KEYNOTE REMARKS: JUDICIAL ENGAGEMENT THROUGH THE LENS OF *LEE OPTICAL*

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It is my great pleasure to be the keynote speaker at this symposium on "Judicial Engagement and the Role of Judges in Enforcing the Constitution." This is a subject of enormous importance and also enormous confusion. I consider it my job to get this conference off on the right foot by describing what judicial engagement is and is not. And just so you don't dismiss this as just the opinion of one idiosyncratic law professor, I am going to take as my role model the judicial opinion in the 1954 case of *Lee Optical of Oklahoma, Inc. v. Williamson*.[1] This is not to be confused with the opinion in the 1955 case of *Williamson v. Lee Optical of Oklahoma, Inc.*[2] The opinion I wish to consider is that of the three-judge panel in the United States District Court for the Western District of Oklahoma, not the Supreme Court opinion of Justice William O. Douglas. The opinion of these three federal judges illustrates how judicial engagement can work in practice. But before I describe their approach, let me digress for a few minutes to provide some background so we can understand the significance of the Supreme Court's reversal of their decision.

I. THE TWO ROADS TO SCRUTINY LAND

In my previous writings, I have described a place called "Scrutiny Land."[3] In Scrutiny Land, the government needs to justify to a court its restrictions on the liberties of the people.[4] Pretty much everyone today believes in Scrutiny Land. For example, there are very few who would deny that, when Congress enacts a statute restricting the freedom of speech or the free exercise of religion, a person whose liberty is affected may seek to have the statute nullified by a federal court because it is unconstitutional. To evaluate this claim, the court needs to ascertain the objective or purpose of the statute, whether that purpose is a proper one, and also to assess the

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1 120 F. Supp. 128 (W.D. Okla. 1954), *rev'd*, 348 U.S. 483 (1955).

2 348 U.S. 483 (1955).

3 Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

4 *See id.*

degree of fit between the means chosen and the end being sought. What people today disagree about is exactly *when* a court may employ judicial scrutiny to nullify a properly enacted statute. In short, they disagree about the proper route to Scrutiny Land.

In describing the traditional routes to Scrutiny Land, permit me to offer a short and dirty version of a long and complex story. The traditional road to Scrutiny Land was to assess the scope of the power being asserted by the legislature as well as the appropriateness of the means chosen to execute such a power. For example, in the 1798 case of *Calder v. Bull*,[5] Justice Samuel Chase opined that he could not "subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without controul*; although its authority *should* not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State."[6] Chase affirmed that "[t]he people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence."[7] Therefore, "[t]he purposes for which men enter into society will determine the *nature* and *terms* of the *social* compact; and as *they* are the foundation of the *legislative* power, *they* will decide what are the *proper* objects of it."[8] He summarized this proposition as follows: "The *nature*, and *ends* of *legislative* power will limit the *exercise* of it."[9]

Chase's opinion is usually characterized as founded on natural rights, probably because of the contrasting opinion of Justice James Iredell, who derided the view of those "speculative jurists [who] have held, that a legislative act against natural justice must, in itself, be void."[10] But Chase based his approach not on the doctrine of natural rights, at least not explicitly or directly. Instead, his focus was on the scope of the legislative powers to which the people have presumably given their consent. "There are acts which the *Federal*, or *State*, Legislature cannot do," he wrote, "*without exceeding their authority*."[11] Among the examples of such laws, Chase listed the claim of power to "take[] *property* from A. and give[] it to B."[12]

The reason Chase offers for why such a law was improper is revealing. "It is against all reason and justice," he said, "for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed that they have done it*."[13] Chase's analysis is therefore based directly on the notion of presumed consent, and only indirectly and silently on natural rights. When

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5 3 U.S. (3 Dall.) 386 (1798).

6 *Id.* at 387-88 (opinion of Chase, J.).

7 *Id.* at 388.

8 *Id.*

9 *Id.*

10 *Id.* at 398 (opinion of Iredell, J.).

11 *Calder*, 3 U.S. at 388 (opinion of Chase, J.).

