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Eldred & The New Rationality

Brian L. Frye

Abstract

Historically, the rational basis test has been a constitutional rubber stamp. In Eldred v. Ashcroft and Golan v. Holder, the Supreme Court applied the rational basis test and respectively held that Congress could extend the copyright term of existing works and restore copyright protection of public domain works, despite evidence that Congress intended to benefit copyright owners at the expense of the public. But in Lawrence v. Texas and United States v. Windsor, the Supreme Court seems to have applied the rational basis test and held that state and federal laws were unconstitutional because they were motivated by animosity, and in Obergefell v. Hodges, it held that states must license marriages between two people of the same sex, because there is no legitimate basis to refuse. This essay argues that Lawrence, Windsor, and Obergefell may reflect the emergence of a “new rationality” that authorizes courts to consider legislative intent when evaluating the constitutionality of legislation. If so, perhaps the Court should reconsider Eldred and Golan.

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INTRODUCTION

Rational basis review is famously forgiving. It provides that most legislation is constitutional, so long as it is conceivably related to any legitimate government interest, even if that interest did not actually motivate the legislation. Accordingly, in *Eldred v. Ashcroft* (2003), the Court applied rational basis review and held that Congress could constitutionally extend the copyright term of existing works of authorship, because it could have believed that doing so would promote their creation and dissemination.

But rational basis review seems to have changed since *Eldred*. In *Lawrence v. Texas* (2003), the Court seemingly applied rational basis review and held that a Texas law prohibiting homosexual conduct was unconstitutional because it was motivated by animosity toward homosexuals. In *United States v. Windsor* (2013), it held that a federal law prohibiting the recognition of same-sex marriages was unconstitutional for the same reason. And, most recently, in *Obergefell v. Hodges* (2015), it held that the Fourteenth Amendment requires states to license marriages between two people of the same sex, apparently because there is no legitimate basis to refuse. So, this “new rationality” apparently provides that legislation cannot be motivated by animosity, even if it is conceivably related to a legitimate government interest.

This change in rational basis review presents an obvious question: Can *Eldred* survive *Lawrence, Windsor, Obergefell* and the new rationality? In practice, of course, the answer is obviously “yes.” The Court has long adhered to the maxim that “foolish consistency is the hobgoblin of little minds.” Or rather, as Justice Holmes more gently observed, “The life of the law has not been logic; it has been experience.”

In fact, it already has. In *Golan v. Holder* (2012), the Supreme Court relied on *Eldred* to hold that Congress could constitutionally restore the copyright in certain works that had fallen into the public domain, because it could rationally believe that doing so could “encourage the dissemination of existing and future works” and induce “greater investment in the creative process.”

But the more interesting question is whether *Eldred, Golan*, and other cases decided under the rational basis test should survive the new rationality. If the standard of review has changed, why has it changed, why is that change legitimate,

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8 OLIVER WENDELL HOLMES, JR., THE COMMON LAW I (1881).
and how should it affect the way the court reviews cases under the rational basis test, if at all?

A Potted History of Constitutional Review

The Court has always assumed its authority to review the constitutionality of federal and state legislation. Most famously, in *Marbury v. Madison* (1803), it held that a federal law was unconstitutional. But the antebellum Court was reluctant to exercise the power of judicial review. While it occasionally held that state laws were unconstitutional, it did not hold another federal law unconstitutional until *Dred Scott v. Sandford* (1857).

Notably, the antebellum Court held that its authority to review the constitutionality of state legislation was limited, especially in the case of legislation affecting individual rights. In *Barron v. Baltimore* (1833), it held that the Bill of Rights did not apply to the states. And it assumed that it lacked the authority to review the constitutionality of state legislation based on the state “police power” to promote health, safety, morals, and general welfare.

The ratification of the Fourteenth Amendment in 1868 changed the scope of judicial review. Initially, the Court was reluctant to expand its authority. But eventually, it held that it was authorized to review the constitutionality of all legislation, state and federal, based on the police power. And it assumed that its authority to review the constitutionality of legislation extended to economic legislation.

