PRESERVING SEPARATION OF POWERS: A REJECTION OF JUDICIAL LEGISLATION THROUGH THE FUNDAMENTAL RIGHTS DOCTRINE*

Rex E. Lee**

I would like to share some thoughts concerning the role of the courts in our constitutionally prescribed separation of powers system of government. I will focus on the problem of how to maintain the courts' indispensable role as the ultimate declarants of constitutional rights without unduly infringing on the equally important role of the legislature in making policy decisions.

The problem is not a new one, and I am certainly not the first to identify it. It is a multi-faceted problem, and there is a currently thriving debate over one of its aspects: constitutional interpretivism versus constitutional non-interpretivism. The interpretivists contend that in declaring constitutional principles, judges are limited to interpreting provisions that actually appear in the Constitution or to discerning principles that can be fairly inferred from a combination of constitutional text and history. As stated by one of the leading interpretivists, Robert H. (now Judge) Bork: "The judge must stick close to the text and the history, and their fair implications, and not construct new rights."[1] The non-interpretivist view is that courts enforce "principles of liberty and justice" even though, as stated by Professor Thomas C. Grey, "the normative content of those principles is not to be found within the four corners of our founding document."[2]

The interpretivist/non-interpretivist debate is a useful one, and the interpretivists clearly have the better argument. In my view, the notion that the Constitution authorizes judges to go outside the four corners of the document itself in identifying the supreme law of the land to which all

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** Solicitor General of the United States. Professor of Law on leave from Brigham Young University, J. Reuben Clark Law School. The views expressed herein are those of the author, and not necessarily those of the United States Department of Justice or the current administration.

1. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).
2. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 706 (1975).

other law must yield cannot be reconciled with either of two undeniable facts: first, that ours is a written Constitution, with expressly stated guarantees, and second, that the process of changing those guarantees, whether by addition or deletion, was deliberately made very difficult.

As important as it is, however, the question of interpretivism versus non-interpretivism is not the one that I intend to address. My remarks will start from the premise that the stewardship vested in the courts by our Constitution is to interpret. The question remains, what accommodations should courts make, in discharging this stewardship, between their own responsibility to interpret provisions that are clearly part of the Constitution and the responsibility of legislators to make policy decisions?

I will begin by examining some broader issues concerning the Constitution and separation of powers. One view of the United States Constitution is that it performs two functions: allocation of governmental power among several different components of government that compete for power, and protection of individual liberties. The Constitution accomplishes the first of these through two principles which pervade it: separation of powers, which is implicit in the written document, and federalism, which is both implicit and explicit. Under this view, it accomplishes the second function through individual prohibitions, such as the "Congress shall make no law" language of the first amendment, and the "No state shall" language of the fourteenth. This, I submit, is a perfectly legitimate and defensible summary of the function of the United States Constitution.

An equally legitimate view is that the Constitution has only one purpose, which is the protection of individual rights, and that its power-allocating functions represent just another means of protecting individual rights—arguably an even more effective means than the direct prohibitions contained in the Bill of Rights, the fourteenth amendment and other parts of the Constitution. In support of this broader view, it can be pointed out that since the protections afforded by the Constitution to individuals are exclusively protections against the government's exercise of its powers, no more effective guarantee exists than to control governmental power itself. This suggests at least a rough analogy to the antitrust laws. By dividing governmental power horizontally among the three branches of the federal government and vertically between the federal government and the states, the Constitution assures the adequacy of both the numbers and the strength of competitors for governmental power by preventing undue concentration of power in any single unit.

In any event, it ought to be clear that when we talk about federalism or separation of powers, much more is at stake than a simple fussiness over governmental turf protection. That is why every American citizen is affected by issues thought by many to be the exclusive domain of law professors and government litigators. They include such matters as legislative vetos, congressional attempts to take away Supreme Court jurisdiction, executive privilege, legislative oversight of executive functions, judicial review of administrative decisions, prosecutorial discretion not to enforce certain laws, Congress' speech or debate immunity, and impoundment, to mention just a few. I will limit myself to a discussion here of only one of

those subjects: the proper allocation of governmental authority and power between legislative policymaking and judicial review.