12 *Id.*

13 *Id.* (emphasis added).

the legislature claims a power that has not expressly been granted to it by the people, such an unenumerated power cannot be presumed. Today, we call this sort of approach a "clear statement" doctrine.[14] Just seven years after *Calder*, Chief Justice John Marshall adopted a very similar clear statement rule with respect to presumed legislative intent in the case of *United States v. Fisher*:[15] "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."[16]

To be sure, natural justice or natural rights lurks in the background. But only as a way of interpreting a claim of implied power. The "due process of law" came to be thought to include a judicial examination of whether a particular statute was within the authority or power of a legislature to enact. In other words, it is part of the "*process* of law" that the judicial branch ensure that a particular statute enacted by the legislative branch was within its power and therefore a "*law*."

At issue here was the relevant default rule. In Justice Iredell's opinion in *Calder*, he contended that if a government "were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void."[17] In other words, when the written constitution is silent, legislatures have unlimited power. To this, Chase responded that "[t]o maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*."[18] For Chase, the legislature only has those powers that are expressly delegated, together with those implied powers that are not fundamentally unjust or, as it later came to be put, exercised in a manner that is "unreasonable, arbitrary or discriminatory." This choice of default rules is of greatest importance when the legislature is exercising implied powers rather than those that were expressly delegated. In the absence of a clear statement, it asks would a free and rational person have consented to *that*?

For 150 years, this traditional police powers jurisprudence allowed for judicial scrutiny of legislation to ensure that the purpose of legislation was genuinely to serve the public welfare, rather than any particular faction or

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14 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406-07 (2010) ("Beginning in the last quarter of the twentieth century, the Supreme Court has displayed a growing fondness for construing statutes in light of constitutionally inspired "clear statement rules," which insist that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value.").

15 6 U.S. (2 Cranch) 358 (1805).

16 *Id.* at 390.

17 *Calder*, 3 U.S. at 398 (opinion of Iredell, J.).

18 *Id.* at 388 (opinion of Chase, J.).

class of persons.[19] Such was the method of analysis employed by the Supreme Court in *Lochner v. New York*.[20] In *Lochner*, the Court took as given that states had the power to promote the health and safety of its citizens.[21] For this reason, the numerous detailed regulations of the Bakeshop Act regulating the bakery business were never under any cloud. The only question considered by the Court was whether the maximum hours restriction was a genuine health and safety regulation of liberty.[22] Finding no reason to single out bakers for this sort of protection, the Court concluded that the law must have been enacted for "other motives," namely the desire of the legislature to serve the partial interests of the bakers' union who pushed for the measure and the large unionized bakery companies, at the expense of small non-union bake shops, rather than serve the general welfare.[23]

In his dissenting opinion, Justice Harlan did not deny that the Court was entitled to engage in such scrutiny of state laws. Indeed, he granted "that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment."[24] Instead, he quarreled with the burden of proof employed by the majority: "the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[25] Harlan contended that, "[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation."[26] He summarized his approach this way: "when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional."[27]

In contrast, in his solo dissenting opinion Justice Holmes took a markedly different approach. "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," he wrote, "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fun-

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19 *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE (1993) (describing the longstanding tradition of police powers jurisprudence).

20 198 U.S. 45 (1905).

21 *Id.* at 53 ("There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare . . . .").

22 *Id.* at 52-53.

23 *Id.* at 63-65. For much more on the factual context of *Lochner*, see DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

24 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

25 *Id.*

26 *Id.*

27 *Id.*

damental principles as they have been understood by the traditions of our people and our law."[28] In other words, for Justice Holmes, in the absence of a traditionally grounded fundamental right, only a *hypothetical* rational basis is required. As he concluded with respect to the Bake Shop Act, "[i]t does not need research to show that . . . . [a] reasonable man *might* think it a proper measure on the score of health."[29] Nor does it matter that the measure is inconsistent with the regulation of other similar forms of labor. "Men whom I certainly could not pronounce unreasonable," he asserted, "would uphold it as a first instalment [sic] of a general regulation of the hours of work."[30]

