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Opticians and Abortion: The Constitutional Myopia of Justice Rehnquist

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Abstract

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KEYWORDS: optical, pregnant, railroad berths

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I. INTRODUCTION

What do opticians in Oklahoma have in common with pregnant women in Texas? On the surface, the answer would seem to be very little, aside from a shared state border. Before I explain why the question is posed in this fashion, let me ask what pregnant women in Texas have in common with the following: men who watch dirty movies in their homes; suspicious men who “case” jewelry stores; men who place bets from telephone booths; people who import window glass; parents who want their children to study German in public schools; and convicted murderers who seek new trials? Again, the answer would seem to be very little.

The answers to both questions are: very little and a great deal. Both the Oklahoma opticians and the mixed bag of other people are connected to pregnant women in Texas by the common bond of involvement in the United States Supreme Court cases that were cited as precedent on both sides in *Roe v. Wade*.¹ Justice (now Chief Justice) William Rehnquist cited in his dissenting opinion a case involving opticians in Oklahoma as his one and only precedent for the argument that the Constitution does not provide a right of “privacy” that would protect women seeking abortions from criminal prosecution.² On the other side, Justice Harry Blackmun, writing for the majority in *Roe*, cited the cases described above among those he utilized to

1. 410 U.S. 113 (1973).

2. *Id.* at 173 (Rehnquist, J., dissenting).

argue that the Constitution does include—or at least implies—a right to privacy “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”³

It may seem a far stretch to analogize between opticians and abortion, or between abortion and such issues as pornography, bookmaking, language instruction, murder trials, and “stop and frisk” practices. If the use of precedent is thought of as a search for cases “on point,” there is little that appears “on point” in these cases. But judges in general—and Justices of the Supreme Court in particular—are not bound by any rules in citing precedent. They often cite as precedent cases that are factually dissimilar to those at issue, looking for a broadly stated principle of law that could add some authority to the argument they are constructing, or to the conclusion they have reached.

On occasion, as illustrated by the *Roe* opinions of Justices Rehnquist and Blackmun, the search for precedent becomes creative and imaginative. I do not mean this in a pejorative way, because legal reasoning is not simply a process of stacking up cases that are factually similar. Argumentation can and should be creative and imaginative; that is why we have such terms as metaphor and simile, apposition and juxtaposition. In some situations, comparing apples to oranges may prove to be fruitful; they are both fruits, roughly spherical, and grow on trees. They have more in common than opticians and abortion.

Let me start with Justice Rehnquist and the case he cited as precedent in his *Roe* opinion, *Williamson v. Lee Optical Co.*⁴ He cited this 1955 decision for the following proposition: “[T]he test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged [in *Roe*] has a rational relation to a valid state objective.”⁵ That sentence provides a good, brief statement of the so-called “rational basis” test applied by the Court to determine the constitutionality of “social and economic” legislation. In contrast, the “strict scrutiny” test is applied to legislation that is alleged to infringe on fundamental rights or to create suspect classifications. This latter jurisprudential test derives from the famous “Footnote Four” in Justice Harlan Fiske Stone’s 1938 opinion in *United States v. Carolene Products*.⁶ The “rational basis” test has earlier roots, but over the past six decades the competing tests have essentially

3. *Id.* at 153.

4. 348 U.S. 483 (1955).

5. *Roe*, 410 U.S. at 173 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

6. 304 U.S. 144, 152–53 n.4 (1938).

polarized the debate over the proper level of judicial scrutiny in constitutional cases.

There is nothing illegitimate in Justice Rehnquist's citation to *Lee Optical* in his *Roe* dissent. His search for precedent led him to a rather obscure, and certainly not momentous, case. However, his statement of its central principle is misleading; in fact, it is flatly wrong. The Court's opinion in *Lee Optical* did not state that the "rational basis" test applied to "social and economic legislation," as Justice Rehnquist wrote. It limited the use of that highly deferential test to state laws that regulated "business and industrial conditions," hardly the same thing as "social and economic" legislation.⁷ The case Justice Rehnquist actually should have cited in his *Roe* opinion was not *Lee Optical*, but the Court's 1979 decision in *Dandridge v. Williams*,⁸ in which Justice Potter Stewart put the *Lee Optical* decision into totally new frames, so to speak. It was Justice Stewart who cited *Lee Optical* for the proposition that in "deal[ing] with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," the Court would apply the "rational basis" test.⁹

