JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS: A RESPONSE TO PROFESSOR LEE

Burt Neuborne*
Charles S. Sims**

We are grateful to the editors of the *Arizona Law Review* for this opportunity to comment on Solicitor General Rex E. Lee's criticism of existing Supreme Court doctrine[1] subjecting government action in derogation of certain "fundamental" individual rights to a more exacting level of judicial scrutiny than government action designed to regulate the economy. Although, as will rapidly become apparent, we disagree with the constricted role Professor Lee would afford Article III judges in protecting "fundamental" personal and political rights, we salute his candor and honesty in presenting his thesis in a form and a forum which invites open debate.

The heart of Professor Lee's argument is that Article III courts should uphold all legislation, no matter what the context, "so long as it seeks to achieve a legitimate governmental end and does so in a way reasonably calculated to reach that end."[2] Such a permissive standard, which is currently used by the Supreme Court to review the constitutionality of statutes regulating the economy,[3] is far more deferential to legislative action than are varying formulations of heightened scrutiny currently applied by the

* Legal Director, American Civil Liberties Union. Professor of Law, New York University School of Law; A.B. 1961, Cornell University; LL.B 1964, Harvard Law School.

** Staff Counsel, American Civil Liberties Union. B.A. 1971, Amherst College, J.D. 1976, Yale Law School.

Our opinions are, of course, our own and do not necessarily reflect those of the American Civil Liberties Union.

1. Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine*, 25 ARIZ. L.REV. 805 (1984).

2. Lee, *supra* note 1, at 813. Professor Lee deals solely with judicial review of legislative activity. He does not venture an opinion on whether judicial review of executive activity should be governed by a similarly permissive standard. Nor does he discuss whether the same standard should govern review of state as opposed to federal activity.

3. Examples of the application of Professor Lee's test include: City of New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Danial v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Quong Wing v. Kirkendall, 223 U.S. 59 (1912); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911).

Supreme Court.[4] Its adoption in individual rights cases would result in the validation of all legislative activity affecting individual rights which cannot be shown to be either improperly motivated or wholly irrational. Since it is virtually impossible to prove improper legislative motivation[5] and almost always possible to concoct a rational *post hoc* explanation for a statute or regulation, it would be a rare act of the political majority which would run afoul of Professor Lee's standard. The net result would be a dramatic increase in the power of the group and a corresponding decrease in the scope of individual rights.

The extraordinary permissiveness of the Lee standard is exemplified by three representative cases. In *Kotch v. Board of River Pilot Commissioners*,[6] the Court utilized Professor Lee's suggested standard to uphold a Louisiana system in which river pilots (the only persons authorized to guide riverboats on the Mississippi River in the vicinity of New Orleans) were appointed exclusively from among the relatives and friends of existing pilots. Justice Black's opinion for the Court stated that "[w]e cannot say that the method adopted [to select pilots] is unrelated to" the objective of securing the "safest and most efficiently operated pilotage system practicable."[7]

In *Goesaert v. Cleary*,[8] the Court used the Lee formulation to uphold a Michigan statute which excluded any woman not "the wife or daughter of the male owner [of a bar]" from serving as a bartender.[9] As a final example, in *McDonald v. Board of Elections*,[10] the Court upheld a scheme which denied absentee ballots to persons awaiting trial in Cook County, while permitting persons incarcerated outside the county to obtain them because the distinction bore "some rational relationship to a legitimate state end. . . ."[11]

None of the three cases could survive any level of heightened scrutiny. *McDonald* was distinguished by *O'Brien v. Skinner*.[12] *Goesaert* was repudiated in *Reed v. Reed*,[13] and *Frontiero v. Richardson*.[14] *Kotch* could not

4. A non-exhaustive compendium of heightened scrutiny formulations would include: "compelling state interest advanced by least drastic means"; "necessary to the advancement of a compelling state interest"; "necessary for the protection of a legitimate state interest"; "bearing a substantial relationship to an important state interest"; "necessary to avoid a clear and present danger."

5. For some insight into the difficulty of proving improper legislative motivation, *see* Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. FORUM 961; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Brest, Palmer v. Hudson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. *See also* United States v. O'Brien, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ."); *but see* Washington v. Davis, 426 U.S. 229 (1976).

6. 330 U.S. 552 (1947).

7. 330 U.S. at 564.

8. 335 U.S. 464 (1948).

9. 335 U.S. at 465.