In 1931, it was Harlan's position rather than Holmes's that was adopted by a majority of the Supreme Court in the case of *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[31] in which the Court refused to strike down an insurance regulation because "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[32] As Justice Brandeis explained, "[i]t does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy."[33] In short, "[t]he record is barren of any allegation of fact tending to show unreasonableness."[34]

But note that, under the burden of proof favored by Justice Harlan and adopted by Justice Brandeis, it was still permissible for a person to challenge a legislative restriction on liberty by showing that it *was* unreasonable, arbitrary, or discriminatory. This was made abundantly clear by the New Deal Court in the landmark 1938 case of *United States v. Carolene Products Co.*[35] Although this case is known for the most famous footnote in the history of the Supreme Court—the celebrated Footnote Four[36]—in the less well-studied body of the case, Justice Stone reaffirmed judicial scrutiny of the reasonableness of a statute was still available. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice," he wrote, "such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[37]

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28 *Id.* at 76 (Holmes, J., dissenting).

29 *Id.* (emphasis added).

30 *Lochner*, 198 U.S. at 76.

31 282 U.S. 251 (1931).

32 *Id.* at 257-58.

33 *Id.* at 258.

34 *Id.*

35 304 U.S. 144 (1938).

36 *See id.* at 152 n.4.

37 *Id.* at 153 (citation omitted).

Earlier in his opinion, Justice Stone was emphatic about the availability of this type of scrutiny.

> We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[38]

Of course, Footnote Four established that:

> 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.[39]

But it should now be clear that this was a claim about burdens of proof. Absent an express prohibition, it was challengers to the rationality who bore the burden of showing that a law was irrational, arbitrary, or discriminatory.

In short, according to the New Deal Supreme Court, there were not one, but two, routes to Scrutiny Land: challengers might present a factual record establishing the irrationality of the legislation; or alternatively, a challenger might assert the violation of an express prohibition in which case the burden of proof would shift to the government to establish the propriety of its legislation.

It is not my purpose here to critique the constitutionality of the doctrine adopted by the Court in Footnote Four. As I have explained elsewhere, this doctrine appears to violate one of the very few express rules of construction in the text of the Constitution—that of the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[40] Whether or not the Ninth Amendment warrants the judicial protection of unenumerated rights, it does bar any construction that would "deny or disparage" the liberties of the people on the ground that "certain rights" were "emumerat[ed] in the Constitution."[41] Footnote Four's preference for "express prohibitions" over other liberties does precisely this.

But when read together with the body of Justice Stone's opinion in *Carolene Products*, the New Deal Supreme Court only "disparaged" the other rights retained by the people by its differential allocation of the bur-

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38 *Id.* at 152.

39 *Id.* at 152 n.4.

40 U.S. CONST. amend. IX; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224-52 (2004).

41 *See* U.S. CONST. amend. IX.

den of proof. It did not "deny" them altogether. That feat was to be left to the Warren Court.

II. HOW TRADITIONAL RATIONAL BASIS REVIEW WORKED

We now come to *Lee Optical of Oklahoma v. Williamson*, the District Court decision in 1954, not the Supreme Court decision one year later. In *Williamson*, the district court considered a challenge to a statute that restricted the activities of opticians in a several ways. First, it barred anyone but a "licensed optometrist or ophthalmologist, 'To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person . . . .' or 'to duplicate or attempt to duplicate or to place or replace into the frames, any lenses'" without a written prescription from an Oklahoma licensed ophthalmologist or optometrist.[42] In the words of the Court, the "unambiguous language" of the statute "makes it unlawful . . . for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer except upon written prescription from a qualified eye examiner."[43]

Second, the statute made it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances."[44] Third, it barred any "person, firm, or corporation engaged in the business of retailing merchandise to the general public" from "rent[ing] space, sub-leas[ing] departments, or otherwise permit[ting] any person purporting to do eye examination or visual care to occupy space" in their retail store.[45]

Lee Optical of Oklahoma was a subsidiary of a Texas company that owned a national chain of eyeglass retailers.[46] Lee Optical was founded by Theodore Shanbaum.[47] Born to Russian immigrants who had settled in Chicago, Shanbaum graduated from the University of Chicago before earning his law degree from DePaul in the late 1930s.[48] His entry into the eyeglass industry came when he visited his brother-in-law, an optometrist, at his home in Dallas.[49] But when he went into business, he chose another optometrist, Dr. Ellis Carp (one of the named plaintiffs in the suit to which Lee Optical most famously lends its name), to partner up with under the obliga-

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42 Lee Optical of Okla. v. Williamson, 120 F. Supp. 128, 135 (W.D. Okla. 1954) (alteration in original) (quoting the Oklahoma statute), *rev'd*, 348 U.S. 483 (1955).