II. A CLOSER LOOK AT LEE OPTICAL

Let us take a closer look, through the corrective lenses of hindsight, at the *Lee Optical* case, to find out why it has become Justice Rehnquist's favorite precedent in cases dealing with issues such as abortion, nude dancing, and the rights of illegitimate children, among others. This case stemmed from a political battle over the eyeglass business in Oklahoma. The state's opticians (who grind lenses and fit them into frames) were pitted against optometrists (who have doctoral degrees and measure vision) and ophthalmologists (who are medical doctors and treat eye diseases). The Court's opinion in *Lee Optical* tells us nothing about this political battle, but it is fair to assume that Oklahoma's optometrists and ophthalmologists (call them the eye doctors) complained to state legislators that opticians (call them the grinders) were cutting into their business by duplicating eyeglass lenses without sending their clients to the doctors for prescriptions. Opticians are capable of duplicating lenses without prescriptions; this is a fairly simple task, as the many "one-hour" optical shops illustrate. However, the eye doctors argue vigorously (as my optometrist recently did to me) that new eye examinations and prescriptions are essential to correct vision changes and

7. *Lee Optical*, 348 U.S. at 488.

8. 397 U.S. 471 (1970).

9. *Id.* at 484.

detect possible eye diseases such as glaucoma. Having a lens duplicated without a prescription could endanger one's vision and eye health. That, at least, is what the eye doctors claim.

That claim persuaded the Oklahoma legislature to pass a law providing (in pertinent part, as lawyers like to say) that "it [shall be] unlawful for any person . . . to duplicate . . . [any] lenses . . . [without a] written prescripti[on] [from an] ophthalmologist or optometrist."¹⁰ The Lee Optical Company challenged the law in federal district court, filing suit against Oklahoma's Attorney General, Mac Q. Williamson. The opticians won a judgment that the law violated the Due Process Clause of the Fourteenth Amendment, in restricting their "liberty" to practice their profession. Williamson appealed to the Supreme Court on the state's behalf, and won a reversal of the lower court's decision.¹¹

This was a fairly simple case for the Justices. A long line of precedent, stretching back to the nineteenth century, proclaimed the principle—as stated by the Court in *Munn v. Illinois*¹² in 1877—that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."¹³ In other words, if Oklahoma's opticians did not like the new law, they should set up a political action committee (EYE-PAC, perhaps) and lobby for its repeal or revision. In many other cases, including *Carolene Products*, the Court had upheld state and federal laws that regulated "business and industrial conditions" against Due Process Clause challenges.¹⁴ In most of these cases, the Justices found a "rational basis" for the law in statements by its sponsors, either in committee hearings or during floor debate, recorded in the legislative history of the statute.

The Court faced a slight problem in the *Lee Optical* case. Apparently, the Oklahoma legislature made no record of its hearings or debates. The legislative history of the challenged statute did not exist. That did not faze Justice William O. Douglas, who wrote for the Court. He simply imagined, or invented, possible "reasons" the legislators may have advanced for the law.¹⁵ Justice Douglas began with an admission that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement" that opticians cannot grind lenses without a

10. *Lee Optical*, 348 U.S. at 485 (citation omitted).

11. *Id.* at 491.

12. 94 U.S. 113 (1876).

13. *Id.* at 134.

14. *United States v. Carolene Prods.*, 304 U.S. 144, 154 (1938).

15. *Lee Optical*, 348 U.S. at 487.

prescription.¹⁶ How had the legislature reached that judgment? Justice Douglas filled in the gaps with speculation. “[T]he legislature might have concluded,” he wrote, that prescriptions were necessary in enough cases to justify the law.¹⁷ He used the words “might” and “may” at least a dozen times in his opinion, with absolutely no support from any record.

