JUDICIAL ENGAGEMENT MEANS NO MORE MAKE-BELIEVE JUDGING

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INTRODUCTION

Every person who goes into court deserves a sincere, impartial judge. A substantial portion of American constitutional doctrine is devoted to ensuring they don't get one. What civil rights plaintiffs often get instead is a judge who wears the garb of a referee while actively playing defense for the home team. The call for "judicial engagement" is a deliberate challenge to that reality, and it aims to upset the constitutional applecart by proclaiming that ends-oriented, government-favoring, pseudojudging has no place in our system.

A related goal of this Essay is to correct a longstanding myth about standards of review (or "tiered scrutiny") in constitutional law. According to the standard framework, courts will subject government action to varying levels of scrutiny depending on the nature of the constitutional value at stake. The image conveyed is of a sloping curve on a graph that descends more or less continuously from "strict scrutiny" at the high end through a number of intermediate standards and then flattens out at the lowest level of scrutiny, rational basis review. But that image, depicted in Figure 1, is highly misleading insofar as it suggests there is actual judging going on at every point along the curve. As reflected in Figure 2, a more accurate image would be one in which the graph begins high above the X-axis in a zone labeled "Real Judging" and slopes down through various levels of strict and intermediate scrutiny, then plunges vertically into a zone below the X-axis labeled "Pretend Judging," which is where a substantial amount of constitutional adjudication occurs today. Proponents of judicial engagement seek to illuminate and eradicate that orthodoxy.

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Figure 1

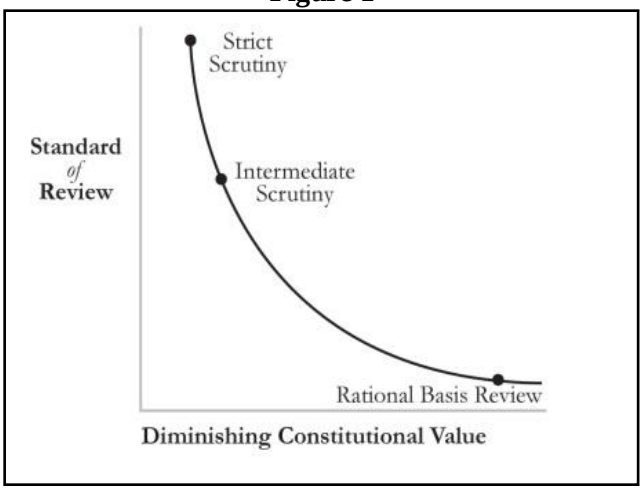
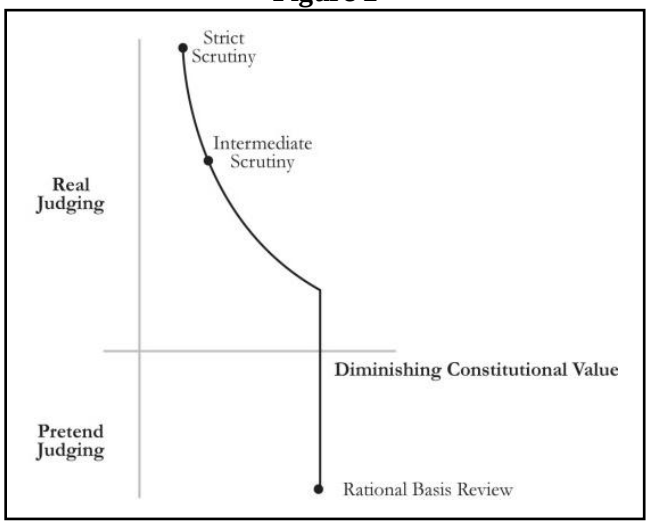


Figure 2



The argument rests on four premises that are universally acknowledged, demonstrably true, or both:

(1) The Constitution was designed in part to limit government power. It requires that both the ends and the means of government be legitimate.[1] Thus, for example, police officers may not pull over random motorists for bribes because both the end (personal enrichment) and the means chosen to advance it (arbitrary traffic stops) are impermissible;

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[1] For an extended discussion of the constitutional requirement that both the government's means *and* its ends must be legitimate, see Timothy Sandefur, *In Defense of Substantive Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 294-307 (2012).

(2) The government sometimes pursues illegitimate ends. Historically, these have included self-enrichment and the enrichment of cronies at public expense; perpetuation of a particular party's (or individual's) political power; suppression of dissent; retribution against personal or political enemies; personal animus; racial animus; religious animus; ethnic animus; gender-based animus; etc.;[2]

(3) Government officials recognize the need to conceal their illegitimate ends, including from courts;[3] and

(4) Judges consider themselves to be capable *in principle* of determining the government's actual ends, and they routinely do so in certain classes of cases.[4]

A key question presented by judicial engagement is whether courts should allow the government to pursue constitutionally illegitimate ends by accepting—or even inventing—false explanations for the government's actions in certain classes of cases. In other words, should there be one class of cases in which courts genuinely seek to ensure that the government's ends are legitimate, and another class of cases in which they simply go through the motions of judicial review but without making any real effort to identify or evaluate the government's actual ends? Modern constitutional doctrine says yes; this Essay argues no.