43 *Id.* (emphasis omitted).

44 *Id.* at 139 (alterations in original) (internal quotation marks omitted).

45 *Id.* at 142 (internal quotation marks omitted).

46 *See* Joe Simnacher, *Rites Held for Theodore Shanbaum: Lee Optical Founder, 87, Was Pioneer in Selling Low-Cost Eyewear*, DALL. MORNING NEWS, Oct. 6, 1999, at 29A.

47 *Id.*

48 *Id.*

49 *Id.*

tion of a Texas law requiring an optometrist to be employed by dispensing opticians.[50] Shanbaum minimized his start-up costs by purchasing a used business sign with the name "Lee Optical"; the name "Lee" has no other connection to the enterprise or its participants.[51]

Lee Optical did business the way LensCrafters® does today. It should come as no surprise that local ophthalmologists and optometrists were none too keen on out-of-state chain competitors advertising lower prices on glasses. Indeed, most of the famous economic liberty cases involved legislation siding with some firms in competition with others. In *Lochner*, the statute promoted by the bakeshop union favored large union-organized bakeries at the expense of small ethnic, nonunion bakeshops.[52] In *Nebbia v. New York*,[53] the regulation raising the retail price of milk sought to protect big milk distributors from competition from small mom and pop retailers.[54] *Carolene Products* protected the powerful dairy farmer constituency from competition from lower-priced "filled" milk.[55]

As was common practice when considering challenges to the constitutionality of legislation, the case was heard by a three-judge panel, which here included a Circuit Court Judge, the Chief Judge of the District, and a District Court Judge. The panel quite consciously adhered to the post-New Deal allocation of the burden of proof. District Judge Wallace's restatement of the New Deal Court's law is worth quoting in its entirety:

> It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[56]

In short, in the absence of an "express prohibition," the court employed the presumption of constitutionality and proceeded to analyze whether the restrictions imposed on opticians were "arbitrary, unreasonable or discriminatory" in light of the arguments and evidence presented at trial.[57] As the court summarized its approach, when "the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accom-

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50 *Id.*

51 *Id.*

52 *See* BERNSTEIN, *supra* note 23, at 23-29.

53 291 U.S. 502 (1934).

54 *See generally id.*

55 *See generally* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

56 *Lee Optical*, 120 F. Supp. at 132.

57 *See id.*

plished and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other."[58]

To see how this approach works in practice, let me describe how the court assessed the restrictions on optician's replacing broken lenses. The statute made it unlawful for an optician to take old lenses and place them in new frames and then fit the completed glasses to the face of the eyeglass wearer except upon written prescription from a qualified eye examiner.[59] This served to prohibit consumers "from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist."[60] As the court noted, this "diverts from the optician a very substantial, as well as profitable, part of his business."[61]

The court began by noting that written prescriptions contain no instructions on how glasses are "to be fitted to the face of the wearer."[62] On the basis of the evidence, the court concluded that "the knowledge necessary to" fit glasses to the face "can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist."[63] For this reason, although "the legislature can regulate the artisan, the merchant, or the professional where the regulated services embrace issues of public health and welfare, the services under consideration [bore] no real or rational relation to the actual vision of the public."[64] After all, to make use of this service, a consumer must already have a pair of glasses, the prescription for which was obtained after examination by an ophthalmologist or optometrist.[65] "The evidence establishes beyond controversy" wrote the court, "that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public."[66] "This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character."[67]

My favorite part of the opinion is the court's discussion of the "mechanical device known as the lensometer," a device that "scientifically

