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A Curious Call for More Judicial Activism: Comment on Alexandra Klein's "The Freedom to Pursue a Common Calling"

Mark Rush*

I. Introduction

H.L. Mencken said, "Democracy is the theory that the common people know what they want and deserve to get it good and hard."¹ Alexandra Klein demonstrates that while Mencken's impatience with democracy may be justified, his observation is built on a fallacy: "the people" do not exist; majorities and minorities do.

This is a foundational part of U.S. constitutional history. The division of federal powers among three branches, the division of national powers between the states and the federal government, the justification for a large republic, staggered electoral terms, and an independent judiciary with the power to declare legislation unconstitutional are all part of a governmental scheme designed to check the power of popular majorities.²

The same fear of tyrannical majorities that animated the Framers also prompted the Supreme Court to subject legislation that threatened the freedom of "discrete and insular minorities" to a much more exacting scrutiny than it used for other legislation.³ In *United States v. Carolene Products*, Justice Stone stated this in the famous fourth footnote to his opinion of the Court:

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1. H.L. MENCKEN, *A LITTLE BOOK IN C MAJOR* 19 (1916).
2. See generally *THE FEDERALIST* NO. 51 (James Madison).
3. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

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. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, 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.⁴

But *Carolene Products* signaled a surrender by the Court. It would no longer subject economic rights to the same strict scrutiny that it continued to employ when dealing with discrete and insular minorities and more fundamental rights such as those noted in footnote four.⁵ Working from the assumption that economic legislation affected rich and poor alike and, therefore, the political process would resolve any controversies regarding such laws, the Court retreated from imposing anything more than “rational basis” review on economic legislation.⁶

While this may have made sense in 1938, Alexandra Klein argues that it no longer does so. She demonstrates that the economic marketplace does indeed generate discrete and insular minorities. The market is neither fair nor efficient. It is as subject

4. *Id.* (citations omitted).

5. *See generally* TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 125 (2010).

6. *See id.* at 153 (“[L]egislation affecting ordinary 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.”).

to domination by special interests akin to the factions Madison feared in *Federalist* 10 as the political marketplace. Economic rights, she argues, are no less important than the other “fundamental” rights outlined by Justice Stone. Insofar as the economic marketplace is unjust, the Court can no longer justify treating challenges to economic regulations with the “kid gloves” of rational basis review.

II. *The Evidence*

In focusing on occupational licensing schemes, Klein brilliantly uses what may seem to be very local or arcane issues to demonstrate a fundamental flaw in the Court’s approach to states’ rights, the federal division of powers, and economic freedoms. There is, as she notes, something peculiarly wrong in the political and economic system if it can take longer to become a pet groomer than it does to become an emergency medical technician. There also is something awry when the standards for getting licensed in particular professions can vary radically from state to state.⁷

Even if one is a staunch defender of the federal structure of the United States’ constitutional system, it is hard to justify radical interstate differences in licensing requirements for the same profession. While the differences in or unique aspects of local topography and climate may render it inefficient to administer land use or waterways with a one size fits all policy emanating from Washington, it is hard to believe that toenails, hair, and pets (not to mention dentistry or heart surgery) vary much from state to state.⁸ Defenders of federalism can seek refuge in romantic notions of states’ rights, traditional state functions, and romantic, Tocquevillian notions of states as “laboratories of democracy.”⁹ But those laboratories of innovation

7. See generally Alexandra Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411 (2016); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL’Y 209 (2016).

8. Klein, *supra* note 7, at 414–15 n.14–22.

9. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

and progress have had a less romantic history as barriers to interstate commerce¹⁰ and backwaters of clientelism and discrimination.

Klein argues that there is a clear justification for states to impose licensing schemes to ensure the integrity of professions, quality of services, and to protect the public interest. No one would doubt the need to ensure that surgeons are licensed. But she argues that special interests have captured state legislatures and transformed licensing schemes from mechanisms to protect the public interest at the expense of private interests to perverse practices that protect private interests at the expense of the public.¹¹ The result, she argues, is a debasement of the individual right to pursue a common calling.

III. A Common Calling

We see this right first alluded to in *Corfield v. Coryell*.¹² There, Justice Bushrod Washington asserted that the Privileges and Immunities Clause¹³ includes “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”¹⁴ From this, the court concluded that “the pursuit of a

10. See generally *S.C. State Highway Dep’t. v. Barnwell Bros. Inc.*, 303 U.S. 177 (1938) (allowing state action to burden interstate commerce through state regulations on weight and width of trucks on state highways); *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (noting that a state regulation on railroad transportation interfered with the Commerce Clause).

11. See Larkin, *supra* note 7, at 235

Where does that leave us? With this remarkable irony. The justification for regulation has come full circle. Originally, the rationale was that government intervention would remedy economic market failures in furtherance of the public interest. Today, we see that government intervention causes political market failures in furtherance of private interests. Government has become the problem, not the solution.

12. 6 F. Cas. 546 (E.D. Pa. 1823).