10. 394 U.S. 802 (1969).

11. 394 U.S. at 809.

12. 414 U.S. 524 (1974).

13. 404 U.S. 71 (1971).

14. 411 U.S. 677 (1973).

survive a Title VII analysis.[15] Professor Lee's suggestion is thus nothing less than an invitation to return to the "good old days" where sexual stereotyping, as in *Goesaert*; racial exclusion, as in *Kotch*; and political manipulation, as in *McDonald*, were shielded from effective judicial review.

We propose to examine Professor Lee's arguments in favor of such a shift in the balance of power between the individual and the state and to sketch a justification for the present scope of judicial review that provides a greater degree of judicial protection for individual rights.

I.

Professor Lee's argument in favor of a uniformly permissive standard of review in constitutional cases begins with an assertion that legislative activity most often represents a victory by one private interest group over competing interest groups.[16] Since, argues Professor Lee, the choice between or among competing private interest groups involves questions of policy and the weighing of conflicting interests, the legislature's policy choice should be upheld unless it is either improperly motivated or irrational. Legislatures, he points out, are far better equipped than courts to develop and to consider the factual issues on which policy judgments must rest and are better qualified than courts to engage in a democratic (i.e., majoritarian) ranking of conflicting claims of right precisely because they are responsible to the people.

With respect, however, far from supporting Professor Lee's call for a uniformly permissive standard of review, his characterization of the legislative process as a struggle between or among conflicting interest groups demonstrates both the need for and the propriety of a more exacting standard of judicial review[17] in cases affecting the enjoyment of those core personal and political activities which the Constitution recognizes are central to our political and social system.[18]

---

15. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

16. Lee, *supra* note 1, at 807.

17. The precise articulation of a given heightened standard of review in various contexts is beyond the scope of this response. As we understand Professor Lee's thesis, he quarrels with the very concept of heightened scrutiny in fundamental rights cases.

18. The identification of such core personal and political activities is, of course, not an easy task. *Compare* Justice Powell's decision for the majority in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) *with* Zablocki v. Redhail, 434 U.S. 374 (1978).

Much ink has been spilled in debating the varying approaches to constitutional interpretation, ranging from an insistence upon literalism to varying forms of interpretivism to arguments in favor of non-interpretivist approaches. For the purposes of this response, delineation of the precise contours of the notion of fundamental rights is less important than a recognition that certain values exist which are so important to our political and social system that they may not be abrogated by the majority without a special showing of need. Far from being a product of Warren Court activism, this view was held by such a zealous interpretivist as Justice Holmes, who opposed the wide-ranging invalidation of economic regulation but would still strike down statutes which "infringe[d] fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *overruled*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1873) (Field, J., dissenting); *Id.* at 115 (Bradley, J., dissenting); *Id.* at 129 (Swayne, J. dissenting). Professor Lee either refuses to recognize that such core values exist or insists that only a directly majoritarian body can identify them. It seems to us that both propositions are demonstrably wrong.

In characterizing the legislative process as a struggle between or among conflicting private interest groups, Professor Lee merely dramatizes the wisdom of the constitutional checks on the politically powerful that the present scope of judicial review affords. The question is not whether legislation represents the triumph of one private interest group over another (often, it does),[19] but to what extent the constitution imposes limits on the ability of one powerful interest group to use the mechanism of the state to impose its will on others who are less powerful. To characterize every legislative triumph of one group over another as raising questions of "policy" subject to legislative resolution rather than questions of "constitutional right" immune from legislative overreaching is to beg the central question of the limits the Constitution places on the legislature. To suggest that legislatures are better equipped to resolve conflicts between claims of right because they have superior fact-finding capability and because they are "responsible to the people" overlooks why we have judicial review in the first place. It is precisely because the Founders recognized that powerful interest groups could not always be trusted to make dispassionate decisions about the "facts" and that the strong could not always be trusted to respect the rights of the weak that we evolved judicial review as this country's principal contribution to democratic political theory.[20]

Professor Lee's suggestion that conflicts between the legislature and the courts can be resolved by permitting the courts to announce the existence of a broad, abstract right, leaving to the legislature the power to determine its precise contours, is, of course, little more than a formula for legislative dominance.[21] What we call rights are, after all, not concrete objects capable of objective measurement. Rather, they are grand and ambiguous abstractions enmeshed in an institutional matrix which gives them precise articulation and provides for their enforcement against the recalcitrant. Since individual rights are almost never self-defining and are certainly never self-enforcing, any political system which intends to protect individual rights from governmental infringement must make a basic choice about what kind of institution is to define and enforce the rights. The choice is between officials whose principal responsibility is to carry out the wishes of the electorate and a more insulated set of officials em-