The stringency of the Court’s constitutional review of economic legislation reached its zenith in *Lochner v. New York* (1905), in which it held that the New York Bakeshop Act, which prohibited most bakery employees from working more than ten hours per day or sixty hours per week, was unconstitutional because it impeded the liberty of contract without a legitimate purpose. Specifically, the Court held that a police power claim cannot be “a mere pretext,” and concluded

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10 See generally Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (reviewing the constitutionality of a federal tax under the Taxation Clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (reviewing the constitutionality of a state law under the Contract Clause).
12 See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (“It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”).
15 See generally The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, (1873).
17 See generally Allgeyer v. Louisiana, 165 U.S. 578 (1897) (holding unconstitutional under the Fourteenth Amendment’s guarantee of liberty a Louisiana law which penalized a citizen of that state for contracting for insurance in New York).
that the Bakeshop Act was not a valid exercise of the state police power because its “real object and purpose were simply to regulate the hours of labor . . . in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.” In other words, the Court held that constitutional review obligated it to consider whether legislation was intended to achieve a legitimate purpose, and likely to actually achieve that purpose: “When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a ‘health law,’ it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.”

Lochner immediately became the bete noire of progressives, who argued that courts should defer to legislators, especially in the case of economic legislation. Eventually, it became synonymous with judicial overreaching. Commentators even coined the term “Lochnering” to describe illegitimate judicial review of economic legislation. Notably, Lochner was initially an outlier, although the Court eventually began to apply its strict standard of review in other cases.

In any case, Lochner didn’t last long. In Nebbia v. New York (1934), the Court held that a New York law creating a Milk Control Board to establish the retail price of milk was constitutional because the liberty of contract was not “absolute” and could be regulated in order to promote the general welfare, so long as the regulations were not “unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” And in West Coast Hotel Co. v. Parrish (1937), the Court held that a Washington minimum wage law was constitutional because Washington “was entitled to adopt measures to reduce the evils of the ‘sweating system,’” and “had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection.”

Finally, in United States v. Carolene Products Company (1938), the Court held that a federal law prohibiting the “shipment in interstate commerce” of skimmed milk compounded with “any fat or oil other than milk fat” was constitutional because Congress could rationally believe that it was “‘an adulterated article of food, injurious to the public health.’” Specifically, the Court held:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary

19 Id. at 56, 64.
20 Id. at 62-63.
23 Bernstein, supra note 21.
commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.\textsuperscript{27}

And then, in the most famous footnote in constitutional history, the Court noted that this “presumption of constitutionality” may not apply to fundamental rights protected by the Constitution, or to laws that affect minority groups:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.\textsuperscript{28}

Footnote four of \textit{Carolene Products} eventually became the basis for modern constitutional review, which requires courts to apply three levels of judicial scrutiny when reviewing the constitutionality of government action, depending on the nature of the claim: strict scrutiny, intermediate scrutiny, and rational basis.\textsuperscript{29}

\textsuperscript{27} \textit{Id.} at 152.
\textsuperscript{28} \textit{Id.} at 152 n.4.
\textsuperscript{29} See Adam Winkler, \textit{Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts}, 59 \textit{VAND. L. REV.} 793, 798 (2006) (“As a mode of judicial review in constitutional law cases, the strict scrutiny standard was first suggested by implication in the famous footnote four of United States v. Carolene Products.”).
Strict scrutiny review applies to government action that affects fundamental rights and certain “suspect classes,” like race, religion, and national origin.\textsuperscript{30} In order to survive strict scrutiny review, a government action must be justified by a compelling governmental interest, narrowly tailored to achieve that goal or interest, and the least restrictive means for achieving that interest.\textsuperscript{31} It has become a truism that strict scrutiny is “strict in theory and fatal in fact,” because government action subject to strict scrutiny review is almost always held unconstitutional.\textsuperscript{32}

Intermediate scrutiny review applies to government action that affects other “suspect classes,” including gender. In order to survive intermediate scrutiny review, a government action must be “substantially related” to the achievement of “important governmental objectives.”\textsuperscript{33} Scholars have argued that the Court developed intermediate scrutiny in order to protect groups that lack power in the political process.\textsuperscript{34} In any case, while intermediate scrutiny is theoretically less stringent than strict scrutiny, it tends to produce similar results.