Part I explains what is meant by "pseudo" or "make-believe" judging by comparing the sorts of inquiries judges make when applying heightened scrutiny to the sorts of inquiries they make (or fail to make) when applying non-heightened standards like rational basis review. Part II addresses three major objections to a more engaged judiciary: judicial activism, epistemological skepticism, and majoritarianism. Part III concludes by examining some of the costs imposed by judicial abdication.

I. MAKE-BELIEVE JUDGING

Consider three different scenarios, none of them hypothetical. First, imagine a state law that forbids certain classes of people from being attorneys. Second, imagine a state law that requires all children to attend public schools and forbids the operation of private schools. Finally, imagine a state law that prohibits citizens from recording the public activities of government officials, including police officers.

In each of those scenarios, the government may be pursuing legitimate or illegitimate ends. For example, when a state prohibits people with history of criminal or unethical conduct from becoming attorneys, it may well be seeking to protect the public and the integrity of the justice system. But

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2 *See infra* Part I.

3 *See infra* Part I.

4 *See infra* Part I.

when a state prevents women,[5] former communists,[6] or nonresidents[7] from being attorneys, naked animus or parochialism seem more plausible. In the second scenario requiring all children to attend public schools, the state may be trying to ensure that all children receive a minimum baseline education. Or it may be facilitating the indoctrination of children at the behest of anti-Catholic bigots and nativists.[8] And when it prosecutes someone for recording the actions of public officials, the government may genuinely be trying to protect legitimate privacy interests—for example, the identity of undercover law enforcement officers—or it may simply be trying to shield itself and its agents from public accountability.[9]

A fundamental—and, I think, fundamentally misguided—premise of modern constitutional doctrine is that there are some settings in which the lawfulness of the government's actions should be judged according to its actual ends, and other settings in which the government's actual ends are irrelevant and should be disregarded by reviewing courts. Notably, the decision whether to evaluate the government's actual ends or ignore them is not made on a case-by-case basis, but instead categorically. Thus, the Supreme Court has held, in effect, that in some classes of cases it matters whether the government's actual ends are legitimate, whereas in other classes of cases it does not matter. Judicial engagement emphatically rejects that dichotomy.

Broadly speaking, there are two ways for courts to evaluate a constitutional challenge to government action: minimal scrutiny, exemplified by the so-called rational basis test; and heightened scrutiny, which features a variety of standards ranging from "intermediate"[10] to "strict."[11] There are two

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5 *See* Bradwell v. Illinois, 83 U.S. 130 (1873).

6 *See* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957).

7 *See* Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985); *see also* Toomer v. Witsell, 334 U.S. 385 (1948) (discussing the Privileges and Immunities Clause).

8 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); *see also* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1200-03 (1997) (documenting Oregon's explicitly "nativist" argument to the Supreme Court in defense of its mandatory public school law); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1016-36 (1992) (arguing that Oregon's public school law was a product of a "strange coalition of ideologies," including nativism, anti-Catholicism, anti-Bolshevism, and Western populism).

9 *See, e.g.*, Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Policy Activity*, 80 GEO. WASH. L. REV. 274, 301-05 (2011).

10 *See, e.g.*, Reed v. Campbell, 476 U.S. 852, 854-55 (1986) (illegitimacy); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (establishing intermediate standard of scrutiny for so-called "commercial speech" under the First Amendment that requires government to identify a substantial government interest that is directly advanced by the challenged regulation and is not more extensive than necessary to serve that interest); Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that gender-related classifications must advance "important" government interests and be "substantially related" to achieving them); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (addressing "incidental" burdens on speech).

particular characteristics that differentiate heightened levels of review from minimal ones like the rational basis test.

First, when a law or policy is reviewed under strict or intermediate scrutiny, the government must provide a "genuine" explanation for its actions, not one that has been "hypothesized or invented *post hoc* in response to litigation."[12] Unlike rational basis review, under heightened scrutiny "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the *actual purposes* underlying a statutory scheme."[13]

Second, under heightened scrutiny the government bears the burden of demonstrating the legitimacy of its actions, and that "burden is not satisfied by mere speculation or conjecture."[14] Instead, the government must support its factual assertions with "actual, reliable evidence."[15] Even under relatively more permissive forms of intermediate scrutiny, like the *Central Hudson*[16] test for commercial speech, courts will not permit the government to "get away with shoddy data or reasoning."[17] Instead, the evidence produced by the government must "fairly support" its asserted justification for the law, whatever that may be.[18]

The difference between heightened forms of scrutiny from intermediate to strict, on the one hand, and minimal scrutiny, including particularly

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11 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting Fed. Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449, 464 (2007))); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applies to all racial classifications); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (applying strict scrutiny and explaining that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

12 United States v. Virginia, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to a case involving a gender-based classification).

13 Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (emphasis added); *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (concluding that ordinances forbidding animal sacrifice "had as their *object* the suppression of religion" and observing that "as in equal protection cases, we may determine the city council's *object* from both direct and circumstantial evidence" (emphases added)).

14 Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

15 Ezell v. City of Chi., 651 F.3d 684, 709 (7th Cir. 2011). *Ezell* applied "heightened" scrutiny to a municipal ban on firing ranges without specifically designating the standard as intermediate or strict. *Id.* at 706-09.