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58 *Id*. at 134 (footnote omitted).
59 *Id*. at 135.
60 *Id*.
61 *Id*.
62 *Lee Optical*, 120 F. Supp. at 135.
63 *Id*.
64 *Id*.
65 *Id*.
66 *Id*. at 136.
67 *Id*.

measures the power of the existing lense and reduces it to prescriptive terms."[68] The court found that:

> The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians, as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed ophthalmologists require a patient to return to the examiner's office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.[69]

As a result of this evidence, the court found that "[i]t is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses."[70] Therefore, it held that "[a]lthough on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved."[71] In this regard:

> The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group, when the public can be completely protected without taking from the optician this valuable property right. . . . The means chosen by the legislature does not bear ''a real and substantial relation'' to the end sought, that is, better vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.[72]

In a footnote, the court noted that the effect of this restriction "is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling."[73] The "ophthalmologists will pointedly refer their business to a limited number of channels, thus denying all other opticians the opportunity

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68 *Lee Optical*, 120 F. Supp. at 136.

69 *Id.* at 137.

70 *Id.*

71 *Id.*

72 *Id.* at 137-38 (footnote omitted).

73 *Id.* at 137 n.20.

to follow their trade regardless how competently the remaining opticians are qualified."[74]

According to the court, "[t]he rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance."[75] But here, "not only is the 'relation to the object of the legislation' questionable . . . but 'all persons similarly circumstanced' pointedly have not been treated alike."[76] After stressing an additional irrationality that the public is allowed to buy ready-to-wear reading glasses from retail establishments without any prescription, the court declared that "[t]he legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses."[77] Employing the same method of analysis, the court also concluded that the restrictions on advertising and allowing eye exams by doctors on the premises were also arbitrary, irrational, and discriminatory.[78]

The most noteworthy aspect of this analysis is that the court spends no time discussing the origin, scope, or fundamentality of the right at issue, which is simply the right to pursue a lawful occupation. Indeed, the court never even specifically identifies the right in question other than a passing reference to "a long recognized trade" and its characterization of the "skills and business" of the optician as a "valuable property right."[79] The issue is not *whether* this right can reasonably be regulated, but *how*, and an analysis of the right does none of the work.

All the emphasis is upon the practical operation of the statute to see if its discrimination against opticians is warranted, even after adopting a presumption in the legislature's favor. The court was simply following the injunction affirmed by the Supreme Court in *Carolene Products*:

> [N]o pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[80]

But as we all know, the Supreme Court reversed.

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74 *Lee Optical*, 120 F. Supp. at 137 n.20.

75 *Id.* at 138.

76 *Id.* at 138-39 (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

77 *Id.* at 139.

78 *See id.* at 139-42 (analysis of advertising restrictions); *id.* at 142-43 (analysis of on-premises eye exams).

79 *See Lee Optical*, 120 F. Supp. at 137.

80 United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

III. GUTTING RATIONAL BASIS REVIEW

The Supreme Court decision in *Williamson v. Lee Optical* is not as famous as such landmark cases as *Marbury*,[81] *Dred Scott*,[82] *Plessy*,[83] *Brown*,[84] or *Roe*[85]—cases so familiar we typically refer to them by one party's name. But it is repeatedly relied upon by the court as the authoritative treatment of rational basis scrutiny of economic legislation.[86] It is a fixed point of reference for all attorneys practicing constitutional law. While most academics attribute the judicial withdrawal from policing economic legislation to the New Deal Court, as the previous analysis shows, the true credit should go to the Warren Court and, in particular, to Justice William O. Douglas.

Justice Douglas's approach is easy to characterize. In place of the opportunity to present evidence showing that a particular restriction was arbitrary, unreasonable, or discriminatory, Justice Douglas held that legislation would be upheld if the court could conceive of any hypothetical reason why the legislature *might* have enacted the restriction.[87]

For example, although it "appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription," the "legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses."[88] "Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature *might* have concluded that one was needed often enough to require one in every case."[89] "Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."[90] Justice Douglas conceded that "the present law does not require a new examination of the eyes every time the frames are changed or

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81 5 U.S. (1 Cranch) 137 (1803).

