Selective Judicial Activism: Defending *Carolene Products*

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INTRODUCTION

Poor minimal scrutiny. It was once the king of constitutional doctrines: the savior of the New Deal, reasserting the Supreme Court's legitimacy and credibility after the Court's obduracy tarnished its reputation during the first third of the twentieth century. And now we have a symposium asking whether the modern rational basis test is unconstitutional.

But maybe we are looking at it all wrong. The rational basis test is not unconstitutional (nor is it the panacea we once thought) because *the* rational basis test does not exist. In the seven decades since the test's inception, it has become clear that it—along with the other tiers of scrutiny—consists of empty buzzwords. They have no fixed meaning, but instead embody a concept. It is really the *concept* that is under attack by modern conservative libertarians.

The concept is that judicial activism should be selective. In some circumstances, the courts should defer to legislative judgment and presume, almost irrefutably, the constitutionality of duly enacted statutes. In other circumstances, the courts should be less deferential and more activist. Selective judicial activism is in fact the Supreme Court's current jurisprudence across a broad range of constitutional doctrines. Since the days of the Warren Court, conservatives have attacked that selectivity by railing against activism. Now the new conservative libertarians have switched tactics: Instead of urging deference across the board, they have begun to champion activism across the board.[1]

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1. For an intriguing discussion of the theoretical prerequisites necessary to allow this about-face, see Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015). For a

In this Essay, I do three things. I begin in Part I by describing the jurisprudential landscape to show that neither strict scrutiny nor minimal scrutiny have any fixed content, but instead vary depending on whether the Court thinks the presumption of constitutionality should be relaxed. In Part II, I show that the real target of modern libertarians' wrath is disagreement with the current state of the law regarding selective judicial activism: they disagree with the modern Court's decisions about the circumstances under which heightened scrutiny should apply. Part III defends the status quo against the libertarian challenge by marshalling four types of arguments: moral arguments, constitutive arguments, consequentialist arguments, and arguments resting on the likelihood of illicit legislative motives.

I. SELECTIVE JUDICIAL ACTIVISM

Hornbook law tells us that most challenges to governmental regulation—regardless of the constitutional source of the challenge—are subject to one of three tiers of scrutiny: strict, intermediate, or minimal (sometimes labeled "rational basis").[2]

Equal Protection Clause jurisprudence applies strict scrutiny to laws that discriminate on the basis of race or national origin or that discriminate with regard to a fundamental right. Thus, those laws are valid only if they are necessary to a compelling governmental interest. Laws discriminating on the basis of gender are subject to intermediate scrutiny: they are constitutional only if they are substantially related to an important state interest. Most other laws are consistent with the Equal Protection Clause as long as they are rationally related to a legitimate governmental interest.

Similarly, First Amendment jurisprudence, while not always speaking in the same terms, can usefully be described as adopting analogous tiers of scrutiny. Most content-based restrictions of speech are subject to strict scrutiny, restrictions on commercial speech are subject to intermediate scrutiny, and most time-place-and-manner regulations or laws with incidental effects on speech get some form of minimal scrutiny.

Cases under the dormant Commerce Clause fit the same pattern. Laws that intentionally or facially discriminate against outsiders or against interstate commerce are subject to strict scrutiny, while those that are facially neutral are subject to minimal scrutiny.

This hornbook law of three tiers of scrutiny still operates in a few established contexts. Discrimination against racial or ethnic minorities still requires a

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more cynical explanation, see generally Mark A. Graber, *Does it Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675 (2006).

2. For overviews of how strict scrutiny developed, and how it applies across doctrinal areas, see, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEG. HIST. 355 (2006); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

compelling governmental interest,[3] as do infringements of enumerated constitutional rights (such as free speech)[4] or rights already declared to be fundamental (such as the right to vote),[5] and laws that facially discriminate against interstate commerce.[6] Discrimination on the basis of gender demands an important governmental interest.[7] Most other laws are subject only to minimal scrutiny.

But the hornbook law has not fully reflected the actual jurisprudence of the Supreme Court (or lower courts) in decades.[8] Instead, the Court has essentially adopted a sliding scale, under which the level of governmental justification needed to sustain a challenged law depends on the strength of the presumption of constitutionality. This sliding scale takes different forms. Sometimes the Court pretends that it is straightforwardly applying the tiers of scrutiny, but then it applies a relaxed form of heightened scrutiny or a rigorous form of minimal scrutiny. In more recent cases the Court has often abandoned even the pretense that it is applying tiers of scrutiny.