16 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); *see supra* note 10 and accompanying text.

17 City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (plurality opinion).

18 *Id.*; *see also Edenfield*, 507 U.S. at 770-71 (holding that "a governmental body seeking to sustain a restriction on commercial speech much demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

the rational basis test, on the other, is not merely one of degree. Instead, the difference is categorical. In heightened-scrutiny cases, judges actually judge. As explained below, in minimal-scrutiny cases, they merely *pretend* to judge.

According to the classic formulation of the rational basis test, laws that do not interfere with "fundamental" constitutional rights or create "suspect" classifications will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[19] Moreover, it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[20] As a result, the "*actual* motivations of the enacting governmental body are entirely irrelevant,"[21] which means that courts must disregard even credible evidence of "improper" government motives, such as a bare desire to retaliate against personal or political opponents.[22] Finally, judges are not merely permitted but "*obligated* to seek out other conceivable reasons for validating" a challenged law when applying rational basis review.[23] And in fact, judges sometimes do help the government by inventing justifications to support its actions in rational basis cases.[24]

Consider that for a moment. Imagine the government is being sued for breach of contract. On the first day of trial, the judge calls the lawyers to the bench and informs plaintiff's counsel that he, the judge, has been retained by the government's defense team to help them think of justifications for the alleged breach of contract, but that he will not formally assist the government in any other way. It would be malpractice for plaintiff's counsel to proceed to trial under those circumstances because due process requires a neutral adjudicator who is free from bias and from the appearance of bias.[25] A judge who is obligated to help one party prevail in litigation simply because of that party's status—be it government, corporation, nonprofit, employer, employee, etc.—is plainly not neutral as a matter of fact

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19 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

20 *Id.* at 315.

21 Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

22 *Id.* at 923.

23 Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004) (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001)).

24 *See, e.g.*, City of Indianapolis v. Armour, 946 N.E.2d 553, 562 (Ind.) (upholding substantially unequal municipal assessment on the ground that residents who paid more for municipal service might have been in "better financial positions" than those who paid less for the same service), *cert. granted*, 132 S. Ct. 576 (2011); Pan. City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1546 n.3 (noting that one of the rationales relied on by the Supreme Court in *FCC v. Beach Communications, Inc.*, 508 U.S. at 313, was invented by a circuit court judge in the proceedings below).

25 *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259-61 (2009) (stating that a litigant has a due process right to an adjudicator who is free from the appearance of bias); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that an adjudicator must not have a financial interest in the outcome of a proceeding).

and cannot reasonably be perceived as being free from the appearance of bias either.[26]

To summarize the categorical distinction upon which a substantial portion of modern constitutional law is based, a court applying heightened scrutiny will seek to determine the government's actual ends based on admissible evidence and will not accept speculation, conjecture, or "shoddy reasoning" (by which the Supreme Court presumably means, or at least includes, demonstrably false explanations for government action). By contrast, courts applying various forms of minimal scrutiny, such as rational basis review, will make no effort to determine the government's actual ends, will accept as true unsupported factual assertions for which the government has no evidence, and will, if necessary, assist the government with the defense of its case by inventing "conceivable" justifications for the challenged law or policy. Again, there is a clear *qualitative* difference between those two standards: one involves actual judging; the other does not. Judicial engagement versus judicial abdication.

II. COMMON OBJECTIONS TO JUDICIAL ENGAGEMENT

It is a testament to how ingrained the practice of judicial abdication has become in current constitutional doctrine that the burden of persuasion rests with those who simply propose that judges act consistently in all cases by (1) making a sincere effort to determine the government's actual ends; (2) candidly evaluating the legitimacy of those ends when they can be determined; (3) refusing to accept unsupported factual assertions; and (4) maintaining judicial neutrality by not helping the other branches defend their own policies in court.

Note that the argument here is not that "tiered" standards of review are inappropriate or that judges must never give other branches of government the benefit of the doubt. Nor is the argument that every constitutional violation requires a judicial remedy; indeed, there are strong arguments for the proposition that some cases, such as those presenting inherently political questions, should be considered nonjusticiable. Those objections are straw men because the point of judicial engagement is narrower and more precise: namely, that a bifurcated system, in which judges actually exercise judgment in some constitutional cases while merely pretending to do so in others, is indefensible. And yet it has no shortage of proponents, whose objections to judicial engagement typically derive from one or more of these

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[26] The fact that courts may, on their own initiative, dismiss a party, claim, or entire lawsuit for lack of standing or other procedural defects does not refute this point. Standing, ripeness, and other jurisdictional requirements are neutral standards that apply equally to all parties, including the government. *See, e.g.*, Virginia v. Sebelius, 656 F.3d 253, 267-72 (4th Cir. 2011) (dismissing, on standing grounds, Virginia's challenge to Patient Protection and Affordable Care Act).

categories: judicial activism, epistemological skepticism, and majoritarianism.