What is judicial review and why is it important? The Constitution, both in its power-allocating provisions and in its guarantees of individual liberties, prescribes the limits beyond which government may not go. The most important of these constitutional guarantees are cast in very broad, imprecise language, such as "commerce . . . among the several states . . .", "due process of law" and "equal protection of the laws." The generality of these provisions necessarily leaves the issue of their specific content to determination by someone. For almost two centuries, the judiciary has ultimately performed the task of determining constitutional meaning. It is clear that the framers intended to vest this responsibility in the courts, and that the courts are better qualified to perform the task than any other entity. The judicial function is to interpret the law, and the Constitution is part of the law which must be interpreted. Moreover, the rights guaranteed by the Constitution are, almost by definition, rights that have been infringed by the branches of government selected by the majority. Members of the judiciary who are not susceptible to being turned out of office because their decisions are at odds with the views of the majority of the voters are, therefore, the best ultimate guardians against intrusions by elected officials into constitutionally secured rights.

Judicial review, then, is the term used to describe the process by which courts determine whether the acts of other components of government can survive as law because they meet the requirements of the Constitution. Challenges to allegedly infringing governmental acts are usually brought by individuals who contend that their constitutional guarantees have been impaired. Accordingly, we customarily refer to judicial review as involving an accommodation of two competing sets of interests, the interests of government versus those of the individual. The judicial task, it follows, is to determine whether the individual interest is constitutionally protected so that the governmental interest must yield.

This view is deficient in that it eliminates one important feature of the overall governmental process. I submit that, in the overwhelming majority of cases, the governmental interest with which the individual interest conflicts involves nothing more nor less than a legislative preference of one private, individual interest over another.

Consider, for example, the facts of *Williamson v. Lee Optical*,[3] involving an Oklahoma statute which restricted the rendering of certain eye-care services to licensed ophthalmologists and optometrists. Under the traditional view, that case would be characterized as involving a conflict between the state's interest in ensuring high quality eye care and the individual interest of opticians, such as the proprietors of the Lee Optical Company, in being allowed to perform the eye-care services which under the statute could be performed only by ophthalmologists and optometrists. If the process is backed up to the legislative stage, one realizes that the legislature's choice was actually a choice between two sets of competing

3. 348 U.S. 483 (1955).

private interests. The optometrists and ophthalmologists represented one interest, and the opticians represented the opposing interest.

In most cases the legislative process consists of similar choices between competing sets of individual interests. Many statutes represent a legislative triumph by one group of citizens in competition with another group of citizens. One side in the competition becomes "governmental" only because government in the form of the legislature is required to choose one side or the other, and it does so. In Oklahoma's case, the "public policy" reflected in the statute actually represents a legislative decision that the public interest is better served by preferring the interests of one private group, the more highly trained optometrists, over those of another, the opticians.

This kind of comparative, line-drawing judgment, preferring one interest over another, deciding which of two points of view or vested interests is more valuable or more aligned with the public interest than the other, is the essence of legislative lawmaking. It is what legislators do most frequently and what they do best. They are called upon to decide whether the arguments of the dairy industry or those of the makers of dairy product substitutes are more persuasive; whether to prefer the advocates of public power or private power; whether the marginal improvement in air quality from the installation of additional pollution control equipment justifies the marginal cost; whether the state university needs a new football stadium more than it needs a humanities building—or whether the university should have neither facility this year, because of the need to repair the state's highways. That is what legislation is all about: making comparisons, drawing lines, deciding whether one thing is more important than another. That is what legislators are hired to do, and that is what they are institutionally capable of doing better than any other branch.