On one side, the Court sometimes treats more deferentially laws that should be subject to strict scrutiny. For example, although the Court pays lip service to the idea that all racially discriminatory laws are subject to strict scrutiny, it applies a much more deferential standard to laws that claim to benefit minorities than to laws that harm them. Both affirmative action and the creation of majority-minority legislative districts have been upheld over strong dissents that point out the weaknesses in the government's justifications—weaknesses that in any other context demanding strict scrutiny would doom the law.[9] The Court also used a more deferential standard than the traditional approach seemed to require when it upheld Sunday-closing laws that reflected a legislative preference for Christianity over other religions (especially Judaism).[10] Similarly, the

3. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

4. *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

5. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

6. *See, e.g.*, Granholm v. Heald, 544 U.S. 460 (2005); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 519 U.S. 316 (1997).

7. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

8. Other scholars have made the same point. *See, e.g.*, JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 71–74 (1982); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3126–27 (2015); Fallon, *supra* note 2; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494–518 (2004); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 990–97 (2004).

9. On affirmative action, see Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 156–58 (describing the Court's failure to apply strict scrutiny in *Grutter v. Bollinger*, 539 U.S. 306 (2003)). On majority-minority districts, compare Shaw v. Hunt, 517 U.S. 899 (1996) (applying strict scrutiny to invalidate majority-minority districts), with Easley v. Cromartie, 532 U.S. 234 (2001) (reversing lower-court invalidation of majority-minority districts).

10. *See* Braunfeld v. Brown, 366 U.S. 599 (1961) (rejecting Free Exercise challenge); McGowan v. Maryland, 366 U.S. 420 (1961) (rejecting Establishment Clause challenge). *Cf.* Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting Free Exercise challenge to military prohibition on wearing headgear, including yarmulkes, under pre-*Smith* regime that purportedly applied strict scrutiny).

Court upheld punishment of anti-war protestors who burned their draft cards even though the law's effect (and probable motivation) was to censor the protestors' expressive conduct: the law, enacted at the height of anti-Vietnam protests in which men burned their draft cards, specifically penalized destroying draft cards, even though men were already required to have their draft cards in their possession at all times.[11]

Even more common than the application of a relaxed form of purportedly strict scrutiny is the application of a heightened form of purportedly minimal scrutiny. In early cases, the Court said it was applying minimal scrutiny but nevertheless struck down perfectly rational laws if they discriminated against vulnerable groups, impinged on important constitutional or democratic values, or appeared to rest on prejudice, protectionism, or other illegitimate motives.

So, for example, the Court famously invalidated laws—using the rational basis test—that discriminated against the developmentally disabled,[12] undocumented immigrant children,[13] or homosexuals.[14] All of these laws might be viewed as both targeting vulnerable groups and motivated by prejudice; the last two also involved the arguably important (but not "fundamental" under existing doctrine) constitutional values of maintaining an educated populace or civic participation. Civic participation probably also played a role in the Court's invalidation of a state provision that limited membership on a local planning committee to property owners.[15] The Court also used minimal scrutiny to strike down state statutes that appeared to be protectionist in nature, such as those preferring in-state residents to out-of-staters[16] or long-term residents to newer arrivals.[17]

More recently, the Supreme Court seems to have given up identifying the type of scrutiny to be applied at all. It has invalidated government limitations on gun ownership[18] and bans on same-sex marriage[19] without specifying the level of scrutiny. Gun ownership is at least arguably tied to constitutional values through the Second Amendment, and gays are both vulnerable and a frequent target of prejudice.

Similarly, lower courts and state courts have found ways to escape minimal scrutiny of local land-use or zoning decisions in cases in which local zoning boards have used their discretion to favor particular groups or individuals, or to

11. United States v. O'Brien, 391 U.S. 367 (1968).
12. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
13. Plyler v. Doe, 457 U.S. 202 (1982).
14. Romer v. Evans, 517 U.S. 620 (1996).
15. Quinn v. Millsap, 491 U.S. 95 (1989).
16. Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Williams v. Vermont, 472 U.S. 14 (1985).
17. Zobel v. Williams, 457 U.S. 55 (1982); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1982).
18. District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).
19. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

make "sweetheart deals."[20] Courts scrutinize especially carefully individualized rezoning, sometimes called "spot zoning."[21] As one commentator noted, "courts have allowed economic substantive due process—an endangered species of constitutional doctrine—to escape extinction (and in some instances even to flourish) within the ecosystem that is land development law."[22]

Given the application of heightened scrutiny in many situations in which the traditional tiers-of-scrutiny analysis does not require it, what is left of the rational basis test? That test applies primarily when the government regulates market behavior, directly or indirectly.[23] The most prominent examples of direct regulation are the alphabet soup of New Deal laws and agencies as well as similar more recent protections for the politically or economically vulnerable: federal statutes like the National Labor Relations Act, the Fair Labor Standards Act, the 1965 Civil Rights Act, the Family and Medical Leave Act, and the Affordable Care Act, as well as their state counterparts, are all easily constitutional under the rational basis test. Indirect regulation of market behavior includes environmental statutes such as the Endangered Species Act, the Clean Air Act, and the Clean Water Act, all of which place significant restrictions mostly on commercial activity.