13. U.S. CONST. art. IV, § 2, cl. 1.

14. *Corfield*, 6 F. Cas. at 552–53.

common calling is one of the most fundamental of those privileges protected by the Clause.”¹⁵

Despite Washington’s broad definition of economic rights and his extraction of a right to pursue a common calling from the general wording of the Privileges and Immunities Clause, the court—and Washington—nevertheless upheld New Jersey’s prohibition against out-of-staters harvesting oysters and clams because the creatures were common property of New Jersey citizens.¹⁶ It seemed that the right to a common calling could stop at a state line. State lines ultimately yielded to the fundamental right to travel in decisions such as *Edwards v. California*¹⁷ and *Saenz v. Roe*.¹⁸ But the scope and definition of the right to a common calling remained somewhat nebulous.

The right to pursue a common calling or honest living is not *sui generis*. It depends on a state power to differentiate between legal and illegal means of making a living. The Court upheld a state’s power to make this differentiation when it sustained Kansas’s prohibition of debt adjustment in *Ferguson v. Skrupa*.¹⁹ In leaving this authority to the states, the Court maintained:

We refuse to sit as a superlegislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts used the Due Process Clause 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.²⁰

Thus, Klein seems to be on the horns of a dilemma. The right she wishes to protect (common calling) is the creation of the same legislative power that creates the occupational licensing schemes that she wants to regulate. This is the same power that lets states decide whether or not to permit alcohol, prostitution, and

15. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 219 (1984).

16. *See Corfield*, 6 F. Cas. at 552 (“[I]t would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states.”).

17. 314 U.S. 160 (1941).

18. 526 U.S. 489 (1999).

19. 372 U.S. 726 (1963).

20. *Id.* at 731–32.

the use of marijuana. If we trust a state with such powers, why do we withdraw that trust when it comes to licensing fortune tellers?

As Klein points out, this conundrum lies at the intersection of public choice theory and constitutional law. Political processes and markets will inevitably be captured by small, powerful groups that exert disproportionate influence and can therefore extract rents from the political process at the expense of the general public and, one would argue, the common good.²¹ Accordingly, Klein demonstrates that we should trust courts to police the economic marketplace in the same way that John Hart Ely called upon them to police the political marketplace in *Democracy and Distrust*.²² As a result, Klein eloquently argues that economic rights should no longer be granted second-class status.

IV. Back to the Future? The Primacy of Economic Rights

In this respect, she touches upon one of the issues that the Founders regarded as most compelling: the protection of property and markets. It is not often noted that the First Amendment is actually the *second* mention of rights in the Constitution. As a result of the economic and political chaos under the Articles of Confederation, the Framers were so concerned with property rights and their security²³ that they wrote Article I, section 10, which reads in part:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal: coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.²⁴

21. Klein cites numerous sources. Klein, *supra* note 7, at 437–41. To hers, I add MANCUR OLSEN, *THE RISE AND DECLINE OF NATIONS* (1984); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); JONATHAN RAUCH, *DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT* (1995).

22. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

23. See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (2004).

24. U.S. CONST. art. I, § 10.

While the Bill of Rights was designed to constrain the Federal Government, Article I, § 10 took dead aim at the states and, in particular, their electoral majorities. It protects the freedom to do what we will with our labor and our property. By protecting contracts and forbidding ex post facto laws, it prevents the state legislative majorities from attacking capital. The rationale was made manifest in *Federalist* 44 where Madison celebrated the Contract Clause:

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . [Such laws] are contrary to the first principles of the social compact and to every principle of sound legislation

Our own experience has taught us, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.²⁵

But, this economic liberty was never unlimited.

Shortly after Justice Washington celebrated the right to pursue a common calling in *Corfield*, Justice Taney offered an extraordinarily circumspect observation about the nature of individual rights: they and their enforcement depend upon the prior and ongoing existence of a public interest. In *Charles River Bridge v. Warren Bridge*,²⁶ he asserted:

The object and end of all government is to promote the happiness and prosperity of the community by which it is

25. THE FEDERALIST NO. 44 (James Madison).

26. 36 U.S. 420 (1837).

established, and it can never be assumed, that the government intended to diminish its powers of accomplishing the end for which it was created The whole community . . . have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity . . . shall not be considered to have been surrendered or diminished by the state unless it shall appear by plain words, that it was intended While the rights of private property are sacredly guarded, we must not forget that the community also has rights, and that the happiness and wellbeing of every citizen depends on their faithful preservation.²⁷

So, even though Harvard had secured from the Commonwealth of Massachusetts what it thought was a monopoly to ferry people across the Charles River, and even though the Charles River Bridge Company had been guaranteed to inherit that right and operate as a monopoly for another decade or so when it was incorporated, the Court declared that the people of Massachusetts could override their contractual obligations and incorporate a rival bridge company.

A century later, Chief Justice Hughes reasserted this vision of individual rights—and the need for the state to regulate the economic as well as political marketplace—in *West Coast Hotel v. Parrish*.²⁸ In sustaining Washington State’s minimum wage laws and other restrictions on women’s employment, Justice Hughes stated that the exercise of rights presupposes a state power that can protect their exercise by restricting it. He explained that, “Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”²⁹ Accordingly, Hughes argued that the Court had to take into account the context in which workers sought to exercise their rights and the inequality of power among actors in the political and economic marketplace:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and thus are relatively defenseless against the denial of a living wage . . . is

27. *Id.* at 547–48.