A. *Judicial Activism*

Somewhat ironically, the most common objection to the call for judicial engagement—that it is merely code for a new kind of libertarianism-promoting "judicial activism"—comes from people who appear not to have engaged the actual argument themselves. For instance, *New York Times* Supreme Court reporter Linda Greenhouse wrote an essay called "Actively Engaged" for the Opinionator blog in which she asserted that many conservatives now embrace "judicial activism" because it has begun yielding results they like. According to Ms. Greenhouse, however, before conservatives could make this move "with a straight face," they first had to rename judicial activism as "judicial engagement."[27] In support of her claim that judicial engagement is simply a new name for activism, Greenhouse quotes the Center for Judicial Engagement's Declaration, which calls for judges "whose duty is 'to fully enforce the limits our Constitution places on government's exercise of power over our lives.'"[28]

The main challenge in refuting charges of "judicial activism" is the fact that the term itself has become an empty vessel into which one may pour nearly any complaint one has about the actions (or inactions) of a particular judge or even the judicial branch as a whole. But how fair are the charges of judicial activism as that term is properly understood? Judicial engagement certainly does not advocate that judges substitute their own policy preferences for validly enacted laws. Nor does it advocate that judges casually disregard precedent or the virtues of *stare decisis*. But it does candidly embrace the proposition that precedent can be at odds with the Constitution, and that in cases of clear conflict, precedent must yield. The Supreme Court's rejection in *Brown v. Board of Education*[29] of the odious separate-but-equal doctrine it embraced in *Plessy v. Ferguson*[30] may be the most celebrated example, but there are many others besides.[31]

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27 Linda Greenhouse, *Actively Engaged*, N.Y. TIMES (Oct. 19, 2011, 9:30 PM), http://opinionator.blogs.nytimes.com/2011/10/19/engagement-as-the-new-activism/.

28 *Id.* (quoting *Declaration of the Institute for Justice Center for Judicial Engagement*, INST. FOR JUST., http://www.ij.org/cje/declaration (last visited Apr. 4, 2012)).

29 347 U.S. 483 (1954).

30 163 U.S. 537 (1896).

31 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down state law criminalizing homosexual intercourse and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); Loving v. Virginia, 388 U.S. 1, 10 (1967) (protecting constitutional right to interracial marriage and overruling *Pace v. Alabama*, 106 U.S. 583 (1883)); Skinner v. Oklahoma, 316 U.S. 535, 538-43 (1942) (striking down compulsory sterilization law for certain criminals and tacitly overruling *Buck v. Bell*, 274 U.S. 200 (1927)).

A particularly glaring example of an indefensible precedent is the 1873 *Slaughterhouse Cases*,[32] which rejected a constitutional challenge to a Louisiana law that created a state-chartered monopoly on the sale and slaughter of livestock in New Orleans. In the course of rejecting that challenge, the Supreme Court had its first opportunity to consider the newly ratified Fourteenth Amendment, including whether its Privileges or Immunities Clause protected the butchers' right to earn a living.[33] After holding that the challenged law did not deprive butchers of their ability to practice their trade (which is the actual holding of the case),[34] the five-Justice majority went on to construe the Privileges or Immunities Clause as protecting only an idiosyncratic and relatively trivial set of so-called rights of "national citizenship, such as access to navigable waterways and the ability to invoke the protection of the federal government when on the high seas."[35]

Virtually all modern scholars agree that *Slaughterhouse* was wrongly decided,[36] but the Supreme Court steadfastly refuses to revisit the decision. Even those Justices, like Scalia, who proclaim themselves to be both textualists and originalists refuse to reconsider this plainly mistaken decision.[37] The Supreme Court's refusal to enforce—or even seek to comprehend—the original understanding of the Privileges or Immunities Clause would seem to be a textbook example of "judicial activism" properly understood, i.e., judges disregarding the text of the Constitution in favor of their own policy preferences. In this case, the policy preference is for reflexive judicial deference to legislatures regarding property and economic regulations, both of which seem most likely to have been encompassed by

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32 83 U.S. (16 Wall.) 36 (1873).

33 *Id.* at 74.

34 *Id.* at 60.

35 Clark M. Neily, III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POL'Y 185, 196 (2010) (internal quotation marks omitted) (discussing *Slaughterhouse*); *see also Slaughterhouse*, 83 U.S. 78-80.

36 *E.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 213 (1998) (noting "[t]he obvious inadequacy" of Justice Miller's majority opinion in *Slaughterhouse*); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1321 (3d ed. 2000) ("[T]he textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection against state rights-infringement is very powerful indeed."); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI. KENT. L. REV. 627, 627 (1994) ("'[E]veryone' agrees the [Supreme] Court incorrectly interpreted the Privileges or Immunities Clause.").