82 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

83 163 U.S. 537 (1896).

84 347 U.S. 438 (1954).

85 410 U.S. 113 (1973).

86 *See, e.g.*, Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2333 (2010) ("When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism [that] due respect for legislative choice demands." (footnote omitted) (citing, among others, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-89 (1955))).

87 *See infra* notes 88-95 and accompanying text.

88 *Lee Optical*, 348 U.S. at 487 (emphasis added).

89 *Id.* (emphasis added).

90 *Id.* (emphasis added).

the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses."[91] But to this he replied in what has now become canonical words: "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."[92]

Whereas the lower court looked to the unequal treatment of opticians as compared with ophthalmologists and optometrist, Justice Douglas did away with such scrutiny with yet more hypothetical justifications: "Evils in the same field *may* be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think*."[93] Alternatively, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."[94] So the differential treatment of one group as compared with another, a tip off that laws are rent-seeking and not serving the public interest, is to be disregarded. "The prohibition of the Equal Protection Clause," wrote Justice Douglas, "goes no further than the invidious discrimination."[95]

In sum, whereas the New Deal Court had adopted the approach of Justice Harlan's dissent in *Lochner*—employing a presumption of constitutionality in favor of the constitutionality of regulations that can be rebutted by evidence showing that the restriction on liberty was arbitrary, unreasonable, or discriminatory—the Warren Court enshrined the approach of Justice Holmes's dissenting opinion. For all practical purposes, what had once been a true presumption that was rebuttable by evidence and reasoning would henceforth be an irrebuttable presumption, which is not truly a presumption at all.

But the Warren Court was not done changing the requirements of "due process of law." Ten years later, in the 1965 case *Griswold v. Connecticut*,[96] the Court invalidated a law banning the sale and possession of contraceptives.[97] Writing for the Court, Justice Douglas refused to reconsider the reasoning of *Williamson v. Lee Optical*.[98] Instead, he purported to stay within the confines of Footnote Four by finding a fundamental right of privacy in

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91 *Id.*

92 *Id.* at 487-88.

93 *Id.* at 489 (emphases added).

94 *Lee Optical*, 348 U.S. at 489 (citation omitted).

95 *Id.*

96 381 U.S. 479 (1965).

97 *Id.* at 480, 485-86.

98 *See id.* at 481-82 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation as we did in [*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and] *Williamson v. Lee Optical Co.* . . . .").

the specific guarantees of the Bill of Rights. To accomplish this, he was compelled to write one of the most ridiculed sentences in the annals of Supreme Court decisions: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[99] To support this conclusion Justice Douglas relied on other so-called *Lochner*-era Due Process Clause cases as *Pierce v. Society of Sisters*[100] and *Meyer v. Nebraska*.[101] And, although Justice Douglas avoided exclusive reliance on the Due Process Clause of the Fourteenth Amendment, eventually the right of privacy was so grounded.

By creating a fundamental unenumerated right of privacy akin to the other "express prohibitions" in the text, in essence, Justice Douglas and the Warren Court were widening the lane to Scrutiny Land provided by Footnote Four to avoid reviving the other traditional route via a police-power rational basis analysis. And thus was born the idea that such "personal" liberties as privacy were to be given heightened scrutiny while mere economic "liberty interests" were subject to *Lee Optical* hypothetical rational basis scrutiny, which is to say no scrutiny at all. The rest, as they say, is history.

CONCLUSION: BEYOND FUNDAMENTAL RIGHTS

Thus, by this circuitous route did we end up with the modern debate between so-called judicial "conservatives," who in essence cling to the four corners of the New Deal's Footnote Four, and so-called judicial "activists," who hew to the Warren Court's approach of Footnote Four-Plus—with the plus being certain additional unenumerated rights deemed fundamental by the Supreme Court; or what is sometimes called "preferred freedoms." One camp consists of *un*reconstructed New Deal jurisprudes; the other of *re*constructed New Deal jurisprudes. If, however, the New Deal represented a genuine revolutionary moment of constitutional change,[102] rather than a restoration of the Constitution's original meaning from the *Lochner* Court's deviation,[103] then neither side of today's debates over judicial engagement can claim the mantle of originalism.

