RESPONSE TO MESSRS. NEUBORNE AND SIMS

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Burt Neuborne and Charles Sims are good lawyers and fair-minded people. I cannot imagine, therefore, why they were not totally persuaded by my essay.[1] I am sure that they will see the light after they read this reply.

I have no quarrel with "the fact that constitutional interpretation is a necessary aspect of the judicial function and that it is not a mechanical process."[2] Where Messrs. Neuborne and Sims and I part company is on the issue of the extent to which members of the judiciary, in performing the vital function of constitutional interpretation, should be influenced by structural separation of powers principles inherent in the Constitution itself.

The assertion that my thesis affects "sexual stereotyping" or "racial exclusion"[3] is simply wrong. I deal now only with the "fundamental rights" doctrine. Issues associated with suspect classifications are quite different and their development must await another day.[4]

In my original essay, I explained that, while the legislature has the primary responsibility for setting policy and the courts the primary responsibility for constitutional adjudication, there is in fact a broad area of overlap in the functioning of these two coordinate branches of government. The dynamics involved in the judicial review of legislative determinations illustrates this overlap. In enacting any law, Congress chooses between competing sets of individual interests and places the imprimatur of "the public interest" on one side of the controversy. The judiciary, when confronted with a constitutional challenge to that legislative resolution, is asked to annul the political policy choice embodied in the disputed law. Thus, constitutional adjudication in essence involves a judicial reweighing

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1. Lee, *Preserving Separation of Power: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine*, 25 ARIZ. L. REV. 805 (1983).

2. Neuborne & Sims, *Judicial Review and Fundamental Rights: A Response to Professor Lee*, 26 ARIZ. L. REV. 513 (1984).

3. *Id.* at 7.

4. Lee, *supra* note 1, at 810.

of a dispute already settled by the legislature. Although judicial restriction or reversal of the legislative decision can be styled as a "vindication" of individual interests, that "vindication" comes only at the expense of vanquishing the individual interests on the other side of the dispute.

This result, in which the legislative winners become losers and vice versa, is most readily justified when an explicit constitutional guarantee is at stake. Indeed, the core function of the judiciary is to protect the individual from majoritarian intrusion upon constitutionally protected rights. But, as the courts move from protecting textually demonstrable rights to ensuring "an individual's right to enjoy the fundamental values of the culture,"[5] the historic justification for judicial review becomes increasingly problematic.

The recognition of a new "fundamental right" restricts the policy options available to the legislature, and the restriction is virtually permanent, because article V makes the Constitution difficult to amend. Recognition of a new "fundamental right" also transfers what had previously been a legislative debate into a judicial forum. This not only undermines the authority of the legislature, it also bodes ill for the courts as they are drawn into a continuing delineation of permissible and impermissible conduct.[6] Such a result is unfortunate, inasmuch as it diverts both branches of government from what they do best: the legislature is precluded from debating the resolution of various policy options, and the courts are forced to choose, on the basis of limited fact-finding capabilities, between conflicting claims of individual and "public" interest.

This is not to say that some rights are not, in an absolute sense, more "fundamental" than others. Of course they are. But the ranking of rights is not nearly as self-evident as Messrs. Neuborne and Sims suggest. The relative importance of a bowl of soup and a birthright may be more clear to Messrs. Neuborne and Sims than to a starving man,[7] but the choices facing a federal court that has been asked to recognize a new "fundamental right" are not pellucidly—or even allegorically—clear.

The suggested distinction between economic and non-economic interests has two shortcomings as a basis for short-circuiting the democratic process. The first is that it is not a distinction that is either stated in the Constitution or clearly reflected in the history of any provision that has withstood the heavy demands for inclusion within that document. The second is that, as a judicial distinction, it does not work very well and has not worked very well.[8] If some component of government is going to make a judgment about the comparative importance of interests and val-

5. Neuborne & Sims, *supra* note 2, at 14.

6. *See* Lee, *supra* note 1, at 811-13.