Rational basis review applies to government action that does not affect a fundamental right or suspect class. In order to survive rational basis review, a government action must only be “rationally related” to a “legitimate government interest.”\textsuperscript{35} Rational basis review is famously lenient. Any conceivable reason for the action is deemed rational, even if it is not the government’s actual reason for the action, and any conceivable interest is deemed legitimate, even if it is not the government’s actual interest.\textsuperscript{36} Under rational basis review, courts must assume that the government’s motives are legitimate, even in the face of evidence to the contrary.\textsuperscript{37} Scholars have long observed that rational basis review is “virtually none in fact.”\textsuperscript{38}

\textsuperscript{30} See Skinner v. Okla. ex rel. Williamson, 316 U.S. 535, 541 (1942) (“We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”).
\textsuperscript{31} E.g., Winkler, supra note 29, at 800-01.
\textsuperscript{32} Gerald Gunther, The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). But see Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (expressing the “wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”). See also Winkler, supra note 29, at 796 (observing that “30 percent of all applications of strict scrutiny--nearly one in three--result in the challenged law being upheld”).
\textsuperscript{33} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{34} Gayle Lynn Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L. J. 779, 784 (1987).
\textsuperscript{36} See, e.g., Williamson v. Lee Optical, 348 U.S. at 487-88 (“But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).
\textsuperscript{37} See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (“When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to
For example, in *Williamson v. Lee Optical*, the Court applied rational basis review to an Oklahoma statute that, *inter alia*, prohibited the manufacture of eyeglasses without a prescription and held that the statute did not violate due process or equal protection, because the legislature could have had a legitimate reason for enacting it. Moreover, the Court explicitly stated:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.  

As a consequence, challenging the constitutionality of economic legislation on due process or equal protection grounds soon became seen as quixotic, at best. For example, the Onion Futures Act of 1958 prohibited the sale of futures contracts in onions. Initially, the Chicago Mercantile Exchange filed an action arguing that the Act was unconstitutional and requesting an injunction prohibiting its enforcement. But when the district court applied the rational basis test and upheld the constitutionality of the Act, the Chicago Mercantile Exchange did not appeal because it considered the action hopeless.

### Eldred v. Ashcroft

The Court has also applied the rational basis test to actions challenging the constitutionality of copyright legislation. For example, the Sonny Bono Copyright Term Extension Act (“CTEA”) extended the copyright term of existing works of authorship by twenty years.

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38 Gunther, *supra* at note 32, at 8.
42 See Russell Wasendorf, Sr., Interview with Leo Melamed, *Innovation Deserves More Than 15 Minutes of Fame*, SFO MAGAZINE, June 2003, at 20, 22.
43 Pub. L. 105-298, §102(b), (d), 112 Stat. 2827-28 (codified as amended in scattered sections of 17 U.S.C.). Under the Copyright Act of 1976, the copyright term was the life of the author plus fifty years.
In *Eldred v. Ashcroft* (2003), petitioners argued, *inter alia*, that this retroactive extension exceeded Congress’s authority under the Intellectual Property Clause, because extending the copyright term of existing works does not and cannot “promote the Progress of Science.” The Court has uniformly held that the purpose of copyright is to encourage the production of works of authorship. Petitioners argued that extending the copyright term of an existing work cannot encourage its production.

The Court applied the rational basis test and unsurprisingly held that the CTEA was constitutional. Writing for the majority, Justice Ginsburg stated, “The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain.” She observed that Congress intended the CTEA to “ensure that American authors would receive the same copyright protection in Europe as their European counterparts,” “provide greater incentive for American and other authors to create and disseminate their work in the United States,” and “encourage copyright holders to invest in the restoration and public distribution of their works.” And she concluded, “In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”

However, as Justices Stevens and Breyer pointed out in their dissents, the justifications provided by Congress are not credible and almost certainly pretextual. As Justice Stevens observed, the retroactive extension of the copyright term “will not even arguably promote any new works by authors or inventors,” and equitable concerns are “a classic non sequitur” because the “reason for increasing the inducement to create something new simply does not apply to an already-created work.” Moreover, as Justice Breyer observed, “no one could reasonably conclude

The CTEA extended the copyright term to the life of the author plus seventy years. See *id.*; 17 U.S.C. 302(a) (West, current through P.L. 114-25 (excluding P.L. 114-18) approved June 15, 2015). Petitioners also argued that the extension of the copyright term violated the “limited Times” requirement of the Intellectual Property Clause and the First Amendment, but these claims were not decided under the rational basis test. *Eldred*, 537 U.S. at 199-204.