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99 *Id*. at 484.

100 268 U.S. 510 (1925).

101 262 U.S. 390 (1923); *see Griswold*, 381 U.S. at 481 (citing *Pierce* and *Meyer*, among other cases).

102 *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255-420 (1998) (contending that the New Deal was revolutionary); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (same); GILLMAN, *supra* note 19 (same).

103 *See generally* WALTON HALE HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW (1937) (contending that the New Deal represented a restoration of

But reading the traditional Due Process analysis with post-New Deal eyes distorts that practice. Under the modern "fundamental rights" approach: first, one only gets to Scrutiny Land if one identifies a fundamental right, whether enumerated or unenumerated. Second, when a fundamental right is at stake, laws must be strictly scrutinized. Third, because scrutiny must be strict, only a small number of fundamental rights can be recognized lest all governmental power be undermined. Finally, it is easy to ask, just what makes judges competent to identify and define unenumerated fundamental rights, when even philosophers disagree?

But the lower court opinion in *Lee Optical* makes clear that a court need not speculate about fundamental rights; it need only identify what today would be called a "liberty interest." All the emphasis is on identifying the proper scope of the legislature's power, be it an enumerated power of Congress or the police power of states to protect the health and safety of the public. To identify legislation that is not in the general interest, but serves to benefit some class or faction at the expense of others, a court need not concern itself with the precise nature of the liberty or right at issue. It need only examine the fit between the purported end and the means chosen to see if the restriction might have been pre-textual.

Twenty years after *Lee Optical*, the Court would once again engage in "rational basis scrutiny" to ferret out an improper motive for a legislative discrimination. In *City of Cleburne v. Cleburne Living Center, Inc.*,[104] it examined the rationales denying a permit for group home for the mentally retarded, without first finding that the mentally retarded were a specially protected class under the Equal Protection Clause.[105] This approach drew a sharp reproach from Justice Marshall who thought it was in direct conflict with *Lee Optical*: "[U]nder the traditional and most minimal version of the rational-basis test, 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'"[106] To this he added, the "suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*."[107] Yet *Cleburne* is still good law.

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original meaning); 1-2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) (same).

104 473 U.S. 432 (1985).

105 *Id*. at 435, 442-47.

106 *See id*. at 458 (Marshall, J., concurring in part and dissenting in part) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

107 *Id*. at 459-60.

While I would prefer that courts adopt a "presumption of liberty" of the sort the Court seemed to employ in *Lochner*,[108] *Lee Optical* shows the power of rational basis scrutiny even when Justice Harlan's rebuttable "presumption of constitutionality" is applied. That which actually exists is possible to exist, and the lower court analysis in *Lee Optical* shows realistic or *actual* rational basis scrutiny about the potentially improper motivation behind some economic legislation is both possible and realistic. By contrast, the hypothetical rational basis approach of Justice Douglas and the Warren Court is a highly unrealistic and formalist irrebuttable presumption that all restrictions on liberty are really in the public interest if any possible rationale for the restriction can be imagined by a judge.

The modern rational basis approach adopted by the Warren Court in *Lee Optical* represents a judicial abdication of its function to police the Constitution's limits on legislative power. It accomplished this by combining its formalist irrebuttable presumption of constitutionality with a judicially-invented distinction between economic and personal liberties found nowhere in the Constitution—a distinction that runs afoul of one of the few rules of construction in the Constitution itself: "The enumeration in the Constitution of certain rights *shall not be construed* to deny or disparage others retained by the people."[109] The lesson of *Lee Optical* is that protection of these retained rights requires neither their discovery and definition, nor what today would be called "substantive" due process. It requires only the recognition that the "due process of law" includes a judicial assessment of whether a restriction on either personal or economic liberty is genuinely rationally related to an end that is within the proper scope of **federal or state legislative** powers, or whether **the restriction** is instead irrational, arbitrary, or discriminatory. In short, the protection of these rights requires judicial engagement.

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108 *See generally* BARNETT, *supra* note 40.

109 U.S. CONST. amend. IX (emphasis added).