37 *Compare* McDonald v. City of Chicago, 130 S. Ct. 3020, 3030 (2010) (plurality opinion) (explaining that "[w]e see no need to reconsider" the *Slaughterhouse* majority's interpretation of the Privileges or Immunities Clause), *with id.* at 3050-58 (Scalia, J., concurring) (joining Court's opinion, "[d]espite my misgivings about Substantive Due Process as an original matter," but not discussing the Privileges or Immunities Clause or its interpretation in *Slaughterhouse*), *and id.* at 3058-59 (Thomas, J., concurring) (critiquing *Slaughterhouse* and advancing textualist and originalist arguments for proposition that the right to keep bear arms is more appropriately protected by the Privileges or Immunities Clause of the Fourteenth Amendment than the Due Process Clause).

the term "privileges or immunities" as it was used by those who drafted the Fourteenth Amendment and as understood by those who voted to ratify it.[38]

The Supreme Court's refusal to confront its glaring error in *Slaughter-house* has had profound consequences. Most significantly, it has created much doubt and confusion surrounding the provenance of various unenumerated rights that the Court protects under the oft-maligned doctrine of "substantive due process."[39] Critics, including Justice Scalia[40] and many leading conservative scholars and commentators,[41] deride the notion of "substantive" due *process* and seriously undermine its legitimacy with their skepticism.[42] But these same skeptics persistently refuse to provide any coherent theory of the Fourteenth Amendment's Privileges or Immunities Clause, which a growing body of scholarship indicates was likely intended to protect an array of individual rights.[43] Thus, proponents of judicial engagement have urged the Supreme Court to revisit a key precedent—the *Slaughterhouse Cases*—that virtually everyone agrees was mistaken in order to recover a more faithful understanding of a provision (the Privileges or Immunities Clause) that would provide both support and guidance for the protection of individual rights under the Fourteenth Amendment.[44] That

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38 *See, e.g.*, Eric R. Claeys, *Blackstone's* Commentaries *and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 782 (2008); Wilson Pasley, Note, *The Revival of "Privileges or Immunities" and the Controversy Over State Bar Admission Requirements: The Makings of a Future Constitutional Dilemma?*, 11 WM. & MARY BILL RTS. J. 1239, 1266 (2003).

39 *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (documenting Progressive-era hostility to judicial protection of liberty, including use of "substantive" due process to protect unenumerated rights).

40 *See, e.g.*, *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (noting his "misgivings about Substantive Due Process"); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2608 (2010) (describing "Substantive Due Process," mockingly, as "a wonderfully malleable concept").

41 *See, e.g.*, Sandefur, *supra* note 1, at 284 nn.2-5 (citing examples).

42 Contrary to the simplistic criticisms frequently leveled against it, the concept of "substantive due process"—i.e., the notion that "due process of law" restricts both the ends and the means of government—has a well-documented historical and textual pedigree that its critics typically ignore. *See, e.g.*, Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 984-85 (2006); Sandefur, *supra* note 1, at 294-95.

43 *See* Aynes, *supra* note 36; Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010); Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate Over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15 (2009). *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (demonstrating that for framers of Fourteenth Amendment the term "privileges or immunities" appears to have been synonymous with "rights").

44 *See, e.g.*, Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 3, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099506, at *3; *see also* Neily, *supra* note 35, at 194.

might well lead to more judicial *activity*, but that is not the same thing as *activism*, properly understood.[45]

It appears from the tenor of their arguments that opponents of judicial engagement are not so much defending the practice of make-believe judging as they are expressing a preference for the status quo over robust judicial enforcement of constitutional limits on government power.[46] But if that includes embracing a standard of review in which courts arbitrarily refuse to consider the legitimacy the government's actual ends, actively assist the government in the defense of its case, and accept as true factual assertions for which no evidence has been offered, then it seems reasonable to question whether it is appropriate for courts to provide actual judicial review in some cases while merely pretending to do so in others. In short, it is one thing to state candidly that a particular issue or class of cases is nonjusticiable; it is quite another to acknowledge the existence of a constitutional right while applying a sham standard of review designed to ensure that the government's true purposes need never be acknowledged and that its factual assertions are accepted at face value, no matter how implausible.

B. *Epistemological Skepticism*

Another common objection to judicial engagement's rejection of make-believe judging in which courts accept false or unsupported justifications for government conduct is that one simply cannot "know" what ends the government is actually pursuing with any given policy or what actually prompted the government to take any given action.[47] There are two basic problems with this critique.

First, as discussed above, it directly contradicts a bedrock feature of contemporary constitutional doctrine, which requires the government—in cases involving constitutional values the Supreme Court deems worthy of meaningful protection—to provide a "genuine" explanation for its actions, not one that has simply been invented for purposes of defending a given case.[48] Unlike rational basis review, under heightened scrutiny "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the *actual purposes* underlying a statutory

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45 *See, e.g.*, Kermit Roosevelt, *Justice Scalia's Constitution—and Ours*, 8 U. PA. J.L. & SOC. CHANGE 27, 34 (2005) (arguing that "a judge that lets an unconstitutional law stand has broken faith with the constitution as much as one that strikes down a constitutional law").

46 *E.g.*, J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2011) (defending ultra-deferential judicial restraint and criticizing constitutional theories that result in judges applying significant scrutiny to government action not explicitly forbidden by the Constitution).

47 *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 65 (1994).