And there is method in this madness. For the last seventy-five years, constitutional jurisprudence has drawn a sharp distinction between economic rights (that is, market regulation) and personal rights. That bifurcation is epitomized by *Carolene Products* and its famous footnote four, in which the Court announced that it would henceforth leave economic rights largely to the mercy of the legislature while reserving authority to more zealously protect personal rights.[24] The tiers of scrutiny were the Court's original attempt to implement the bifurcation. Over time, the Court recognized that neither the three paragraphs of the *Carolene Products* footnote nor the rigid application of tiers of scrutiny satisfactorily captured the distinction between legislative actions that demanded scrutiny and those that demanded deference.[25] So the jurisprudence evolved away from rigid application of tiers of scrutiny into the more fluid sliding scale that I have just described.

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20. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 851 (1980); *see also* Carl J. Peckinpaugh, Jr., *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499 (1980). The seminal case is *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973).

21. *See generally* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS, 336–44 (4th ed. 2013).

22. Robert Ashbrook, *Land Development, the* Graham *Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1257 (2002).

23. *See, e.g.*, Kelo v. City of New London 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (mentioning "the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses . . . .").

24. United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1983).

25. For a historical account of this development, see G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005). *See also* David Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1255, 1268–69 (arguing that the *Carolene Products* footnote at least gives us a way to think about how the Court should approach its role).

But, as the next Part of this essay shows, modern conservative libertarians want the presumption of constitutionality relaxed for *all* government regulation, including market regulation. Today's libertarians reject the *Carolene Products* bifurcation, instead seeking some form of heightened scrutiny for government limitations on all economic rights.

II. THE LIBERTARIAN ATTACK ON SELECTIVE JUDICIAL ACTIVISM

The modern attacks on the rational basis test are the latest incarnation of attacks on the post-New Deal bifurcation that go back at least fifty years.[26] While earlier generations tended to attack the application of heightened scrutiny accorded to personal rights, modern critics instead focus on deferential review of market regulation. They mostly have no quarrel with the Court's personal-rights jurisprudence of strict scrutiny; it is the deferential scrutiny accorded to economic rights to which they object. As two scholars have put it, the libertarians are at the forefront of a movement within modern conservative legal thought "to embrace *Lochner* . . . by recommitting to some form of robust judicial protection for economic rights."[27]

Thus, when Richard Epstein suggests that "there are virtually no cases, except perhaps on some narrow national security questions, where rational basis sets the right standard of review,"[28] he is urging doctrinal change only with regard to market regulation. He recognizes that "in areas of speech, religion, and privacy," his views and the Court's overlap in "support[ing] a broad reading of the basic protection and a narrow reading of the police power"[29]—in other words, that heightened scrutiny already applies to infringements of personal rights but that he would extend it to infringements of economic rights.

Similarly, Randy Barnett has long called for a "presumption of liberty"[30] specifically in order to protect "rights of private property and contract."[31] He argues that "a two-tier treatment of constitutional rights violates both the plain and original meaning of the Ninth Amendment."[32] David Bernstein attempts to "rehabilitate" *Lochner*'s vigorous scrutiny of economic regulation.[33] Jeffrey

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26. For a brief description of the older attacks, see Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1473 (2015).

27. Colby & Smith, *supra* note 1, at 531.

28. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 311 (2014).

29. *Id.* at 305.

30. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 259–69 (2004).

31. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?* 35 HARV. J.L. & PUB. POL'Y 5, 12 (2012) (arguing that "protections of our natural rights—both personal *and* economic—remain a part of the written Constitution of the United States."); *see also* BARNETT, *supra* note 30 at 352 (suggesting that congressional regulation of the market is unconstitutional).

32. Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1496 (2008); *see also* Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV 845, 858 (2012) (advocating rejection of the *Carolene Products* approach).

33. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

Jackson wants to strengthen the rational basis test, suggesting that the weak version used in economic-rights cases like *Williamson v. Lee Optical* should be replaced with the stronger version used in personal-rights cases like *Cleburne*.[34] David Mayer labels as "improper judicial activism" the "creation of the [*Carolene Products*] double standard, under which economic liberty and property rights are devalued."[35] Michael Greve, focusing on federalism rather than rights, lambastes the New Deal constitution for its "systematic suppression of political and economic competition among the states"[36] and derides the *Carolene Products* bifurcation as "emblematic of the New Deal Court's policy of letting unvarnished interest group swinishness pass without judicial scrutiny [while signaling] the Court's intention of protecting rights (of a certain description)."[37]

The thrust of modern conservative libertarian legal scholarship, then, is that economic rights should be subject to the same heightened scrutiny as personal rights. Judicial activism should no longer be selective. And the consequence of accepting these arguments is to invalidate most federal and state laws regulating the market, consequently dismantling much of the modern regulatory state.[38] This scholarship thus now provides theoretical support for the long-held position of political conservatives "that government generally should not interfere in the marketplace."[39]

As I have noted elsewhere, although attacks on the *Carolene Products* bifurcation are longstanding, defenses are few and far between—and none are strong enough to withstand the libertarians' recent assaults.[40] In the remainder of this Essay, I sketch out a preliminary defense[41] of the existing jurisprudential distinction between personal rights and economic rights.