See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”). See also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.”) (internal quotations omitted).

*Eldred*, 537 U.S. at 196 n.3.

Id. at 205-08.

Id. at 205-207.

Id. at 208.

*Id.* at 239-40 (Stevens, J., dissenting).
that copyright's traditional economic rationale applies here,” because the value of the copyright extension is too small to affect the incentives of marginal authors.\footnote{Id. at 254-55 (Breyer, J., dissenting) (“Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), it seems fair to say that, for example, a 1% likelihood of earning $100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.”) (citation omitted); id. at 267 (estimating “the economic value of 1998 Act copyrights relative to the economic value of a perpetual copyright, as well as the incremental value of a 20–year extension of a 75–year term”) (citation omitted).}

The claim that retroactive copyright extension provides incentives to republish and redistribute existing works is totally inconsistent with both the purpose of copyright and actual experience, which shows that public domain works are more readily available at lower prices than copyrighted works.\footnote{Eldred, 537 U.S. at 261 (Breyer, J., dissenting) (“[N]ew, cheaper editions can be expected when works come out of copyright”) (quoting EDWARD RAPPAPORT, CONG. RESEARCH SERV., COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 3 (1998)).}

Finally, Justice Breyer pointed out that the actual reason that Congress retroactively extended the copyright term, as reflected in the legislative history of the CTEA, was to provide financial assistance to the entertainment industry, a purpose that is not consistent with the justification for copyright protection:

I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant's monopoly power, likely leading to higher prices both at home and abroad, solely in order to produce higher foreign earnings. That objective is not a copyright objective. Nor, standing alone, is it related to any other objective more closely tied to the Clause itself. Neither can higher corporate profits alone justify the grant's enhancement. The Clause seeks public, not private, benefits.\footnote{Id. at 262-63.}

Indeed, as many scholars have observed, the true purpose of the CTEA was to prevent certain iconic copyrighted works from falling into the public domain, and thereby enable their owners to continue to collect monopoly rents on their use.\footnote{Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: Copyright Term Extension and Intellectual Property As Constitutional Property, 112 YALE L. J. 2331, 2333 (2003) (“At the time of the statute's passage, a number of iconic works were on the cusp of entering the public domain, the most prominent being early films starring Mickey Mouse.”).} As a result, the CTEA is often pejoratively referred to as the “Mickey Mouse Protection Act.”\footnote{Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. REV. 1057, 1065 (2001).} In fact, a scholarly consensus has emerged that rent-seeking legislation of this kind is improper and ought to be unconstitutional.\footnote{Schwartz & Treanor, supra note 54, at 2332 (“With striking unanimity, scholars have called for aggressive judicial review of the constitutionality of congressional legislation in this area.”).} However, this position is obviously inconsistent with traditional rational basis review of
economic legislation.57 As the Court implicitly observed in Eldred, if rational basis review does not permit examination of the actual motives for a government action, then any conceivably legitimate motive will do, no matter how implausible.

The “New Rationality”

Under traditional rational basis review, Eldred was a foregone conclusion. But what if rational basis review changed to permit consideration of the actual motives for a government action? Can Eldred survive more searching review? And should it?

It appears that rational basis review may have undergone just such a change. In Lawrence v. Texas (2003),58 United States v. Windsor (2013),59 and Obergefell v. Hodges (2015), the Court seems to have applied rational basis review, but considered the actual motive for a government action or omission, rather than searching for a conceivably legitimate motive.60

In Lawrence v. Texas, the Court held that a Texas law prohibiting homosexual conduct was unconstitutional, because it violated due process.61 The basis for the Court’s ruling is surprisingly unclear, because it did not specify the standard of constitutional review.62 However, Lawrence explicitly overruled Bowers v. Hardwick (1986), which applied rational basis review to hold that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was a legitimate government interest.63 In Romer v. Evans (1996), the Court applied rational basis review to hold that an amendment to the Colorado Constitution violated equal protection, because it was “born of animosity toward the class of persons affected,” which is not a legitimate government interest.64 The Lawrence Court relied on Romer, holding that there is no legitimate government interest in prohibiting homosexual conduct: “The Texas