48 *See supra* notes 10-24 and accompanying text.

scheme."[49] Courts routinely inquire into legislative motive in heightened-scrutiny cases involving fundamental rights and suspect classifications, even under the less searching "intermediate" standards of review.[50] Indeed, the Supreme Court is so confident of courts' abilities to ascertain the government's motives that it has even created a test for public-employment cases that requires the fact finder to determine what action the government *would* have taken towards an employee that it has terminated for a potentially unconstitutional reason had the government been aware of information discovered after the fact that would have provided appropriate grounds for termination.[51]

Second, the notion that courts should make no effort to ascertain and evaluate the government's actual ends in particular classes of cases undermines the entire notion of judicial review. Again, the Constitution limits not just the means of government but its ends as well. Thus, if the government has a policy requiring the payment of a bribe before a person can do X, it doesn't matter what "X" is—whether it's opening a restaurant, renovating a building, or riding a bicycle. The use of government power for purposes of self-enrichment is an illegitimate end, and that suffices to resolve the constitutionality of the policy, quite apart from however a court might ultimately characterize the importance of the individual right or the invidiousness of the classification at issue. But if having a constitutionally legitimate end is an absolute baseline requirement for government action and courts refuse to undertake that inquiry in certain classes of cases—not because they are unable to make the inquiry, but simply because they refuse to undertake it—then they are not really "judging" the constitutionality of the government's action, they are rationalizing it.

Consider one of the illustrations offered above, prohibiting citizens from recording government officials in public places. Lower courts are split on how to characterize the nature of the asserted individual right in that case—fundamental versus nonfundamental—and the Supreme Court has not yet weighed in.[52] But note how differently courts will approach the issue

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49 Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (emphasis added).

50 *See supra* notes 10-11 (collecting strict and intermediate scrutiny case citations).

51 *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

52 *Compare, e.g.*, ACLU v. Alvarez, No. 10-C-5235, 2011 WL 66030, at *3-4 (N.D. Ill. Jan. 10, 2011) (dismissing citizen recording case on the grounds that it presented no First Amendment issue), *and* Commonwealth v. Hyde, 750 N.E.2d 963, 969-70 (Mass. 2001) (rejecting First Amendment defense to criminal prosecution of citizen who recorded police officers during a traffic stop without their knowledge), *with* Glik v. Cunniffe, 655 F.3d 78, 82-85 (1st Cir. 2011) (holding that there is a "clearly established" First Amendment right to record the public activities of law enforcement personnel and distinguishing *Hyde* on the dubious premise that the recording in that case was done without the officers' knowledge whereas it was done openly in *Glik* (internal quotation marks omitted)). *See also* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that citizens have "a First Amendment right, subject to reasonable time, manner and place restrictions . . . . to "to gather information

depending on which of those doctrinal boxes the right to record public officials ends up in. A court applying rational basis review according to its strict formulation would be obliged to accept at face value even a demonstrably insincere and factually baseless assertion by the government that it is simply trying to protect the privacy interests of public officials who are sometimes required to do unpopular things as part of their job. On the other hand, a judge applying heightened scrutiny would seek to determine the government's *actual* objectives in enforcing that policy and would not be blind to the very real possibility that the government's only plausible purpose in arresting people for recording public officials was to avoid accountability for the actions of its agents.

Reasonable people might well debate the constitutionality of a law that criminalizes the recording of public officials without their permission. But it is not credible to suppose that a judge's ability to ascertain the government's "actual"[53] ends in enforcing that law depends on whether the constitutional right at stake is characterized as fundamental or nonfundamental. And a constitutional doctrine that stands for that proposition—as the rational basis test does—represents the worst kind of formalism.

C. *Majoritarianism*

The last objection to address regarding judicial engagement is the stated concern for majoritarianism. Sometimes cloaked in terms of commitment to "democracy" and sometimes as an aversion to so-called "judicial supremacy," the underlying point is that courts should be hesitant to interfere in the political process lest they inadvertently thwart the legitimate policy choices of "the people."[54] While that is certainly an important concern, the inconsistent, undisciplined, and self-serving manner in which it is often asserted seriously undermines its credibility in application.

First, the Constitution is deliberately antidemocratic in many important ways, including the explicit protection of various individual rights, separation of powers, federalism, and other structural limits. The proposition that the Constitution's primary or "default" value is the promotion of supposedly democratic choice is hardly self-evident. Moreover, the notion that any

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about what public officials do on public property, and specifically, a right to record matters of public interest").

53 *See* United States v. Virginia, 518 U.S. 515, 535-36 (1996).

54 *See* WILKINSON, *supra* note 46, at 114 (arguing that "[t]he grand quest of [constitutional] theorists has left restraint by the wayside and placed the inalienable right of Americans to self-governance at unprecedented risk"); *cf.* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344-45 (2007) (noting that the Court is "particularly hesitant to interfere with" local policy judgments and avoids "step[ping] in and hand[ing] local businesses a victory they could not obtain through the political process").

given policy—say, subsidizing the production of ethanol[55] or forbidding people from selling floral arrangements without a license[56]—represents a truly majoritarian outcome is quite dubious, particularly in light of developments in public choice theory. As public choice theory has demonstrated, there are systemic failures in the political marketplace that seriously undermine the proposition that government policymaking consistently reflects popular will.

Moreover, history has shown what the Framers knew very well, which is that the popular will can be extraordinarily ugly and that "the people" frequently pursue ends through the political process that the Constitution—properly understood—forbids. Specific examples are sadly abundant and would include racial segregation, antimiscegenation laws, religious persecution, eugenic sterilization, and the persecution of homosexuals.