What is the relevance of this repeated supposition and speculation to Justice Rehnquist’s citation of *Lee Optical* in his *Roe* opinion? It saved him the trouble of finding an actual “rational basis” for the Texas law that criminalized abortions.¹⁸ This law, first enacted in 1854, had no recorded legislative history.¹⁹ The possible reasons for the criminal abortion statute, advanced by the state’s lawyers during oral argument before the Supreme Court, were totally speculative. The lawyers guessed that “protection of the mother, at one time,” may have been the Texas legislature’s intent.²⁰ The lawyers also speculated that “when this statute was first passed, there was some concern for the unborn fetus.”²¹ Needless to say, the state’s lawyers did not have the faintest support for their speculations. This hardly constitutes, in my mind, any “rational basis” for the Texas criminal abortion statute, since no reasons were proffered in any record. Guessing the intent of long-dead legislators cannot manufacture a “rational basis” for any statute, unless Madame Blavatsky is sitting next to the judge.

Should this reliance on speculation make any difference to the legitimacy of the “rational basis” test as applied by Justice Douglas in *Lee Optical* and Justice Rehnquist in his *Roe* opinion? I suggest that it does, by allowing judges to relieve legislators from their duty to articulate, in some record, sufficient reasons for their decisions that can be examined for possible bias or error. Justice Douglas may well have been correct in imagining what the Oklahoma legislators “might have” intended in passing their law, but he might equally have been wrong, and the statute may have suffered from serious defects. We simply have no way of knowing, and the “rational basis” test does not require that judges know anything about the “real” reasons any law was adopted. Further, it implies that judges do not, and should not, care about those reasons.

16. *Id.*

17. *Id.*

18. *Roe v. Wade*, 410 U.S. 113, 117–19 (1973) (citing TEX. PENAL CODE ANN. §§ 1191–1194 (1911)).

19. *Id.* at 119 (citing 3 H. GAMMEL, LAWS OF TEXAS 1502 (1898)).

20. LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, Vol. 75, 802–03 (P. Kurland and G. Casper, eds. 1973).

21. *Id.* at 803.

This reliance on the “rational basis” test is the logical extension of legal positivism. This is the jurisprudential philosophy that any law that is duly enacted by a legislature is, *ipso facto*, constitutional. By his own admission, Justice Rehnquist is a committed legal positivist. Laws “take on a form of moral goodness because they have been enacted into positive law,” he argued in the most elaborated statement of his judicial philosophy.²² Exceptions to this jurisprudential rule would be hard to find, and would be limited to those laws that on their face violate an explicit provision of the Constitution. The “rational basis” test, as applied by Justice Rehnquist, is virtually impossible to flunk.

III. A QUICK SLAP AT JUSTICE STEWART

It is not entirely fair to blame Justice Rehnquist for his misreading of the *Lee Optical* decision, in which Justice Douglas limited the application of the “rational basis” test to laws that regulated “business and industrial conditions.”²³ Of course, Justice Rehnquist (or his clerks) should have carefully read the *Lee Optical* opinion and quoted it correctly for the principle he purported to find in it, that his favored judicial test applied to a broader range of “social and economic” legislation. For this misreading of precedent, whether deliberate or not, Justice Rehnquist deserves censure. However, the real blame for this unwarranted expansion of the *Lee Optical* principle rests with Justice Potter Stewart. His 1970 opinion in *Dandridge v. Williams* allowed the Court to evade the “strict scrutiny” test in cases that raised issues of “fundamental rights” and that challenged “suspect classifications” by legislators.²⁴

The *Dandridge* case involved a Maryland law that placed a cap on welfare payments to families with dependent children.²⁵ The law provided that families with six or more children could receive no more benefits than those with five children.²⁶ In other words, the “excess” children received no money for food or clothing. This law was clearly intended to punish families (almost all headed by single mothers) who exceeded the state legislature’s notion of proper family size. It would be fatuous to ignore the political and racial context of this legislation; states like Maryland (and Congress as well)

22. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

23. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

24. *Id.* at 471.

25. *Id.* at 473.

