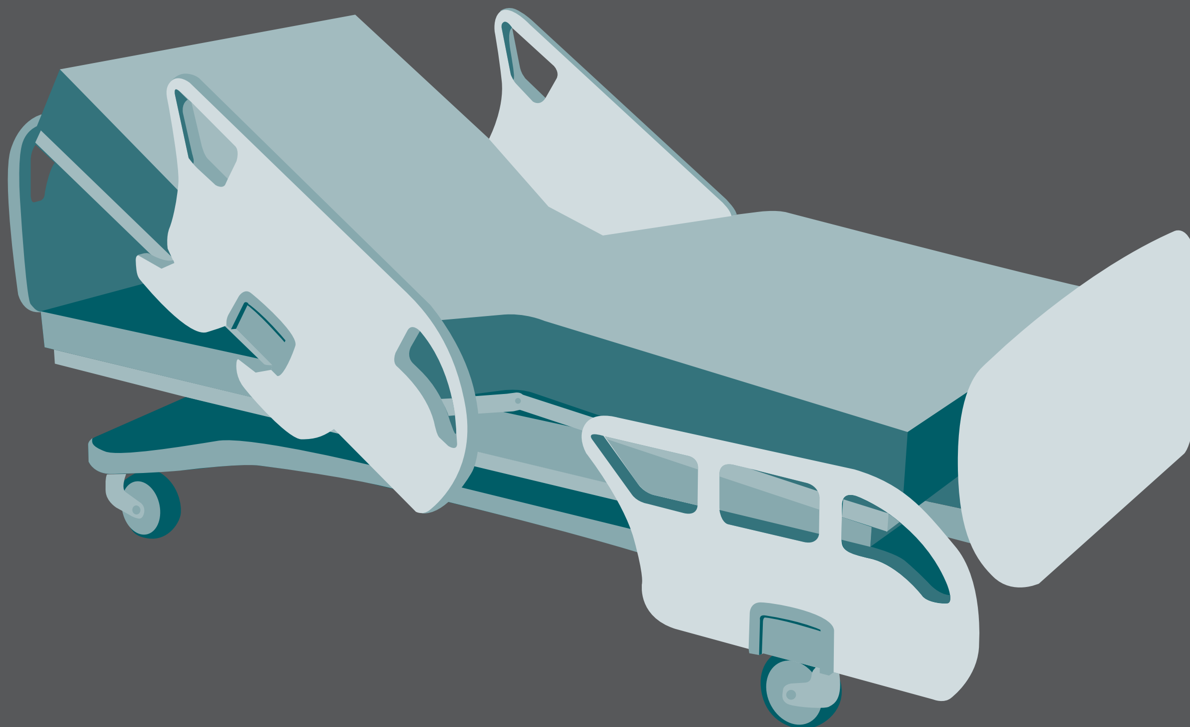
Nicholas Glisson died an agonizing death while incarcerated at Plainfield Correctional Facility (Plainfield). In 2003, Glisson was diagnosed with laryngeal cancer and had radical surgery. The surgery left him in need of voice prosthesis and a feeding tube, rendered his neck too weak to support his head (thus requiring a neck brace to ensure unimpeded breathing), and led to the development of spine damage. Following his September 3, 2010 conviction (for giving one prescription painkiller pill to a friend) and before sentencing, one of Glisson's physicians wrote a letter to the court expressing doubt that Glisson would survive if incarcerated.

The Indiana Department of Corrections (INDOC) housed Glisson in its Reception Diagnostic Center from September 3 through September 17. During that time, medical personnel noted spikes in Glisson's blood pressure, an occasional low pulse, and low oxygen saturation level, indicating respiratory problems. He also demonstrated signs of confusion and anger and was at one point deemed a suicide risk. As a result, INDOC placed him in segregation and had him undergo a psychiatric evaluation. He was then transferred to Plainfield Correctional Facility, where his condition rapidly deteriorated. Symptoms suggesting acute renal failure led INDOC personnel to transfer him to a local hospital. He remained there until October 7, when he was sent back to Plainfield. On October 10, he died from complications of laryngeal cancer with contributory renal failure.