To say to the victims of those policies that their only recourse must be to the political process would be self-evidently disrespectful and outrageous. And yet that is precisely what proponents of the majoritarian objection to judicial engagement propose with respect to rights they consider unimportant—not just that courts should give the government broader leeway in those areas or that judges should employ a lower but still meaningful standard of review, but rather that courts should exempt the government from its constitutional obligation to pursue only legitimate ends in cases involving rights deemed nonfundamental by the Supreme Court.

Another objection from majoritarianism is the assertion that constitutional decisions have the effect of permanently foreclosing particular policy choices.[57] But that concern is substantially overblown for the simple reason that judges can write their decisions as broadly or narrowly as they wish. In some cases—say, constitutional challenges to compulsory sterilization for eugenic purposes or criminalizing interracial marriage—courts might feel confident enough to issue a sweeping decision that absolutely forecloses those policies absent constitutional amendment. But other cases might present a closer factual call or greater doubt about competing values and the nature of the interests at stake. In those cases, judges can write their decisions more narrowly, holding only that the explanations offered or evidence presented by the government are insufficient to justify the challenged regulation on that particular record. Should the government later identify a more persuasive explanation for its policy or discover new evidence to support it, then there is in principle no reason why courts may not permit the government to try again. Thus, in cases where they think the constitutional call is a close one, or where the consequences of error appear particularly grave, judges might well choose to base their rulings on the narrowest possible

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55 *See, e.g.*, 26 U.S.C. § 6426 (2006).

56 *See, e.g.*, LA. REV. STAT. ANN. § 3:3808(B)(1) (2010).

57 *See, e.g.*, WILKINSON, *supra* note 46, at 20 & 121 n.47; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1661-62 (2005).

grounds in order to provide maximum leeway for legislative policymaking while still discharging their constitutional obligation to sincerely judge the constitutionality of government action.

III. THE COSTS OF ABDICATION AND BENEFITS OF ENGAGEMENT

While the stated objections to judicial engagement either fail to address the points it actually makes or are undermined by their own lack of consistency, proponents of the status quo tend to drastically underestimate the costs of judicial abdication. It would be impossible to document all of those costs, but three seem particularly noteworthy here.

First and foremost is the systematic loss of liberty due to judicial rubberstamping of unconstitutional government action. History makes clear that the government sometimes acts for constitutionally illegitimate purposes. This includes areas, such as economic and property regulations, involving rights currently deemed nonfundamental by the Supreme Court. Because those rights receive no meaningful level of judicial review, there will be at least some instances where the government is permitted to violate people's constitutional rights by pursuing demonstrably illegitimate ends.

Perhaps not surprisingly, the Supreme Court's decision to give the government a free pass to violate people's constitutional rights by simply looking the other way does not always seem to sit well with judges. Thus, for example, in *City of Cleburne v. Cleburne Living Center, Inc.*,[58] the Court refused to accept the perfectly "conceivable"—but plainly insincere—justifications offered by the city in defense of its refusal to allow the creation of a home for mentally retarded adults.[59] Three Justices concurred in the result but dissented in part, arguing that the majority had failed to apply the rational basis test literally[60] because instead of asking what the city's motives might *conceivably* have been, the majority based its decision on what it concluded was the city's actual motive, namely "irrational prejudice against the mentally retarded."[61]

The Supreme Court has shown similar ambivalence about whether to acknowledge or ignore the government's "actual purposes" in other rational basis cases involving illegitimate government ends, including animus to-

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58 473 U.S. 432 (1985).

59 *Id.* at 448-50; *see also id.* at 455 (Stevens, J., concurring) (explaining that he finds "wholly unconvincing" the city's assertion that it "was really motivated by a desire to protect the mentally retarded from the hazards presented by the neighborhood").

60 *See id.* at 456 (Marshall, J., concurring in part and dissenting in part) (explaining that the city's action "surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation").

61 *Id.* at 450 (majority opinion).

wards "hippies"[62] and homosexuals,[63] naked favoritism,[64] and perhaps other motivations that the Court simply cannot bring itself to ignore, even though (as inevitably pointed out by the dissenters in those cases)[65] it is technically supposed to.

Second, when courts make no effort to distinguish between actual and disingenuous explanations offered by the government for its own conduct, they reward the government for misrepresenting its true ends. For example, in *City of Cleburne*, it is utterly implausible to believe that the city refused to issue an occupancy permit to the home for mentally retarded adults because it genuinely feared that residents would be unable to escape the home in the event of a flood or that the city would be unable to protect residents from assaults by children at a nearby middle school.[66] Yet those were the explanations the city offered for its conduct, and the Supreme Court has repeatedly held in rational basis cases that the government's actual motives are irrelevant.[67] Inviting the government to misrepresent its actual motivations, and then rewarding it for doing so, seems inimical to the adjudicative function, not to mention individual rights.