III. A PRELIMINARY DEFENSE OF SELECTIVE JUDICIAL ACTIVISM

I begin by identifying what I mean by economic rights. What I mean here are the kind of rights that modern libertarians are trying to protect: economic rights in the commercial context, that is, rights related primarily to revenue-producing

34. Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 537–38 (2011).

35. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 8 (2011).

36. MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 178 (2012).

37. *Id.* at 198.

38. For descriptions of these consequences, see, e.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005); Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL'Y 13, 16–17 (2012); Brian Beutler, *The Rehabilitationists*, THE NEW REPUBLIC (Aug. 13, 2015), https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal.

39. Colby & Smith, *supra* note 1, at 570.

40. Sherry, *supra* note 26, at 1468–75.

41. The defense in section III, especially the latter half, is deliberately very lightly footnoted. It is meant to be only a tentative suggestion of some ideas and directions of inquiry.

property or market-based economic activity.[42] Epstein succinctly captures that focus when he describes as unconstitutional any government regulation that fails "to keep public hands off voluntary transactions in labor, capital, goods, or services."[43] This includes not only regulation directed at market activity, but also regulation that applies to both commercial and non-commercial activity but has its most serious negative effects on commercial activity. As noted earlier, direct or indirect regulation of economic rights is pervasive at both the state and federal level, including tax and social security policies, labor regulations and the Affordable Care Act, and much environmental regulation.[44]

Scholars have identified two main justifications for the application of heightened scrutiny to invasions of personal rights: heightened scrutiny is needed to smoke out illegitimate motives and to protect important rights. Each is less salient in the economic rights context. Thus, while heightened scrutiny is justifiable to protect personal rights, it is not justifiable to protect economic rights.

A. The Process-Based Justification: Smoking Out Illegitimate Motives

Applying strict scrutiny to require a compelling and tightly linked legislative justification allows the Court to guard against laws with illegitimate, invidious, or discriminatory purposes, without actually having to inquire into the legislature's motives. The Court's application of heightened scrutiny—whether explicitly or implicitly—often occurs in contexts that trigger suspicions of illegitimate legislative motives. Applying heightened scrutiny to discrimination against unpopular groups (*Carolene Products'* "discrete and insular minorities") in the Equal Protection context, or censorship of unpopular ideas (content-based restrictions) in the First Amendment context, fits this model.[45] So does applying heightened scrutiny to individualized zoning decisions, on the ground that

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42. By limiting my discussion to this sort of economic activity, I mean to exclude rights that protect against confiscatory (as opposed to progressive) taxation, regulations reducing citizens to poverty, or the taking of individuals' homes or livelihoods. Those are not ordinary commercial regulations.

43. EPSTEIN, *supra* note 28, at 42.

44. There is not an absolutely clear line between personal rights and economic rights. Private home ownership, for example, partakes of aspects of both. It is obviously property, but it is not used commercially. "The home is affirmatively part of oneself—property for personhood." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 992 (1982); *see also* Rose, *supra* note 20, at 911 (describing the relationship between people and their neighborhood). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1096 (2009) ("The legal mythology of the home . . . has disguised rent seeking with rhetoric and recast economic protectionism as a humanistic endeavor."). For that reason, it might be a special case, and I reserve judgment on the appropriate level of scrutiny for incursions on homeowners' rights. Nevertheless, the distinction between economic rights related to commercial activity and personal rights unrelated to market activity can serve to place most government regulation on one side or the other of the *Carolene Products* dichotomy.

45. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (Equal Protection); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 96 (1997) (First Amendment); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (First Amendment); Suzanna Sherry, *Selective Judicial*

"local government cannot be trusted to deal fairly or carefully" with such particular land-use questions.[46]

Run-of-the-mill market regulation does not trigger such suspicions. Even if some market regulation is ill-considered, inefficient, or even counterproductive, the Court has no reason to doubt the good faith of the enacting legislature. And if there is no reason to suspect illegitimate legislative motives, there is no reason to relax the presumption of constitutionality and no reason to apply heightened scrutiny.