19. Professor Lee's assertion that *all* legislation reflects a struggle between or among private interest groups is, of course, an overstatement. Much legislation involves purely government interests; for example, legislation in the national security and criminal law areas. *See, e.g.*, 18 U.S.C. § § 793, 794 (1976) (transmitting defense information); 22 U.S.C. § 211a (West. Supp. 1979) (authorizing certain passport restrictions); 42 U.S.C. § 2274 (1976) (communication of restricted data concerning atomic energy); 50 U.S.C. § 421 (West. Supp. 1983) (Intelligence Identities Protection Act of 1982). However, for the purposes of analysis, we are prepared to accept his characterization at face value.

20. Judicial review, as the principal mechanism for resolving the tension between democratic political theory and individual right, is on the rise worldwide. *See generally* Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U.L.REV. 363 (1982).

21. Lee, *supra* note 1 at 811-12. The argument is identical to Professor Lee's unsuccessful submission in City of Akron v. Akron Center for Reproductive Freedom, 103 S. Ct. 2481 (1983) (O'Connor, J., dissenting). In *Akron Center for Reproductive Freedom*, Professor Lee, as Solicitor General, argued that although Roe v. Wade, 410 U.S. 113 (1973), recognized an abstract right to an abortion, local legislative bodies should be permitted broad latitude to define its contours. 103 S. Ct. at 2511 n.10.

powered to enforce constitutional limitations without regard for the wishes of the politically powerful. Professor Lee's vision of our system vests enormous power to define and enforce individual rights in legislators who are beholden to the electorate. He views such political accountability as a recommendation, not a drawback.[22] When, however, the very issue is whether an individual possesses a right to do what he or she wishes regardless of the desires of the group, it makes little functional sense to vest officials who are beholden to the politically powerful with authority to decide the question. Close (and not so close) questions would, under Professor Lee's formulation, almost always be resolved against the individual.[23]

II.

The Supreme Court has evolved three interrelated sets of doctrines which require courts to defer to legislative judgment in the vast bulk of settings, but which preserve the power to act effectively to protect individual rights in those settings where heightened judicial protection is particularly appropriate. Where a legislature acts to burden a "discrete and insular" group which has traditionally been the target of intolerance,[24] or acts to deny particular persons or groups access to participation in the democratic process,[25] or acts to deprive a particular person or group of the ability to enjoy one or more of the central values of our culture,[26] the Supreme Court requires the politically powerful to do more than demonstrate "rationality." The Court requires a showing of genuine need by imposing a degree of heightened judicial scrutiny.

Professor Lee does not address the first of these justifications for heightened review.[27] His reluctance to challenge the "suspect classification" aspect of heightened judicial review is understandable. When the loser in the legislative sweepstakes is a member of a "discrete and insular minority" which has traditionally been a victim of intolerance, a degree of heightened judicial scrutiny is not only appropriate, it is demanded by the very logic of Professor Lee's position. Indeed, that same logic compels a heightened standard of review not only for racial minorities,[28] but also for legislative classifications based on religion,[29] political belief and association,[30] alienage,[31] out-of-wedlock status,[32] newcomer status[33] and sex.[34]

22. Lee *supra* note 1 at 808.
23. *See supra* notes 6-15 and accompanying text.
24. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
25. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
26. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) (speech); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).
27. Lee, *supra* note 1, at 810.
28. Korematsu v. United States, 323 U.S. 214, 216 (1944). *Korematsu* is unfortunate proof that even an excellent standard of review can fail to protect an unpopular racial minority from majoritarian hysteria. How much greater would the risk of oppression be if the standard were lowered? For a happier application of strict scrutiny to protect racial minorities, see Loving v. Virginia, 388 U.S. 1 (1967).
29. Sherbert v. Verner, 374 U.S. 398 (1963).
30. NAACP v. Alabama 357 U.S. 634 (1958).
31. Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973).