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57 Id. at 2332-34.
58 See generally 539 U.S. 558 (2003) (appearing to apply rational basis to Texas’ actual interest in promoting morality).
59 See generally 133 S. Ct. 2675 (2013) (appearing to apply rational basis to the Texas’ actual interest in promoting morality).
60 E.g., Lawrence, 539 U.S. at 582 (O’Connor, J., concurring) (“Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.”); Windsor, 133 S. Ct. at 2693 (“The House concluded that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.’”) (quoting H.R. REP. No. 104-664, 12-13 (1996)).
61 Lawrence, 539 U.S. at 578-79.
62 See, e.g., Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 55 SUP. CT. REV. 27, 45 (2003) ("Was Lawrence based on rational basis review, or instead on something else? It is astonishing but true that this question is exceedingly difficult to answer.").
statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."\textsuperscript{65}

Moreover, Justice O’Connor’s concurrence explicitly applied rational basis review and concluded that the Texas law violated equal protection because it was intended to harm homosexuals, and “some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests.”\textsuperscript{66} And Justice Scalia’s dissent explicitly pointed out that the majority can only be applying rational basis review:

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.\textsuperscript{67}

Accordingly, it appears that the Lawrence Court applied rational basis review and held that the Texas law was unconstitutional because animosity toward a politically unpopular group is not a legitimate government interest: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”\textsuperscript{68}

Then, in United States v. Windsor, the Court held that a federal law prohibiting the federal recognition of same-sex marriages was unconstitutional because it violated the Equal Protection clause of the Fourteenth Amendment.\textsuperscript{69} As in Lawrence, the basis for the Court’s ruling in Windsor is unclear, because it did not specify the standard of constitutional review. However, it seems that the Court once again applied rational basis review and held that the federal law failed to advance a legitimate public interest because it was motivated by animosity:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.\textsuperscript{70}

\textsuperscript{65} Lawrence, 539 U.S. at 559-60.

\textsuperscript{66} Id. at 580 (O’Connor, J., concurring) (internal quotation marks omitted).

\textsuperscript{67} Id. at 599 (Scalia, J., dissenting).

\textsuperscript{68} Id. at 560 (quoting Bowers v. Hardwick, 478 U.S. at 216 (Stevens, J., dissenting)).

\textsuperscript{69} United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

\textsuperscript{70} Id. at 2696.
Moreover, in his dissent, Justice Scalia once again observed that the majority must have been applying rational basis review, albeit of a form considerably more stringent than historically applied:

    In accord with my previously expressed skepticism about the Court’s “tiers of scrutiny” approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like Moreno. But the Court certainly does not apply anything that resembles that deferential framework.\textsuperscript{71}

Finally, in \textit{Obergefell v. Hodges}, the Court held that the Fourteenth Amendment requires states to license marriages between two people of the same sex.\textsuperscript{72} Again, the basis for the Court’s holding is unclear, because it did not specify the standard of constitutional review. But it appears to have applied rational basis review, and held that there is no legitimate basis to refuse to license marriages between two people of the same sex. The Court did not hold that gay people are a suspect class, which would have required the application of strict scrutiny. Instead, it observed that marriage is fundamental right protected by due process, and held that the refusal to license marriages between two people of the same sex violates equal protection by preventing gays and lesbians from exercising that right:

    It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.\textsuperscript{73}

\textsuperscript{71} \textit{Id.} at 2706 (Scalia, J., dissenting) (citation omitted).
\textsuperscript{73} \textit{Id.}
Indeed, Chief Justice Roberts’s dissent explicitly accused the majority of "Lochnering,” or constitutionalizing its policy preferences: “Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*, 198 U.S. 45.”74 Roberts argued that the fundamental right of marriage provides only a right to marry “as traditionally defined,” which has never included a right to marry a person of the same sex, and that the majority’s decision was based only on its own policy preferences:

The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” . . . Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.75

So, it appears that *Lawrence, Windsor, and Obergefell* may all have applied a new form of rational basis review, based on *Romer* and other cases, under which courts must consider the actual motivation for a government action in determining whether it advances a legitimate state interest, which cannot include animosity. Many commentators have argued that this development should be understood as the gradual emergence of a new level of judicial scrutiny, “rational basis review with bite,” which is limited to government actions that affect particular suspect classes.76 Curiously, this new level of scrutiny seems indistinguishable in practice from intermediate scrutiny.77 Others have argued that the Court actually created, *sub silentio*, a fundamental right to engage in homosexual conduct.78 And some federal courts have agreed with this reading.79