26. *Id.* at 474.

were dominated in the late 1960s by conservative white voters who resented giving their tax dollars to African-American women who kept having children just to increase their welfare funding. However incorrectly the voters perceived the welfare issue (in fact, most families who received Aid to Families with Dependent Children (“AFDC”) benefits were white), and however tainted by racial prejudice, they acted on their beliefs. This was the political reality of those years, however much we may want to erase it from our memories.

The Supreme Court, speaking through the patrician Justice Stewart, closed its eyes and ears to this reality. Justice Stewart conceded that the Maryland law produced “some disparity in grants of welfare payments to the largest AFDC families.”²⁷ He also conceded that the case “involves the most basic economic needs of impoverished human beings.”²⁸ Justice Stewart further admitted that the “rational basis” cases—including *Lee Optical*—on which he relied for precedent “have in the main involved state regulation of business or industry.”²⁹ So why did he extend the *Lee Optical* principle, limited by Justice Douglas to cases involving “business and industrial conditions,” to the much broader category of “social and economic” legislation? Justice Stewart did not explain this jurisprudential expansion. He simply wrote the following words: “We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.”³⁰

Why not? The Maryland legislature certainly had a “rational basis” for the law, in saving taxpayer dollars, but was that enough? Do children have a “fundamental right” to food and clothing? Or did the legislature create a “suspect classification” by discriminating between larger and smaller families, without regard to their needs? These seem to me to be relevant questions, worthy of judicial scrutiny, but Justice Stewart brushed them aside, concluding (without any discussion) that the Maryland law did “not affect[] freedoms guaranteed by the Bill of Rights,” presumably the only rights protected against governmental deprivation.³¹

Am I being unfair to Justice Stewart? After all, the development and progression of constitutional doctrine requires (in appropriate cases) the expansion of principles developed in one era to cover situations that arise in later times. But I think, at least in the *Dandridge* case, that he stretched the

27. *Id.* at 484.

28. *Dandridge*, 397 U.S. at 508.

29. *Id.* at 485.

30. *Id.*

31. *Id.* at 484.

Lee Optical principle far beyond the limits that Justice Douglas had intended to impose on his fellow judges. Justice Rehnquist, in turn, stretched the *Dandridge* principle even further, since it would be difficult—if not impossible—to deny that the abortion question does not raise a “liberty” claim under the Fourteenth Amendment. Justice Rehnquist, in fact, conceded in his *Roe* dissent that the “liberty” interest “embraces more than the rights found in the Bill of Rights.”³² Whatever those rights may be, they certainly require more judicial scrutiny than the “rational basis” test provides, which is the bare minimum. To hold otherwise is to depreciate those basic constitutional rights; to see them as deserving of no more judicial scrutiny than the regulation of the Oklahoma eyeglass business.

Before I let Justice Rehnquist escape from my critical lens, let me point out that he has continued to cite the *Lee Optical* case as precedent in dozens of opinions, both before and after *Roe*. For example, writing in solo dissent in 1972, he relied on *Lee Optical* in arguing that illegitimate children (whose paternity had been acknowledged by their deceased father) had no right to benefits granted their legitimate siblings under workmen’s compensation law in Louisiana.³³ And in 1986, writing for the Court in a case that upheld the power of cities to zone “adult theaters” into the boondocks far from downtown areas, Justice Rehnquist again relied on *Lee Optical* for support.³⁴ Even on the abortion issue, Justice Rehnquist still trots out his favorite precedent. Having failed to find the indispensable fifth vote to overturn the *Roe* decision, he grudgingly bowed to reality in 1992, when Justices Sandra O’Connor, David Souter, and Anthony Kennedy wrote (delivering “the opinion of the Court” in *Planned Parenthood v. Casey*³⁵) that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”³⁶ Justice Rehnquist conceded in his *Casey* dissent that “[a] woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause,”³⁷ but he continued to insist, citing *Lee Optical*, that “[s]tates may regulate abortion procedures in ways rationally related to a legitimate state interest.”³⁸ In other words, even if a right is protected by the Constitution, and state laws that deprive someone of that right are subject to the “strict scrutiny” test, laws that limit the exercise of that right short of absolute deprivation should be examined under the highly deferential “rational basis”

32. *Roe v. Wade*, 410 U.S. 113, 172–73 (1973) (Rehnquist, J., dissenting).

33. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 179–80, 183–85 (1972).

34. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986).

35. 505 U.S. 833 (1992).

36. *Id.* at 846.

37. *Id.* at 966.

38. *Id.* (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

test. This seems illogical to me, but obviously not to Justice Rehnquist. Even as he retreats, he defends his remaining ground with great tenacity, inch by inch.

IV. PREGNANT WOMEN, RAILROAD BERTHS, DIRTY BOOKS, AND BOOKIES

The major purpose of this article is to explore Justice Rehnquist's use of the *Lee Optical* case to defend his position that the Constitution does not imply a "right of privacy" that extends to abortion rights. Yet, it also seems fair to question whether Justice Blackmun, writing for the *Roe* majority, misused or stretched precedent in concluding that the Constitution does imply these rights. Let us take a look (more briefly than our examination of the *Lee Optical* case) at the cases Blackmun cited as precedent in concluding that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."³⁹ The nine cases he cites for these propositions, one broad and the other more narrow, are certainly a mixed bag.⁴⁰ The "line of decisions" he cited had no chronological order (they ranged between 1886 and 1969), but they roughly tracked the provisions of the Bill of Rights, as Blackmun stacked up his precedential building blocks.

The first case seems an odd choice. Back in the nineteenth century, Clara Botsford took a trip on the Union Pacific Railroad and was smacked on the head by a Pullman berth, "causing a concussion" that left her with "great suffering and pain to her in body and mind, and in permanent and increasing injuries."⁴¹ After she filed suit for damages, the railroad's lawyers moved that Ms. Botsford be required "to submit to a surgical examination" by its doctors, who agreed not to "expose" her body "in any indelicate manner."⁴² She refused, and the trial judge upheld her objection.⁴³ The Supreme Court agreed, holding that compelling anyone, "especially a woman, to lay bare the body, or to submit it to the touch of a stranger,

39. *Roe*, 410 U.S. at 152.

40. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886).

41. *Botsford*, 141 U.S. at 250.

42. *Id.*

43. *Id.* at 251.

without lawful authority, is an indignity, an assault and a trespass" in violation of "common law" principles.⁴⁴

But the Supreme Court went further in its *Union Pacific Railway Co. v. Botsford* opinion. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," wrote Justice Horace Gray.⁴⁵ "As well said by Judge Cooley," Gray continued, "'The right to one's person may be said to be a right of complete immunity: to be let alone.'"⁴⁶ Justice Gray quoted in this passage from the leading treatise on torts by the leading constitutional scholar of those times, Judge Thomas Cooley of the Michigan Supreme Court.⁴⁷ Cooley was best known for his massive book, *A Treatise on Constitutional Limitations*, first published in 1868, which elevated the "freedom of contract" to the constitutional pantheon, from which it was finally dislodged by the Supreme Court during the "Constitutional Revolution" of 1937.⁴⁸

Judge Cooley was not, however, the judicial reactionary that his writings on economics seem to suggest. He was more of a nineteenth century "liberal;" what we might now label as a "libertarian." His term, "the right to be let alone," was later appropriated by Louis Brandeis, the "people's lawyer," who joined the Supreme Court in 1916. It is ironic that the "right to be let alone," which the Supreme Court first applied in a railroad tort case, was transmuted by Louis Brandeis into a "right of privacy" that he first applied to the field of commercial advertising. The long road from *Botsford* to *Roe* wound through some very strange byways.

Brandeis actually invented "the right to privacy" before the Supreme Court decided the *Botsford* case, in a seminal *Harvard Law Review* article he wrote (with Joseph Warren) in 1890 with that title.⁴⁹ Brandeis even used the term "the right to life" in this article, although he employed it in a much different sense than opponents of abortion now do. His article rejected the rigid formalism of nineteenth-century jurisprudence; it reflected the rapid growth of technology that propelled American society toward the twentieth

44. *Id.* at 252.

45. *Id.* at 251.

46. *Botsford*, 141 U.S. at 251 (citation omitted).

47. THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 438 (1868).

48. *Id.*

49. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (6th ed. 1890).

century. “Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the common law, in its eternal youth, grows to meet the demands of society.”⁵⁰ He noted that “in very early times” the “right to life” afforded protection only against “battery in its various forms”⁵¹ But, he continued, “now the right to life has come to mean the right to enjoy life,—the right to be let alone.”⁵²

Significantly, Brandeis did not direct this “right to be let alone” against state intrusion, but that of private individuals and corporations. He wanted the common law to protect the individual’s name and likeness from commercial exploitation or exposure. “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life,” Brandeis complained, “and numerous mechanical devices threaten[ed] to” invade personal privacy.⁵³ He referred to the case of Marion Manola, a Broadway actress whose “appearance in tights” had been “photographed surreptitiously and without her consent” and used for advertising purposes by the “Castle in the Air” company.⁵⁴ Long before the *National Enquirer* appeared on supermarket racks, Brandeis decried “the invasion of privacy by the newspapers” and urged that “the law must afford some remedy” to people like Marion Manola.⁵⁵

Having invented the “right to privacy” in the *Harvard Law Review*, Brandeis repeated the term (and big chunks of his article) in later Supreme Court opinions. Among the “mechanical devices” he had warned against in 1890 was the microphone, which could be attached to a telephone and hooked up to a recording machine.⁵⁶ These three “recent inventions” threatened, he wrote, “to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”⁵⁷ Prophetically, Brandeis had foreseen in 1890 the telephone wire-tapping that he denounced in 1928, dissenting in *Olmstead v. United States*,⁵⁸ in which the Court’s majority upheld a federal law that authorized the interception and recording of telephone conversations in criminal cases.⁵⁹ “The makers of our Constitution,” Brandeis chastised his colleagues, had “conferred, as against

50. *Id.* at 193.

51. *Id.*

52. *Id.*

53. *Id.* at 195.

54. Warren, *supra* note 49, at 195 n.7.

55. *Id.* at 195.

56. *Id.*

57. *Id.*

58. 277 U.S. 438 (1928).

59. *Id.* at 440.

the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁶⁰

Justice Blackmun approvingly cited Brandeis’ *Olmstead* dissent in his *Roe* opinion.⁶¹ Blackmun also cited a 1969 Supreme Court opinion that quoted extensively from this dissenting opinion, a case that reversed a criminal conviction for possession of pornographic movies.⁶² The Court’s opinion in *Stanley v. Georgia*,⁶³ holding that the First Amendment protects “the right to receive information and ideas” from state intrusion, relied on Brandeis’ *Olmstead* dissent for the proposition that the Constitution embodies a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”⁶⁴ Mr. Stanley certainly did not want the State of Georgia to restrict his right “to receive information and ideas” from the raunchy movies he concealed in his dresser drawers. But does this case really help Justice Blackmun to answer the abortion question?

Some of the other cases cited by Justice Blackmun in his *Roe* opinion seem even less supportive of the “right to privacy” than the *Stanley* decision. Blackmun traced one of the “roots” of privacy rights to the Fourth Amendment’s protection against “unreasonable searches and seizures” by government agents.⁶⁵ However, the Supreme Court opinions he cited on this issue have only tenuous connections to this constitutional root. Along with Brandeis’ *Olmstead* dissent, Justice Blackmun cited two later decisions, one involving a federal prosecution for placing sporting bets from a telephone booth, and the other a state prosecution for possession of concealed weapons. In the “bookie” case of *Katz v. United States*,⁶⁶ the Court adopted the position Brandeis had advocated in his *Olmstead* dissent, but with significant limitations.⁶⁷ The Court’s majority in *Katz* held that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”⁶⁸ Citing the 1890 *Harvard Law Review* article by Warren and Brandeis, the Court noted that “protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of

60. *Id.* at 478.

61. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

62. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

63. *Id.* at 557.

64. *Id.* at 564 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

65. *Katz v. United States*, 389 U.S. 347 (1967).

66. *Id.* at 347.

67. *Id.* at 352.