These classifications are—and should be—tested by a stricter standard precisely because such "discrete and insular" targets cannot be expected to defend their interests effectively in the legislative rough and tumble.[35]

Similarly, using Professor Lee's model of the legislative process as a struggle among private groups, when one private group persuades the legislature to advance its interests by denying others equal ability to participate in the political process, the logic of Professor Lee's position demands heightened judicial scrutiny.[36] Under his model, judicial deference to legislative judgments is based upon an assumption that all persons in the society are afforded a fair opportunity to participate in the political interplay of private forces which finally results in a legislative judgment. Where, however, one private interest group (or a combination of several groups) has succeeded in persuading the legislature to prevent other private groups from speaking freely or from voting or running for office, the legitimacy of Professor Lee's model is in jeopardy. How can one argue for deference to a legislative balancing process from which certain persons or groups have been unfairly or unnecessarily excluded? Since unequal allocation of the opportunity to participate fully in the political process endangers the moral legitimacy of the process, such unequal allocations must be held to a minimum in order to preserve Professor Lee's ability to urge deference to the legislative process. Not surprisingly, therefore, legislative activities in derogation of free speech[37] and voting rights[38] are—and should be—subject to a heightened level of judicial scrutiny. The net effect of such heightened scrutiny has been to eliminate unnecessary and trivially-based restrictions on free and open political activity. If Professor Lee is serious in viewing the legislative process as a struggle among private interests the results of which should command respect and deference, we do not understand why he would object to the use of a standard of review which is essential to assure that no interest is excluded or hampered unless it is genuinely necessary to do so.

Finally, each time interest groups clash in a legislative arena, the stakes are not always equivalent. As the three cases discussed by Professor Lee demonstrate, the cost to the losing group will vary dramatically depending upon the context of the legislation. In *Williamson v. Lee Optical Company*,[39] the losing group lost a potential economic benefit—the ability to sell prescription eyeglasses. In *Kramer v. Union Free School District*,[40] the losing group lost the ability to participate in the election of a body

32. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

33. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

34. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

35. J. ELY, DEMOCRACY AND DISTRUST 75-104, 135-179 (1980).

36. *Eg.* Anderson v. Celebrezze, 103 S. Ct. 1564 (1983); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

37. *E.g.* Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969).

38. *See* cases cited *supra* at note 36.

39. 348 U.S. 383 (1955).

40. 395 U.S. 621 (1969).

which affected their community. In *Zablocki v. Redhail*,[41] the losing group lost the ability to marry. Professor Lee claims to perceive no clear difference in the nature of the losses suffered in each case. Since, he argues, *Williamson* (a paradigm economic regulation case) was decided pursuant to a permissive "rational relationship" standard, *Kramer* and *Zablocki* should have used the same permissive standard to uphold the statutes at issue.[42]

Whatever the correctness of using a rational basis standard to measure the constitutionality of all economic regulations,[43] however, certain values in this country transcend dollars and cents. Values like marriage[44] and family,[45] personal autonomy,[46] political equality,[47] religious tolerance,[48] and racial and sexual equality[49] are, quite simply, more "fundamental" than which private interest group gets what economic plum. That is why the Founders provided such fundamental values with special protection against majoritarian overreaching by insisting upon an explicit Bill of Rights. Professor Lee's permissive standard of review might be perfectly appropriate for a short-form constitution whose only prohibition was on irrational legislation; but it falls short of the mark to the precise extent that our Constitution with a carefully drawn Bill of Rights singles out certain values for special protection.

In short, Professor Lee's argument that a highly permissive standard of review should apply is, we believe, plainly wrong when the government—or even a private group—seeks to advance its ends by using the state to deprive another group of the enjoyment of one or another of those fundamental values. If, taking Professor Lee's view of the legislative process, political majorities wish to advance the interests of one or another private group by diminishing the ability of a weaker group to enjoy the

41. 434 U.S. 374 (1978).

42. It is unclear from Professor Lee's essay whether he would accept heightened scrutiny in any constitutional case, even one involving the first amendment.

Read charitably, Professor Lee's essay would approve heightened scrutiny to protect certain enumerated constitutional rights, such as freedom of speech, from trivial or unnecessary suppression. If such a reading is accurate, Professor Lee appears to be making an indirect argument for a narrow and literalistic reading of the Constitution. *See infra* note 50. However, given the majestic ambiguity of terms like "due process of law" and "equal protection of the laws," to say nothing of "freedom of speech," such an invitation to literalism is virtually meaningless and would preclude any judicial enforcement of these constitutional guarantees from legislative abridgement.