Compared to infringements on personal rights, market regulation is much less likely to stem from illegitimate motives. The key difference lies in how self-dealing operates in each context. Members of the legislature (and others who are "like them") almost always benefit from—or, at the very least, are not harmed by—laws that restrict personal rights. As John Hart Ely showed us, that is most obvious when the laws discriminate against discrete and insular minorities.[47] But it is also true when legislatures suppress unpopular speech or enact their personal moral codes into law by prohibiting things like abortion or assisted suicide. Of course, some such laws may be justified. But the point is that because there is a likelihood of self-dealing—that is, of illegitimate motives—courts require a more persuasive demonstration that the law *is* justified. Heightened scrutiny serves to smoke out illegitimate motives when the likelihood of such motives is unacceptably high.

When the legislature regulates the market, however, self-dealing is not an inherent risk in the same way. Legislators themselves do not derive any special benefit from laws regulating wages or hours, or requiring contributions to social security or the purchase of health insurance. Indeed, in many cases market regulation restricts the actions of people who are of the same socio-economic class as most legislators in an attempt to help those who are not. Because the legislature is acting against self-interest—or, at the very least, in ways that are not blatantly in its self-interest—we can, and should, credit their good faith. Selective activism recognizes that there is a difference between a law that is badly motivated and a law that is a bad idea. (In other words, we should not attribute to malevolence what is really due to incompetence.)

The risk of self-dealing in market regulation usually arises only if we suspect that legislators have been persuaded—perhaps by campaign contributions or outright corruption—to enact someone else's preferences into law. And given the outsized influence on the legislature of those with money and economic power,[48] market regulation is unlikely to be the result of such electoral pressure: economic regulations generally favor those with less economic or political

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Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction, 73 GEO. L.J. 89 (1984) (Equal Protection).

46. Rose, *supra* note 20, at 841.

47. *See* Ely, *supra* note 45, at 152–53.

48. *See, e.g.*, MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); KAY LEHMAN SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE

power over those with more.[49] Conservationists do not have the deep pockets of the energy industry; workers and victims of discrimination have less political power than the large corporations who employ them.

There are two possible situations in which legislative self-dealing might be more of a concern: local land regulation and occupational licensing. Both are better handled in other ways, and neither justifies the abandonment of minimal scrutiny as the default test for market regulation.

For land regulation, the problem is that zoning drives up the value for current owners and keeps out people disfavored by current owners. For the egregious cases that result from "spot-zoning," courts generally use heightened scrutiny.[50] For the more generic cases, the problem is that while legislative zoning might sometimes result from protectionist motives, it also solves a collective action problem: no one wants to limit their own options, but they may want to limit their neighbors' options. Applying strict scrutiny in such cases, and thus leaving it to the market to decide in most cases, would likely leave everyone worse off as all neighborhoods deteriorated to the lowest common denominator because there would be little or no regulation.

As for protectionist occupational licensing, there are various ways to invalidate such laws within the current jurisprudential framework. One is to declare protectionism of that sort to be an illegitimate motive, as several circuits have done.[51] A second is to hold the regulations to be a violation of federal antitrust law.[52] Finally, as with "spot-zoning," it is possible to make licensing regulations an exception to the general rule of minimal scrutiny, specifically because of the risk of illegitimate motives.

In focusing on these two problematic contexts, conservative libertarians are using a very small tail to wag a very large dog. Just because the rational basis test might allow a few bad laws to slip through does not mean that it is

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AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008).

49. Ironically, the two specific Supreme Court cases that libertarians focus on most often are cases in which we might have reason to suspect the motives of the legislature in just this way. The maximum-hours law invalidated in *Lochner* may well have resulted from union attempts to "drive small bakeshops that employed recent immigrants out of the industry," with the support of larger corporate bakeries who would also benefit if their small competitors disappeared. BERNSTEIN, *supra* note 33, at 23, 23–28. The law upheld in *Lee Optical* similarly resulted in giving optometrists and ophthalmologists the power to limit competition by opticians. *See* Barnett, *Keynote Remarks*, *supra* note 32, at 854–55 (discussing the lower court's opinion in *Lee Optical*). The problem is that we cannot, or at least should not, generalize from these two cases to assume that *all* legislative regulation of the market is likely enough to be venal that we ought to impose heightened scrutiny. Further, other doctrines may substitute for heightened scrutiny in the case of industry attempts to limit competition. *See* N.C. Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

50. *See supra* notes 23–25 and accompanying text; *see also* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 722 n.19 (2008) (collecting cases).

51. *See* St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

52. *See N.C. Bd. of Dental Exam'rs*, 135 S. Ct. 1101.

fundamentally flawed, much less unconstitutional. Indeed, one might suspect that scholars who focus on these two contexts—rather than on the larger effects of increasing scrutiny of economic regulation—are trying to hide their radical goals behind a minimalist screen.

In summary, to the extent that the *Carolene Products* bifurcation is a process-based device designed to smoke out illegitimate motives, it is justified. Laws affecting personal rights are more likely to stem from illegitimate motives than are laws affecting economic rights.