28. 300 U.S. 379 (1937).

29. *Id.* at 392.

not only detrimental to their health and well-being, but casts a direct burden for their support on the community.³⁰

The New Deal Court, which established tiers of scrutiny in *Carolene Products* also asserted the need to maintain equitable market conditions to protect economic actors. Klein finds herself in a peculiar situation: she agrees with the same court with which she disagrees.

V. Conclusion: Judicial Review and Imperfect Democracy

A minority that suffers discrimination is discrete and insular—regardless of whether the right at stake is property, contract, speech, or religion. The decision in *Carolene Products* to create tiers of scrutiny and hierarchies of rights was a judicial prophylactic that enabled the Court to extract itself from the quagmire of reviewing economic legislation while remaining vigilant and active with regard to political equality. The time has come, says Klein, to revisit and perhaps dispense with this prophylactic.

Klein's logic in this respect, is as unassailable as it is earthshaking. Her analysis is nothing less than a call for a constitutional or federal revolution and a remarkable increase in judicial activism. With regard to federalism, what Klein calls for is a reassertion of the principles that animated much of the Supreme Court's Commerce Clause jurisprudence: the states could not balkanize the national economy. With regard to property or economic rights, she calls for a resuscitation of the principles that underpinned *Lochner v. New York*:³¹ the Court cannot simply turn a blind eye to the rent-seeking behavior that permeates politics. But, are we prepared to give the judiciary the final say regarding the necessity and rationality of licensing schemes—or any other legislation?

Judges are not experts in economic or other professional regulation. They are trained as lawyers—not as pet groomers, land use regulators, or surgeons. As a result, it has become manifest that the courts struggle to analyze or offer informed

30. *Id.* at 399.

31. 198 U.S. 45 (1905).

judgments about scientific, professional or other “expert” testimony dealing with the intricacies of particular legislation.³²

With regard to policing the democratic process, the courts are not necessarily any more competent to discern whether it is functioning properly or improperly than they are to assess licensing schemes. Insofar as the legislative process is iterative and dynamic, it may be the case that a law that seems to persecute a discrete or insular minority may be a necessary step in an attenuated legislative process designed to bring about a more just political system.³³ If so, is the primary justification for judicial interference simply to speed the political process up?

So, we find ourselves still stuck in our conundrum. If the legislature is corrupt, but the courts are not particularly competent, what is a citizen or scholar to do?

VI. *The Case for a More Activist Court: Constitutional Confidence*

Regardless of the pitfalls of calling for more judicial activism, Klein’s case is firmly grounded in sound principles. The marketplace metaphor applies as well to politics as it does to economics.³⁴ A strong, but messy, case can be made for more judicial oversight of both despite the limits to judicial knowledge and the impact of judicial review on the democratic deliberative process.

If we do seek more judicial activism in the name of interstate consistency and a better protection of fundamental rights, then consistency would dictate that the court protect all rights equally. If so, this certainly justifies the Supreme Court’s decision in *Obergefell v. Hodges*.³⁵ Certainly, if it is unconscionable for

32. See generally Gatowski, et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUM. BEHAV., 433–58; David Faigman, *The Law’s Scientific Revolution*, 57 WASH. & LEE L. REV. 661 (2000); David Faigman, *The Daubert Revolution and the Birth of Modernity*, 46 U.C. DAVIS L. REV. 893 (2013).

33. See generally CHRISTOPHER MANFREDI & MARK RUSH, *JUDGING DEMOCRACY* (2008).

34. See generally Samuel Issaccharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

35. 135 S. Ct. 2584 (2015).

licensed hairdressers, dog groomers, dentists, and fortune-tellers to navigate an irrational web of ad hoc and unjustified occupational licensing schemes from one state to the next, then it stands to reason that spouses in same-sex marriages also ought to be protected from the balkanization of marriage law.

If we are concerned with the integrity and efficiency of political as well as economic marketplaces, then there is much to be said for an activist judiciary. But there are equally powerful arguments against. As Justice Roberts noted in dissent in *Obergefell*:

The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.” . . . As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?³⁶

Roberts laments judicial action. But, per Klein’s analysis, inaction has an equal but opposite effect. If the economic or political marketplace is malfunctioning, how can the Court turn a blind eye and simply defer to a romantic, but inaccurate vision of deliberative democracy that ignores the realities of public choice theory? If Roberts’s assessment of the democratic process is accurate, then he and critics of judicial activism can easily find solace in the structure of the constitutional system. In response to a judicial decision, a legislature may look to pass another law and thereby engage in a constitutional dialogue with the Court.³⁷ The constitutional system envisions a democracy that is driven by clashes among the three branches.³⁸ Perhaps a more activist Court would force the elected branches to respond to its decisions and, in so doing, reinvigorate American democracy.

36. *Id.* at 2612 (Roberts, J., dissenting).

37. *See generally* LOUIS FISHER & NEAL DEVINS, *DEMOCRATIC CONSTITUTION* (2d ed. 2015).

38. *See* THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).