Read uncharitably, Professor Lee's essay may be arguing for a permissive standard of review in all constitutional cases. Such an argument reduces a written constitution describing enumerated rights to a general ban on arbitrary or capricious conduct. A nation hardly needs a Bill of Rights to outlaw arbitrary or capricious conduct.

43. It may well be that a degree of heightened scrutiny is appropriate in certain commercial cases. *See* Morey v. Doud, 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

44. Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

45. Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Soc'y. of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

46. Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

47. Anderson v. Celebrezze, 103 S. Ct. 1564 (1983).

48. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

49. Brown v. Bd. of Education, 347 U.S. 483 (1954).

fundamental values of our culture, it is not asking too much to require the majority not merely to demonstrate the rationality of its action, but to show that the action is necessary to advance a general interest of great importance.

III.

To a large extent, our disagreement with Professor Lee concerning the appropriate standard of judicial review—ostensibly a dispute about process—masks a basic disagreement about the judicial function. Professor Lee, we believe, accepts judicial review in principle and recognizes that when legislative activity—even rational legislative activity—interferes with an explicitly delineated constitutional right—free speech, for example—it may be subjected to heightened judicial scrutiny.[50] His disagreement with cases like *Kramer* and *Zablocki* flows, we believe, from his refusal to authorize judges to read the Constitution in anything other than a literal fashion. What really appears to trouble Professor Lee is the lack of a literal mention of voting or marriage in the Constitution. In the absence of such a literal mention, Professor Lee would deny judges the ability to provide heightened protection for fundamental values. Thus, while he purports to avoid the questions that lie at the heart of the debate between interpretivist and non-interpretivist theoreticians,[51] Professor Lee, in fact, offers a vision of the Constitution which rejects interpretation in favor of a retreat into literalism. One need not adopt a non-interpretivist approach to constitutional adjudication, however, to reject Professor Lee's plea for literalism. The Framers consciously adopted a Constitution replete with majestic ambiguities precisely because they recognized that an enduring Constitution could not be framed with the narrowness and precision of an insurance policy or an income tax regulation. In ascertaining from the ambiguous constitutional text and context the degree to which our constitutional system is designed to protect certain values from majoritarian action, Article III judges perform nothing more than their assigned role. While reasonable people may differ over whether, after considering constitutional text and context, voting and marriage are among such protected activities, we do not believe that a serious question exists about the responsibility of the judiciary to make that decision or the fact that it cannot be made by a literal or mechanical application of the constitutional text.

We do not mean to couch our disagreement with Professor Lee in

50. It is unclear whether Professor Lee would agree with heightened scrutiny in even first amendment cases. If his argument is read as a wholesale attack on all heightened scrutiny, however, it would be indefensible, both as a matter of policy and precedent. Accordingly, we have chosen to address ourselves principally to Professor Lee's attack on heightened scrutiny in the non-enumerated "fundamental rights" area.

51. Lee, *supra* note 1 at 806. Interpretivist theoreticians argue that constitutional adjudication should be linked to an explicit or implicit expression of intent by the Framers. Non-interpretivists argue that references to general standards like fairness and justice are permissible regardless of whether the Framers actually considered the particular issue before the Court. Given the degree of choice open to a conscientious judge seeking to interpret how the Founders "intended" to resolve a given issue, the debate appears highly artificial. The more fruitful question is whether an Article III judge is bound by a literal reading of the constitutional text or whether she may use a structural or purposive approach in determining its meaning.

terms of the debate between interpretivist and non-interpretivist theoreticians, since the very decisions which Professor Lee attacks—*Kramer* and *Zablocki*—are classic exercises in interpretivist adjudication. While there can and should be lively disagreements over the correctness of a given interpretation of the Constitution, we do not believe that any disagreement should exist over the fact that constitutional interpretation is a necessary aspect of the judicial function and that it is not a mechanical process.

What is particularly disappointing about Professor Lee's argument is his attempt to show that the Supreme Court has done a poor job of interpreting the Constitution by misidentifying the fundamental values which the Constitution endows with heightened protection. In an attempt to demonstrate judicial ineptitude in identifying "fundamental" values, Professor Lee seeks to contrast Morris Kramer's right to vote in a local school board election, at stake in *Kramer*, with Kramer's hypothetical right to engage in his profession, the issue at stake in *Williamson*, and argues that since (in his opinion) the economic interest is more important to Kramer than the political one, it makes no sense to use heightened scrutiny to protect the right to vote, but not the right to be a stockbroker.[52] Professor Lee's argument is profoundly wrong, on both the law and the facts.