B. The Substantive Justification: Preferred Rights

The process-based defense of *Carolene Products* does not fully dispose of libertarian arguments, however. An alternative justification for selective activism is more substantive. As one scholar has suggested, the modern strict scrutiny test serves as a way to implement a jurisprudential distinction "between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or 'preferred' liberties entitled to more stringent judicial protection."[53] When heightened scrutiny is used to protect constitutional or democratic values, this substantive justification is more salient. And here the libertarians can (and do) object that economic rights should not be considered inferior to, or less important than, personal rights.

The modern conservative libertarians therefore urge us to equate decisions about whether and how to engage in commercial activity—to enter into employment contracts, to buy and sell property, to keep income earned on the market rather than save it for retirement or redistribute it to the less fortunate—with decisions about such choices as who to marry, whether to have children and how to raise them, or what to think, believe, or say. Are they right?

I describe here three categories of reasons for believing that the libertarians are wrong, and that personal rights should be, as they currently are, treated more favorably than economic rights: moral reasons, constitutional or constitutive reasons, and consequentialist reasons.

First are reasons based on moral arguments. Start with John Rawls, perhaps the most influential political philosopher in contemporary America. He suggests that there is a difference between individual liberty on the one hand and the distribution of wealth within a society on the other. Protecting the former, he

53. Fallon, *supra* note 2, at 1285. The distinction between the two justifications is not clean; there is often overlap. For example, racial discrimination can be described either as likely motivated by illegitimate prejudice, or as the violation of a fundamental or preferred right to equal treatment. Laws banning abortion can be described either as likely motivated by traditional prejudices about gender roles or stereotypes, or as the violation of a fundamental or preferred right to control one's own body or reproduction. But for purposes of argument, I will concede that some instances of heightened scrutiny rest on substantive concerns. *See id.* at 1310 ("[I]t . . . seems indisputable that the court's inquiries do not always focus on governmental purposes.").

says, has priority over ensuring the fairness of the latter.[54] He goes further, suggesting that there are moral limits on wealth *inequalities*,[55] but we need not accept that further proposition to recognize that legislative infringements on individual liberty are of greater concern than legislative adjustments to the distribution of wealth.

More generally, one can argue that while individual liberty is inherent to personhood or membership in the polity, wealth distribution is contingent on particular social arrangements. This suggests that infringements on personal rights serve as both an actual and a symbolic diminution of one's status as a person or a citizen. Altering social arrangements in a way that affects wealth distribution, on the other hand, does not undermine any person's claim to equal treatment or respect, nor does it do harm to any other inherent aspect of personhood. This is a variant of Kant's distinction between the way we should value persons and the way we should value things: the former deserves dignity, the latter only price.[56]

We can also distinguish, as a moral matter, between objective values and personal (or competitive) interests. Values reflect who we are; interests reflect what we want. Objective values come from reflection and deliberation about the meaning of the good life for humans, while personal interests come from mere personal preference. Personal rights are about preventing political majorities from imposing their values on individuals who may not share those values. Economic rights—at least those implicated by market regulation—are about managing conflicts of interests. The legislature does not have blanket authority to select values, but it does have the primary role in managing or balancing conflicting interests.

When the legislature restricts my right to marry or forces me to have children, it is imposing the majority's values on me. But when it tells me that I must pay taxes in order to support social security or the military, it is balancing my interest in keeping my money against an opposing interest perceived by the majority. When it prohibits me from clear-cutting forests on land I own in order to protect the spotted owl, it is balancing my interest in making money (by selling the wood or developing the land) against the majority's interest in avoiding the extinction of spotted owls. That is exactly the kind of decision that we assign to the legislature. We can neither demand that it protect your interest in the survival of spotted owls nor demand that it protect my interest in making money—whichever it chooses to do is by definition an acceptable choice. Not so when the legislature chooses between my values and yours: when it decides, for example, that same-sex marriage is bad, that one religious belief or practice

54. JOHN RAWLS, A THEORY OF JUSTICE 60–61 (1971).

55. *Id.* at 75.

56. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 40 (James Ellington trans., 1981). A similar distinction is also reflected in the difference between liability-rule protection and property-rule protection, discussed *infra* at text accompanying note 62.

is superior to another, or that women should fill certain social roles or be subservient to men.

All three of these related arguments are made more persuasive by subjecting them to Rawls' veil of ignorance: They are arguments that are likely to be accepted by thoughtful people who know neither on which side of the wealth distribution and contingent social arrangements they might fall, nor what their values and interests might turn out to be.

A second category of reasons for allowing the legislature greater freedom to regulate economic rights than to regulate personal rights might be characterized as constitutional (with a small 'c') or constitutive in the sense that they are part of our particular history, community, and web of beliefs.