Courts are uniquely equipped for the truth-seeking role they normally perform. It is one thing for a judge to acknowledge that in a particular case he or she is unable to ascertain the truth of a situation, including the government's actual ends in pursuing a given policy. But that should be done candidly, on a case-by-case basis, and not categorically, on the premise (never explicitly asserted and not true in any event), that it is possible for courts to determine the government's "actual purpose" in some kinds of cases but not in others. The current dichotomy in constitutional law is nothing more than a *policy choice*—a decision to permit the government to violate the Constitution by pursuing improper ends in some classes of cases but not others.

Moreover, there may be real value in having courts assess the candor of the government's stated explanations for its conduct. If courts determine that the asserted justifications are not "genuine"—in other words, that the government has offered a demonstrably false explanation for its conduct—

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62 *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (internal quotation marks omitted).

63 *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

64 *See* Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882-83 (1985); Zobel v. Williams, 457 U.S. 55, 65 (1982).

65 *See, e.g.*, *City of Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part and dissenting in part); *Ward*, 470 U.S. at 901-02 (O'Connor, J., dissenting).

66 *City of Cleburne*, 473 U.S. at 449-50.

67 *E.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (noting that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

then that might well be useful information for citizens to have in evaluating their support for the policy in question.[68]

Consider the federal government's inconsistency in the healthcare litigation about whether the financial exaction for failure to comply with the individual mandate is a tax or a penalty. During the legislative process both Congress and President Obama repeatedly denied that the exaction was a tax.[69] But then, having reaped the political advantages of that position, the government promptly reversed itself and took the position in court that the payment for noncompliance with the individual mandate was, in fact, a tax. As Judge Roger Vinson explained in denying a motion to dismiss Florida's constitutional challenge to the Affordable Care Act,

> Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an "Alice-in-Wonderland" tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check.[70]

As noted, courts are uniquely equipped to ferret out the truth, even in the face of concerted efforts to conceal it. The mere fact that the government may be willing to misrepresent its true ends in particular cases provides no warrant for courts to abandon their truth-seeking function. It is one thing to be *unable* to identify the government's actual purpose in a given case; it is another thing entirely to refuse even to try.

A final virtue of this form of judicial engagement—that is, candidly evaluating the government's true ends in all cases where it can be done—is that it may help to avoid unnecessary conflict over the existence of particular constitutional rights and whether to characterize them as fundamental or nonfundamental. Thus, for example, the Constitution contains no explicit protection of the right to bodily integrity or the right to reproduce, nor is there any specific mention of a right to earn a living in the occupation of one's choice. The Supreme Court has been inconsistent in its recognition and conception of those rights,[71] and reasonable people have vastly different

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68 *Cf.* United States v. Hughes, 716 F.2d 234, 240 (4th Cir. 1983) (noting that lack of candor "may be considered as circumstantial evidence of guilt"). Likewise, if the government feels moved to conceal its true ends, then citizens might reasonably consider that circumstantial evidence that the government considers those ends to be illegitimate or otherwise indefensible.

69 Florida v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1133 n.5 (N.D. Fla. 2010).

70 *Id.* at 1143 (footnote omitted).

71 *Compare* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding forced sterilization for purposes of removing "socially inadequate" persons from the gene pool), *with* Skinner v. Oklahoma, 316 U.S. 535, 538-43 (1942) (striking down a compulsory sterilization law for certain criminals and tacitly overruling *Buck v. Bell*). Similarly, while the Supreme Court has described the right to pursue "a common calling" as "one of the most fundamental" rights protected by Article IV's Privileges and Immunities Clause, see *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 n.9 (1985) (quoting United Bldg. &

views about the legitimacy of providing meaningful judicial protection for unenumerated rights. But one need not believe in a constitutional right to procreate to recognize that eugenic sterilizations are unconstitutional because they serve no *legitimate* government purpose. Similarly, a law conditioning the issuance of an occupational license on the payment of a sufficient bribe to the relevant government officials is likewise unconstitutional because self-enrichment through graft is not a *legitimate* government end. The same is true if the only genuinely plausible purpose for a given occupational licensing law is to advance the anti-competitive ends of an industry interest group.[72]

CONCLUSION

As the Eleventh Circuit noted in declaring the Affordable Care Act's individual mandate unconstitutional, when government oversteps the outer limits of its legitimate powers, "the Constitution requires judicial engagement, not judicial abdication."[73] History and experience show that governments pursue both legitimate and illegitimate ends. In cases involving values they deem sufficiently important, judges will seek to determine the government's actual ends to ensure they are constitutionally legitimate. Judicial engagement rejects the premise that it is appropriate for judges to make a genuine effort to police the constitutional bounds of government power in some cases but not in others. Judicial engagement calls for commitment and consistency in reviewing constitutional challenges to government power and an end to judicial abdication in the form of make-believe judging.

Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219 (1984)) (internal quotation marks omitted), it considers that same right to be *nonfundamental* under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-89 (1955).

[72] *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002) ("Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored," namely suppressing competition at the behest of the industry group that lobbied for the law). *But see* Powers v. Harris, 379 F.3d 1208, 1221-22 (10th Cir. 2004) (holding that naked economic favoritism is a legitimate government purpose and noting "that while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments").

[73] Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1284 (11th Cir.), *cert. granted*, 132 S. Ct. 603 (2011).