As a matter of law, if, as Professor Lee suggests in his hypothetical, Oklahoma attempted to bar the newly arrived Mr. Kramer from practicing as a stockbroker for five years, its action would not be measured by a permissive standard. Rather, since the legislation attempts to differentiate between newcomers and established residents in allocating economic benefits, it would trigger heightened scrutiny and would, almost certainly, be unconstitutional.[53] Indeed, it is precisely such a legislative propensity to favor established residents (who have local political power) over "newcomers" (who do not) that induced the Supreme Court to enunciate a heightened level of judicial scrutiny in such "durational residence requirement" cases.[54]

More fundamentally, Professor Lee's attempt to argue that Morris Kramer's economic interests are more important than his political rights is unwittingly similar to the attempt by Marxist legal scholars to demonstrate the alleged insignificance of our "political" constitutional guarantees.[55] Both Professor Lee and the Marxists are right in recognizing that a starving man will trade his birthright for a bowl of soup.[56] However, they are both profoundly wrong in deducing from that fact that material values are more important than political or spiritual values. While history amply

52. Lee, *supra* note 1 at 811.

53. *See generally* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (invalidating durational residence requirement for county medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating durational residence requirement for voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating durational residence requirement for welfare assistance); *but see* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding durational residence requirement for divorce).

54. Durational residence cases are often analyzed as imposing a penalty on the right to travel. It is equally valid, however, to view them as suspect classification cases protecting newcomers, much as the alienage cases are designed to shield outsiders.

55. For an especially plodding example of the genre, see V. CHKHIKVADZE, THE STATE, DEMOCRACY AND LEGALITY IN THE U.S.S.R. 38-58 (1972).

56. *Genesis 25:30-33.*

proves that people can be starved or brutalized into surrendering essential elements of human dignity, history also proves that it is the resilience of the human spirit, not materialism, which ultimately triumphs. While Professor Lee may have been led by the heat of argument into appearing to denigrate the relative importance of our political and moral heritage, his life is ample testimony to the fact that he doesn't believe it.

IV.

As we have noted, Professor Lee's description of the legislative process characterizes the legislature as the final arbiter between conflicting private interests.[57] Accordingly, whatever the final legislative balance of interests, it is, under Professor Lee's theory, the positivist product of the legislature's action or inaction. But an individual's right to enjoy the fundamental values of the society does not, and should not, depend on the largesse of the legislative majority. When values like free expression, marriage and family, religious liberty, voting, and racial and sexual equality are in play, human beings enjoy—and our Constitution guarantees—an inertial presumption of freedom from state-imposed restrictions on their enjoyment. Indeed, it is one of the basic purposes of a written constitution to erect such inertial presumptions in order to insulate those values from majoritarian overreaching. Professor Lee's formulation would destroy the presumption by allowing the legislature to act in derogation of a fundamental value wherever it is rational to do so. The Supreme Court, on the other hand, allows the presumption to be rebutted only when a legislature makes a genuine showing of compelling need. We assume that both legislatures and courts, staffed by humans, are prone to error. Professor Lee would, in the name of majority rule, deflect error in favor of legislative overregulation of the fundamental values in our culture; the Supreme Court (and, we believe, the Founders), have chosen to deflect error in favor of their free enjoyment by individuals.

It, quite frankly, remains a mystery to us why persons who describe themselves as principled conservatives would argue, as Professor Lee appears to, for an institutional structure that is statist at its core. Human beings are not fodder for legislative interest group balancing. They are presumptively free to enjoy the essential attributes of their humanity. By identifying fundamental values and requiring a genuine legislative showing of need before those values can be overridden, the Supreme Court fulfills its institutional role as protector of the individual. When fundamental values are at stake, heightened scrutiny enforces the separation of powers by requiring the legislature to justify infringements by persuading an independent judge that a genuine need exists which cannot be met by alternatives which would do less damage to the protected values. That such an approach vests judges with the power to frustrate majority will is undoubtedly true. But it is equally true that the Constitution does not leave the strong free to deprive the weak of the ability to marry or to procreate or to

57. Lee, *supra* note 1, at 808.

vote or to speak freely or to enjoy the other core values of the culture without a demonstration of compelling necessity.