But why not take *Lawrence, Windsor, and Obergefell* at face value and assume that the Court actually intended to change rational basis review, by authorizing courts to consider the actual motivation for government action when determining whether it was intended to advance a legitimate government interest? I will refer to

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76 See, e.g., Ian Bartrum, *The Ninth Circuit’s Treatment of Sexual Orientation: Defining "Rational Basis Review with Bite,"* 112 MICH. L. REV. FIRST IMPRESSIONS 142, 145-46 (2014). See also Gunther, supra at note 32, at 18-19 (arguing that several “minimal scrutiny” cases applied a standard with “bite”).

77 See Pettinga, supra note 34, at 779-80.


79 Sec. e.g., Witt v. Dept’ of Air Force, 527 F.3d 806, 816 (9th Cir. 2008) (“We cannot reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review.”).
this apparent change in the application of the rational basis test as the “new rationality.” But the terms of the new rationality remain unclear.

If the new rationality requires courts applying the rational basis doctrine to consider the actual motives for a government action, rather than hunting for any conceivably legitimate motive, which motives are legitimate and which are not? In Lawrence, Windsor, and Obergefell, the court held that animosity is not a legitimate motive, and explicitly rejected religious justifications for legislative decisions. That stands to reason, although as Justice White observed in Bowers, “if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”

Are any other motives illegitimate under the rational basis test? Several scholars have argued that the new rationality should also extend to rational basis review of economic legislation. For example, David Bernstein has argued that Lawrence and other substantive due process cases reflect a gradual return to the form of judicial review applied in Lochner. And Randy Barnett has argued that Lawrence reflects the wholesale importation of libertarian values into constitutional review.

Some federal judges seem to agree. Several courts have held that economic legislation failed the rational basis test because its actual purpose was economic protectionism. For example, in Craigmiles v. Giles (2002), the Sixth Circuit held that rational basis review does not require courts to accept pretextual justifications for government actions, and that economic protectionism is not a legitimate government interest. In Merrifield v. Lockyer (2008), the Ninth Circuit held that rational basis review does not require courts to accept irrational justifications, and that economic protectionism is not a legitimate government interest. In St. Joseph Abbey v. Castille (2013), the Fifth Circuit held that rational basis review requires courts to identify an actual rational basis for believing that a government action would advance a legitimate government interest, and that economic protectionism

83 Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) ("No sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations for the 1972 amendment. We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.").
84 Merrifield v. Lockyer, 547 F.3d 978, 991 (9th Cir. 2008) ("Indeed, the record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield.").
is not legitimate. And in *Wildcat Moving v. Zawacki* (2013), the United States District Court for the Eastern District of Kentucky applied *Craigmiles* and held that a Kentucky law regulating intrastate moving failed the rational basis test because its sole purpose was "to protect existing moving companies from outside economic competition."

Of course, these cases appear to be facially inconsistent with Supreme Court precedent. Specifically, in *New Orleans v. Dukes* (1976), the Supreme Court held that a New Orleans ordinance prohibiting pushcart food vendors in the French Quarter, with a "grandfather clause" that provided an exception for certain long-time vendors, passed the rational basis test, because:

The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause"—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Essentially, the *Dukes* Court held that courts should not question the rationality of economic legislation explicitly overruling *Morey v. Doud* (1957), the last case in which it had overruled economic legislation as irrational. And yet, the Supreme Court seems newly concerned by government action based on economic protectionism. For example, in *North Carolina Board of Dental Examiners v. Federal Trade Commission* (2015), the Court held that the North Carolina State Board of Dental Examiners was not entitled to state-action antitrust immunity because it was not actively supervised by the state. The Board of

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85 St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423, (2013) ("Mindful that a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board's chosen means must rationally relate to the state interests it articulates, we turn to the State Board's proffered rational bases for the challenged law. Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.").


88 Id. at 306 ("Actually, the reliance on the statute's potential irrationality in *Morey v. Doud*, as the dissenters in that case correctly pointed out, . . . was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. Morey is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case, but the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.").