68. *Id.* at 350.

his property and of his very life, left largely to the law of the individual States.”⁶⁹

If the *Katz* case did not offer Justice Blackmun much support for his *Roe* opinion, the Court’s 1968 decision in *Terry v. Ohio*⁷⁰ offered even less. In this criminal case, the defendant had been convicted of carrying a concealed weapon.⁷¹ A suspicious police officer observed two men who had been pacing up and down the sidewalk outside a Cleveland jewelry store. His search revealed a loaded pistol in a pocket of Terry’s overcoat.⁷² Upholding this “stop and frisk” search against a Fourth Amendment challenge, Chief Justice Earl Warren cited and quoted from the *Botsford* and *Katz* opinions for the proposition that individuals are “entitled to be free from unreasonable governmental intrusion” into their privacy.⁷³ But Warren noted that “the specific content and incidents of this right must be shaped by the context in which it is asserted.”⁷⁴ In his *Terry* opinion, Warren did not find a “privacy” right that prevailed over the government’s interest.⁷⁵

Two of the other cases that Justice Blackmun cited for support in his *Roe* opinion did not use the term “privacy” or come even close to the abortion issue. In 1923, the Supreme Court struck down a Nebraska law—enacted during World War One—that banned the teaching of German in public schools.⁷⁶ The Court’s decision in *Meyer v. Nebraska*⁷⁷ interpreted the “liberty” interest of the Fourteenth Amendment as protecting “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁷⁸ That statement did not move Justice Blackmun very far on his journey toward abortion rights.

Even less helpful was Blackmun’s citation to *Palko v. Connecticut*,⁷⁹ decided in 1937. This bizarre case involved a man who had been convicted of murder and sentenced to life imprisonment.⁸⁰ The State appealed and was granted a new trial.⁸¹ The jury in the second trial convicted him again and

69. *Id.* at 350–51.

70. 392 U.S. 1 (1967).

71. *Id.* at 2.

72. *Id.* at 1.

73. *Id.* at 9.

74. *Id.*

75. *Terry*, 392 U.S. at 9.

76. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

77. *Id.* at 390.

78. *Id.* at 399.

79. 302 U.S. 319 (1937).

80. *Id.* at 321.

81. *Id.*

sentenced Palko to die in the electric chair.⁸² His lawyers appealed to the Supreme Court, citing the Fifth Amendment provision that protects any person from being subjected “for the same offense to be twice put in jeopardy of life or limb.”⁸³ The Supreme Court rejected Palko’s appeal, ruling that the Double Jeopardy Clause of the Constitution did not bind the states to the federal rule.⁸⁴ The Justices further held that constitutional rights such as trial by jury and prosecution by grand jury indictment “are not of the very essence of a scheme of ordered liberty.”⁸⁵ The *Palko* decision, which cost the hapless defendant his life, was a very shaky precedent for Justice Blackmun’s later claim in his *Roe* opinion that the Texas criminal abortion statute violated any right of privacy.

V. WHOSE THUMB WEIGHS HEAVIER ON THE CONSTITUTIONAL SCALE?

Justice Rehnquist cited only one case, *Williamson v. Lee Optical*, to support his proposition that the Constitution does not imply a “right of privacy” that can be extended to protect abortion rights.⁸⁶ Justice Blackmun cited nine cases to support his contrary position.⁸⁷ Which of these two Justices bested the other in this constitutional conflict? Blackmun had both cases and votes on his side in *Roe v. Wade*. Seven Justices—including Chief Justice Warren Burger—joined the majority opinion in the *Roe* decision.⁸⁸

That majority eroded as public opinion shifted on the abortion issue. Writing for the Court in 1989, Justice Rehnquist (who succeeded Burger as Chief Justice in 1986) upheld significant restrictions on abortion rights in *Webster v. Reproductive Health Services*.⁸⁹ Rehnquist employed the “rational basis” test to endorse state laws that barred doctors from “‘encouraging or counseling’ a woman to have an abortion not necessary to save her life,” and that subjected doctors to criminal penalties if they failed to perform tests of fetal “viability” on women that they had “reason to believe”

82. *Id.*

83. *Id.* at 322 (quoting U.S. CONST. amend. V).

84. *Palko*, 302 U.S. at 323.

85. *Id.* at 325.

86. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

87. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886).