7. Neuborne & Sims, *supra* note 2, at 13.

8. Messrs. Neuborne and Sims' response to the Morris Kramer hypothetical misses the mark. What the hypothetical shows is that courts are not adept at making judgments as to the comparative importance of human values The question is not whether a Morris Kramer newly moved to Oklahoma could successfully challenge an Oklahoma statute on some other ground that has nothing to do with the comparative importance of practicing one's profession or voting in a school board election by a non-parent who paid no school taxes. The question is simply which of those Morris Kramer—or any other human being—is likely to consider more important.

ues that has the effect of putting some of those beyond the pale of legitimate democratic choice when they conflict with others, that judgment ought to be made by a process that is careful and deliberate. It should be a process that assures maximum opportunity for all competing considerations to be taken into account, and for the people affected by the outcome to express their views. The process that offers the most in this respect is amendment of the Constitution. The one which permits the least is judicial decision-making. Legislation occupies the middle ground.

Where the framers of our Constitution have deliberately concluded, therefore, that one interest is more important than another, that judgment should prevail. Absent such a judgment, decisions concerning comparative importance should be left to the representative branches of government.

I find persuasive the argument of Messrs. Neuborne and Sims that " a legislative balancing process from which certain persons or groups have been unfairly or unnecessarily excluded . . . endangers the moral legitimacy of the process. . . ."[9] But it is totally irrelevant to the fundamental rights issue. The remedy for exclusion from participation in the processes of democracy is not to create some fundamental rights. It is to eliminate the exclusion.

I am not suggesting the repeal of judicial review, or wholesale abdication by the courts of their historic role as the protectors of individual rights. Nor am I arguing in favor of a system of government that is "statist at its core."[10] The framers of our Constitution wisely provided a means to amend the Constitution when the need for such a revision becomes sufficiently compelling. What I am suggesting is that the courts should carefully consider their role in the structure of American government as the interpreters of a written Constitution. The standard of review suggested in my earlier essay is not "perfectly appropriate for a short-form Constitution."[11] Rather, it is required precisely because our government does operate under a written Constitution. It is a Constitution whose provisions are expressly stated, and one of whose articles makes it difficult to change those provisions. It may be Messrs. Neuborne and Sims who are suggesting adoption of a "short form" Constitution: a model of judicial review which, if taken to its logical conclusion, would operate most neatly under a Constitution containing approximately six words—"The courts shall safeguard fundamental rights."

To their credit, Messrs. Neuborne and Sims purport to stop short of advocating a non-interpretivist approach. Yet it is difficult to distinguish—at least in result—their approach from complete non-interpretivism. The pivotal questions, of course, are what the "central values of our culture" are, and to what source of law we look for their identification. If "centrality" or "fundamentality" for these purposes were determined by inclusion or non-inclusion in the Constitution (or if it could be shown as a

9. Neuborne & Sims, *supra* note 2, at 10.
10. *Id.* at 14.
11. *Id.* at 11.

matter of historical fact that securing a particular value was the central purpose of a particular constitutional provision), this would certainly be a legitimate basis for narrowing the otherwise permissible scope of legislative policy choices. But absent such a constitutional anchor, decisions concerning which values are more central, or more fundamental, or more important should be left to the democratic process. The policy choices resulting from that process should be reversible only where the participants in it behave unreasonably.[12]

The fact of the matter is that no one even attempts to show—and any attempt would be unavailing—that the fundamental/non-fundamental distinction is keyed in any way to a judgment made by those who wrote the Constitution. The issue, then, is: should the residual policy-making authority—the authority to make policy choices in matters not addressed by the Constitution—be vested in those whose governmental stewardship is lawmaking or law interpreting?

I have no doubt that all American citizens have the right "to enjoy the fundamental values of the culture."[13] What I doubt is the ability of the judiciary, unaided by explicit constitutional language or persuasive historical evidence, to pick unerringly these core values out of American society. I therefore doubt the practical wisdom of expanding the "fundamental rights" doctrine so as to place such values beyond the sphere of political debate. As Judge Learned Hand wisely stated, "To me it would be most irksome to be governed by a bevy of Platonic guardians if I knew how to select them, which I do not."[14]

12. As noted in the opening essay, the present approach has led to a circumstance in which the decisions made by representatives of medical organizations control not only the legislative, policy-making function, but also the judicial task of determining whether what the legislature does is constitutional or unconstitutional. That kind of result—effectively vesting ultimate governmental authority in non-governmental entities—follows, I believe, from judicial attempts, however well-intentioned, to perform tasks that the Constitution never intended them to perform and for which they are ill-equipped.

13. Neuborne & Sims, *supra* note 2, at 12.

14. L. HAND, THE BILL OF RIGHTS 73 (1962).