Dental Examiners was a state regulatory body composed primarily of practicing dentists, which prohibited non-dentists from offering teeth-whitening services that do not require medical skill. The FTC argued that the Board’s action violated federal antitrust law, but the Board responded that it was entitled to state-action antitrust immunity. While the Court did not actually apply the rational basis test, it was clearly concerned about the legitimacy of the Board’s action. Indeed, Justice Alito’s dissent explicitly argued that the majority’s opinion was motivated by opposition to economic protectionism:

When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways. So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today’s decision.90

**Eldred & the New Rationality**

If the new rationality prohibits economic protectionism—or rather, corruption—an *Eldred* survive the new rationality? In practice, of course it can. The Court can do whatever it likes, and it is perfectly capable of turning a blind eye to corruption, if it so chooses. In fact, *Eldred* has already survived the new rationality. In *Golan v. Holder* (2012), it relied on *Eldred* to hold that Congress could restore copyright protection of works that had fallen into the public domain.91 In particular, the Court held that the Copyright Clause empowers Congress to grant copyright protection in order to promote both the creation of new works and the dissemination of existing works, and Congress could have believed that restoring copyright protection of existing works could encourage their dissemination.92 In other words, the Court applied the traditional rational basis test, rather than the new rationality.

The more interesting question is, should *Eldred* and *Golan* survive the new rationality? And that is a question that has been percolating for quite some time. Ever since *Eldred* was decided, scholars have recognized that requiring courts to consider the actual motives for copyright legislation would inevitably invoke the

90 *Id.* at 1123.
92 *Id.*
spectre of *Lochner*.  

As a consequence, they have argued that courts should defer to Congress when reviewing copyright legislation, and by extension, that courts should defer to legislatures when reviewing economic legislation.

And yet, perhaps they overstate their case. The traditional reason for rejecting *Lochner* and its more stringent review of economic legislation is that courts should respect the democratic process, even if it results in government action unlikely to achieve welfare-maximizing ends. Or rather, as Justice Holmes put it, “if my fellow citizens want to go to Hell I will help them. It’s my job.”

But what if economic legislation is not the result of the democratic process? What if it is the result of corruption? Should courts defer to all economic legislation, even in the face of evidence of corruption? The justification for judicial deference is that courts should respect government actions based on majority opinion. As Justice Stevens observed:

> I think it appropriate to emphasize the distinction between constitutionality and wise policy . . . [A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: “The Constitution does not prohibit legislatures from enacting stupid laws.”

But *Lawrence, Windsor*, and *Obergefell* held that courts should not respect government actions based on animosity, because animosity is not a legitimate basis for government action. Neither should courts respect government actions based on corruption, because it is not even an expression of majority opinion, it is just a means of rent-seeking. As other commentators have noted, “[w]ith the appearance in the circuits of a new series of cases applying ‘rational basis with bite,’ one might ask whether underlying them is another normative change, one of growing public disapproval of rent-seeking and special-interest legislation.”

In other words, perhaps the “new rationality” should be understood to provide that courts may consider legislative intent, but not legislative wisdom. Of course, legislative intent may be diffuse and difficult to discern. And yet, courts routinely consider the intent of non-economic legislation. Indeed, the purpose of strict and intermediate scrutiny is essentially to enable courts to review the intentions

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93 See generally Schwartz & Treanor, supra note 54.
94 Id.
95 See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (“The received wisdom is that Lochner was wrong because it involved ‘judicial activism’: an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”).
motivating government action that affects fundamental rights and minority groups. While the stakes are high, because the protecting fundamental rights and minority groups is of paramount importance, there is also room for legitimate disagreement on normative grounds as to what counts as a fundamental right and how minority groups ought to be protected. By contrast, corruption and rent-seeking are considerably easier to identify.

So, perhaps the new rationality provides that government action can be foolish, but cannot have improper motives, like animosity or corruption. Courts can and do review the motives for government action. There is no reason for them not to review for both animosity and corruption. And there is no reason to believe that the public will object. In fact, it is far more likely that the public will object to invalidation of government action based on animosity than that it will object to the invalidation of government action based on corruption.

It goes without saying that Eldred and Golan would not fare well under this “new rationality.” No one seriously believes that the CTEA was intended to do anything but benefit the owners of valuable copyrights that were nearing the end of their term. Any degree of scrutiny more searching than the Court’s credulous acceptance of Congress’s absurd justifications would require reversal. But it remains to be seen whether the Court will follow this new line of doctrine to its logical conclusion.