88. *Roe*, 410 U.S. at 115.

89. 492 U.S. 490 (1989).

were pregnant for twenty weeks or more.⁹⁰ The *Webster* decision, which in effect stationed police officers inside doctors' offices, did not overrule *Roe*, but it deployed the "rational basis" test to undermine a ruling based on the judicial standard of "strict scrutiny" of laws that implicated constitutional rights.⁹¹

In the *Webster* case in 1989, Justice Rehnquist fell short by one vote of his long-proclaimed goal of applying the "rational basis" test to the abortion question, and thereby reversing the *Roe* decision. Three years later, in the *Casey* decision in 1992, Rehnquist lost even more ground.⁹² Only Justices Antonin Scalia and Clarence Thomas (both fervent Roman Catholics) joined Rehnquist (a Calvinist Lutheran) in voting to overturn *Roe*.⁹³ Was it religious persuasion or belief in the "rational basis" test that influenced judicial votes in the *Casey* decision? In my opinion, neither of these factors determined the outcome. Justice Anthony Kennedy, who voted in *Casey* to "reaffirm" the central holding of the *Roe* case, was an equally fervent Roman Catholic and a former altar boy. But Kennedy believed that his "personal reluctance" to uphold abortion rights must yield to his conviction that "the Court's legitimacy depends on making legally principled decisions" that will be "accepted by the Nation."⁹⁴

Justice Kennedy's reference to the public's perception of the Court's "legitimacy" introduces a new factor into the judicial balancing of individual rights and state powers. The "strict scrutiny" and "rational basis" tests of legislation both focus their judicial lenses on lawmakers. In contrast, the "legitimacy" test looks to the public for support. The triumvirate of Kennedy, O'Connor, and Souter called on "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁹⁵ However, that mandate was not rooted in any explicit or even implicit constitutional provision. It rested, Kennedy explained, in the Court's reluctance to "surrender to political pressure" and to "overrule under fire" a "watershed decision" upon which an entire generation of women had relied.⁹⁶

Where does the *Casey* decision leave us in deciding whether Justice Rehnquist or Justice Blackmun had the stronger argument in the *Roe* case? In my opinion, Justice Kennedy lured the Court down an enticing, but

90. *Id.* at 501.

91. *Id.* at 503.

92. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

93. *Id.* at 833.

94. *Id.* at 866.

95. *Id.* at 867.

96. *Id.*

dangerous, bypass of the constitutional crossroad that Rehnquist and Blackmun forced us to confront. The “rational basis” road on which Rehnquist travels has few bumps or potholes. Under the doctrine of legal positivism, whatever the legislature enacts is constitutional, with only the most egregious exceptions. The “strict scrutiny” road on which Blackmun crosses this judicial intersection forces judges to look closely at the “compelling state interest” in the challenged legislation. It requires more of judges, but it also requires more of legislators, which I consider a good thing. All too often, elected officials become what Justice Robert Jackson called “village tyrants” in bowing to popular demands to punish an unpopular group or criminalize unpopular behavior.⁹⁷ The more that such officials know their actions will face the “strict scrutiny” of judges who need not fear electoral retribution, the more (hopefully) they will think before they vote.

To my mind, it is ironic that Justice Rehnquist clerked for Justice Jackson, whose 1943 opinion in *West Virginia Board of Education v. Barnette*⁹⁸ remains the classic statement of the limits of the “rational basis” test. The right of a state to regulate a business (i.e., eyeglasses), includes the “power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting,” he wrote.⁹⁹ “But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.”¹⁰⁰ Jackson widened his judicial vision. “One’s right to life, liberty, and property,” he added, “and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹⁰¹ It may be presumptuous for me to suggest that Justice Rehnquist dig out Volume 319 of the United States Reports and read Justice Jackson’s majestic opinion in the *Barnette* case. If he does, and if he thinks about the spirit of Jackson’s words, I hope he will conclude that laws designed to punish women who choose abortion over childbirth deserve “more exacting judicial scrutiny” than laws that regulate the eyeglass industry.

97. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

98. *Id.* at 624.

99. *Id.* at 639.

100. *Id.*

101. *Id.* at 638.

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