Because the private corporation (Corizon) that provides medical care at Plainfield serves a governmental function—caring for state prisoners—it can be held civilly liable for constitutional violations. Glisson's mother Alma brought suit, charging that Corizon was deliberately indifferent to her son's medical needs and thus violated the Eighth Amendment's prohibition against cruel and unusual punishment. Specifically, she claimed that Corizon's failure to implement a particular INDOC Health Care Service Directive requiring centralized monitoring of inmates with complex medical conditions amounted to "a deliberate choice to follow a course of action . . . from among various alternatives," and that this choice "prevent[ed] medical personnel from communicating properly and ensuring appropriate continuity of care for inmates with serious medical problems."

What Did the Court Say?

The court dismissed Glisson's claim. Writing for a divided panel, Judge William Bauer explained that the Supreme Court has long held that victims of constitutional torts who seek to sue municipalities or



private entities serving governmental functions must produce evidence of "the existence of an 'official policy' or other governmental custom that not only causes but is the 'moving force' behind the deprivation of constitutional rights." Further, Judge Bauer explained, "where a plaintiff alleges that a *lack* of a policy caused a constitutional violation," that plaintiff must produce evidence of a "series of incidents" that indicates that "the lack of a policy is in fact a de facto policy choice, not a discrete omission."

The majority's analysis of Glisson's claim runs a single paragraph in length. Because the claim was construed as resting upon the lack of a policy, the claim could not survive without "evidence that [Corizon] staff had been deliberately indifferent to other inmates, and that a widespread practice of deliberate indifference flowed from the failure to implement the directive." Because Glisson had "only produced evidence of alleged deliberate indifference towards Glisson," the claim failed.

What Went Wrong?

The majority opinion reads like a straightforward application of settled precedent. But Judge Diane Wood's detailed and penetrating dissent exposes it as a stark example of judicial abdication.

Judge Wood began by relating the events leading up to Glisson's death in excruciating detail, leaving no doubt that Glisson died as a consequence of fractured, uncoordinated care. His voice prosthesis and neck brace were lost and never replaced. No one developed a medical treatment plan for him—indeed, during his first 24 days in INDOC's custody, no one even reviewed his medical history. No one ever took steps to integrate a growing body of evidence of his malnutrition with his overall mental and physical health.

Judge Wood then criticized the majority for reading Glisson's complaint as alleging only that Corizon's failure to implement INDOC's Directive violated the Eighth Amendment, rather than "as presenting a broader argument attacking Corizon's decision not to require centralized monitoring of inmates with complex medical conditions." Glisson argued that Corizon had made an "affirmative, official decision" to "rely on each provider's isolated decisions." Given that the INDOC directive concerning centralized monitoring was seven years old and that Corizon had "admitted that it was aware of the Directive's existence and that it had done nothing to comply with its dictates," it is hard to imagine that Corizon's decision was not "consciously chose[n]."

Tragic as Glisson's case is, it is not the first, nor will it be the last, example of governmental immunity defeating a constitutional claim that deserves meaningful adversarial testing.

Conclusion

As Alexander Hamilton wrote in Federalist 78, the federal judiciary is designed to serve as "an intermediate body between the people" and our agents in government and thus to keep those entrusted with the government's coercive power "within the limits assigned to their authority." Some of the cases discussed in this report disclose the consequences of judicial abdication—when judges fail to engage in impartial, evidence-based judicial review, ordinary citizens are left with no refuge from governmental abuses. Other cases show that when judges engage, we enjoy nothing less than our birthright—our freedom to peacefully pursue our happiness, each in our own way, without unreasonable coercive interference by those whom we entrust with government power.

Constructing a jurisprudence that consistently protects our freedom after decades of judicial abdication in numerous areas of law may seem like hard work. But the tools are ready at hand. Judges can and do carefully scrutinize evidence and identify the government's true ends in constitutional cases. They can and do distinguish between constitutionally proper and constitutionally improper governmental ends, and between plausible explanations for official conduct and explanations that are nonsensical. What judges can do in some settings, they can do in all settings.

The call for judicial engagement is, ultimately, a call to judicial duty—a call for judges to do what the Constitution both empowers and obliges them to do. By vesting the federal courts with the judicial power, the Constitution guarantees to "We the People"—every one of us—access to a forum in which we can be confident that conflict will be resolved in accordance with the letter and the spirit of the law of the land, rather than the mere will of the powerful. It is the duty of every judge to do his or her part, in any given case, to maintain the rule of law and to ensure that government might does not trump individual rights. Judicial engagement equips them to do so.

About the Author

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.

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