One constitutive argument is based on the difference between public and private, which runs through American law.[57] Market activity is public—in the sense that it is out in the world—in ways that choices about home, family, belief, and the like are not. Whether I am willing to invite people of a different race or religion to dinner at my home is a different kind of decision than whether I am willing to sell my products to them or hire them in my business. How I raise my children is a different kind of choice than how I structure my corporation. What I believe about the existence of God (or war or democracy or anything else) is not the same as how I choose to earn or spend money.

When we act in the world, we must expect to give up some freedom. The only question, then, is how much. The difference between personal rights and economic rights—between private rights and public rights—suggests that it is legitimate to expect people to give up more when they act publicly than when they act privately. The difference is not always clean, of course. Many private rights are exercised in public, or are linked to market transactions. Publishing a newspaper or paying a doctor to perform an abortion can be characterized as market activity. But there is a core difference between using market activity to implement private choices, and engaging in market activity for its own sake or for the financial benefit it brings.

Another constitutive approach begins with the recognition that constitutional doctrine—including the *Carolene Products* bifurcation—does not spring fully formed from the Constitution or even the Court. It comes, as Ted White has reminded us, "from a set of shared social and political attitudes that shape[] the conceptions of the role of the judiciary in American constitutionalism."[58] There are many indications that Americans' "shared social and political attitudes" grant the legislature considerable power over economic rights. Recent historical scholarship suggests that until the mid-twentieth century, many Americans believed that the primary purpose of the constitutional and political structure was to prevent the domination of a "moneyed aristocracy" over the middle

57. The distinction is notoriously slippery, and means different things in different contexts. But the distinction I discuss in the text accurately marks general boundaries.

58. White, *supra* note 25, at 83.

class.[59] One goal of both the legislature in enacting laws and the courts in enforcing the Constitution, therefore, was to prevent the accumulation of too much money and power in the same hands—in other words, to adjust both existing wealth distributions and future opportunities to acquire wealth, as necessary.

Contemporary American politics also suggests comfort with the *Carolene Products* bifurcation. It is hard to believe that the average American would equate being forced to buy health insurance (perhaps the most controversial market regulation) with being forced to attend church, prohibited from having children, or being told who she could marry. The invasion of personal rights, such as those involving race relations or other social issues, can trigger quiet disobedience, outright defiance, and noisy and sometimes violent confrontations. Economic regulation, not so much. No one marches in the streets to protest OSHA or even the ACA. Instead, conservative libertarians—who generally lose in Congress and the state legislatures—have waged a long battle to stack the judiciary with opponents of market regulation and bring back the pre-New Deal "Constitution in Exile."[60]

The difference in the way that personal and economic rights are perceived is analogous to the difference between what Peggy Radin identified as property imbued with aspects of personhood and property not so imbued. Just as "if someone returns home to find her sofa has disappeared, that is more disorienting than to discover that her house has decreased in market value by 5%,"[61] most people would be more troubled if the legislature adopted China's one-child policy than if the legislature adopted Sweden's taxation and welfare scheme.

A final constitutive argument—applicable to property rights but not necessarily to other economic rights—is that the Constitution itself treats property rights as different from other types of rights. Most personal rights are absolutely protected, in the sense that if the government lacks a sufficient justification it may not infringe the rights. The Takings Clause, however, allows the government to infringe property rights (under specified conditions) as long as it compensates the rights-holder. In other words, personal rights are protected by "property rules" while property rights are protected only by the lesser "liability rules."[62]

A third category of reasons to privilege personal rights over economic rights is more consequentialist or utilitarian. Protecting my personal rights rarely decreases yours or harms you in any way. (There are a few conflicts, but not

59. *See* Joseph Fishkin & William E. Forbath, *The Anti-Oligarch Constitution*, 94 B.U. L. REV. 669, 692 (2014); Ganesh Sitaraman, *America's Post-Crash Constitution*, POLITICO (Oct. 5, 2014), https://perma.cc/VU7T-JPN7. *See generally* GANESH SITARAMAN, THE MIDDLE CLASS CONSTITUTION (forthcoming) (book manuscript on file with the author).

60. *See* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, at 42.

61. Radin, *supra* note 44, at 1004.

62. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

many). But protecting my economic rights often harms you. Another way to put this is that economic rights operate against a background of scarcity but personal rights do not.[63]

Take legislation that prescribes minimum wages or maximum hours, for example. Without government intervention, employers can probably find employees willing to work more hours for lower pay. But the ripple effects through the economy mean that labor is disadvantaged compared to capital. As one commentator described it, the problem arises from "the discrepancy between the state's moral assumptions in favour of a society of free and equal citizens, and the economic structure of capitalism which produced an unequal ownership of property (particularly in the ownership of the means of production), and allowed one class to increase its own political and economic strength at the expense of another."[64] Thus even if the individual employees have entered into fully consensual contracts (as opposed to contracts that exploit their vulnerability, which is also a possibility), other workers are disadvantaged by the lack of regulation. If the government steps in, it helps some workers but limits the freedom of other workers and many employers. Someone loses either way. The same arguments can be made about the Affordable Care Act: it helps some people, but at the expense of others.

In the context of market regulation, then, the government is adjusting or redistributing rights or interests that inevitably conflict. No one can get more rights without someone else getting fewer. It is therefore up to the legislature to decide on the appropriate allocation of rights.[65]

That conflict is generally not present with regard to most personal rights. My speech does not diminish your opportunity to speak. My marriage to whomever I please does not restrict your right to marry whomever you please. What I believe or how I worship (or not) does not affect your beliefs or your religion. The only injury you might suffer is purely psychological: it is "mental displeasure" from another person's beliefs or conduct.[66] At worst, protecting individual rights might cost some minimal amount of taxpayer money, but it almost never infringes on anyone else's non-economic rights. In the absence of scarcity or conflict, there is less justification for governmental regulation.

This scarcity-based distinction between personal and economic rights leads to another argument in favor of bifurcation. Equality is a core American value, just

63. *See* Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 101–04 (1992) (making this distinction between economic rights and expressive rights).

64. H.V. EMY, LIBERALS, RADICALS, AND SOCIAL POLITICS, 1892-1914, at 290 (1973) (describing the views of Hilaire Belloc).

65. It is not a sufficient response that we should use either the common law or the results produced by the market as the baseline and that any legislative deviations from that baseline require justification. As many others have noted, neither the common law nor the market are neutral baselines. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 451, 501–03 (1987).

66. The phrase "mental displeasure" was used by Justice Scalia to describe psychological injury in the context of standing doctrine; such injury is insufficient to confer standing. Hein v. Freedom From Religion Found., 551 U.S. 587, 619 (2007) (Scalia, J., concurring).

as liberty is. The relationship between the two is complicated and often conflicted, but we can agree that more equality is, in the abstract, better than less equality. Infringements on personal rights tend to decrease equality (or increase inequality), while infringements on economic rights tend to increase equality (or decrease inequality).[67] This does not mean that every government regulation that increases equality is necessarily good or even constitutional. But it does suggest that courts might want to scrutinize regulations that decrease equality more closely than those that increase it. The Affordable Care Act, social security, and anti-discrimination laws are all examples of government economic regulation that increases equality. Laws censoring speech, banning gay marriage, or restricting reproductive rights, on the other hand, decrease equality.

A confluence of reasons, then, supports the *Carolene Products* distinction between personal rights and property rights.[68]

CONCLUSION

The bottom line is that selective judicial activism is both practically and theoretically defensible on many grounds. Any of the individual grounds might not be enough alone to justify the *Carolene Products* bifurcation. But together they present a powerful case in favor of a selective judicial activism that privileges personal rights over economic rights. Another way to put it is that every argument strongly supports heightened scrutiny for personal rights, while heightened scrutiny for economic rights is refuted by some of the arguments and strongly supported by none.

This is not to say that the line between personal and economic rights is always clear, or that there is never a reason to closely scrutinize economic legislation. Nor do I deny that some personal rights create conflicts or cause harms. There will always be gray areas, and the closer a case is to the line between personal and economic rights, the more difficult the decision will be. I have tried to identify some of those cases; there are likely others. Nevertheless,

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67. For a somewhat related description of the "liberty-equality connection," see Trevor W. Morrison, *Lamenting* Lochner*'s Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 869–70 (2005).

68. Given the space limitations and the preliminary nature of this Essay, I have omitted discussion of some important questions that will be the subject of later work. One argument against the rational basis test is that it allows the government to defend badly motivated legislation by reference to legitimate but pretextual reasons for the legislation. My response is that as long as the legislature *could have* enacted the regulation (i.e., as long as it is rationally related to any legitimate goal), we should not care why they *actually* enacted it, since the law is constitutionally permissible—at least for laws touching on economic rights. A second objection to bifurcated judicial scrutiny is that the difference between economic and personal rights does not justify the gulf between minimal and heightened scrutiny insofar as the first almost guarantees that the law will be upheld and the second offers a significant possibility of invalidation. My response is that if one starts from a presumption of constitutionality—and thus of deference to the legislature—the leap to heightened scrutiny is justified by either the substantially increased probability of illegitimate motives or the substantially increased importance of the right in question.

the basic dichotomy holds, and the conservative libertarian scholars' wholesale calls to abandon selective judicial activism should be rejected. The rational basis test—translated as the Court has done into great deference for most market regulation—is not only constitutional, it is the most plausible implementation of the values of our constitutional democracy.