In *Williamson*, the Court left the legislative judgment intact. What, however, would be the effect of a judicial holding of unconstitutionality on the legislature's performance of its governmental responsibility—particularly its choice between the interests of competing groups of private citizens? In *Zablocki v. Redhail*,[4] the United States Supreme Court held unconstitutional a Wisconsin statute requiring that, as a condition to their marrying, persons with existing child support obligations had to satisfy the state that these obligations to their children would be adequately discharged. Under the traditional view, judicial review of that statute would be described as involving an accommodation of two competing sets of interests: the interest of government, as reflected by the statute, in assuring that the children are cared for, and the interest of individuals, such as Mr. Redhail, who want to marry.

Once again I submit that the traditional view is wrong, and it is wrong in ways that ought to affect our thinking about the respective roles of legislatures and courts. The reason it is wrong is that it considers the competing sets of interests only at the stage where those competing interests come into court. At that point in time, government, in the form of the legisla-

4. 434 U.S. 374 (1978).

ture, has already considered those interests and has made a choice between them. In *Zablocki*, as in *Williamson* and most other cases, the first governmental choice, the legislative choice, is a choice between two sets of competing individual interests. The only reason that at the judicial stage we can neatly divide the competing interests into governmental and individual interests is that, by the time the controversy reaches the judicial stage, one branch of government has already addressed the controversy, made its choice between the competing sets of individual interests, and placed the imprimatur of public interest on the side of one of the two individual competitors.

A temptation exists to end the analysis at this point. It would end with the observation that it is improper for courts to engage in that kind of judgment substitution, first, because judicial review necessarily reverses the policy choices—not between governmental interests and individual interests, but between two sets of individual interests—with the result that the legislative winners end up as losers, and second, because policy is the domain of the legislature. Courts should always do what the Supreme Court did in *Williamson*, rather than what it did in *Zablocki*.

The problem with this conclusion, however, is that it proves too much. If carried to its logical end, it would totally repeal judicial review, which is just as essential to the judicial branch as policy choices are to the legislative branch. The controlling fact is that the exercise by either the legislative branch or the judicial branch of its most central government responsibility—policymaking or constitutional adjudication—has the potential to oust the other branch of its own core function under the Constitution. For the courts never to reverse a legislative policy judgment would completely eliminate judicial review. The power to invalidate statutes, however, is also the power to remake the legislature's policy decisions by choosing between two competing sets of private interests.

Conceptually and actually, therefore, a large overlap exists. It arguably reaches the total universe of legislative power, with concomitant risks to separation of powers. The problem is not susceptible to solution by asserting either that courts should never displace the legislative judgment on policy matters, or that as long as there is a dispute that involves a constitutionally protected value, the courts must always vindicate that value. The key to the problem is recognition of the existence of the overlap—an area within which the line between constitutional adjudication and substitution of the judicial decision for the legislative will on policy matters is not a fine bright one.

Given the existence of that overlap between matters arguably legislative and arguably judicial, what is the best way to accommodate the respective governmental responsibilities of the two branches? Regardless of how this question is resolved substantively, it is quite clear that procedurally the answer must come from the courts. There is a sense of anomaly about vesting the umpiring responsibility in one of the two competing teams, but anomalous or not, it is unavoidable. The question concerns the meaning of the Constitution, and the ultimate arbiters of constitutional meaning are the courts.

It does not follow, however, that it is the judiciary whose prerogatives should most frequently prevail. We are, after all, talking about lawmaking. More specifically, we are talking about areas of the lawmaking overlap which could be defined either as legitimately legislative or legitimately judicial. The question, within those areas of overlap, is whether it is better to have the dominant lawmaking function vested in the legislative branch or in the judicial branch. It is in the choice of a standard of review that the judiciary effectively supplies the answer to that question.

What is the standard of review presently applied by the courts? In most cases it is a standard of judicial deference to the legislative judgment. So long as the legislature acted pursuant to a proper governmental objective, and there is some reasonable chance that the statute at issue will enhance the achievement of that objective, the courts will not interfere with the legislative judgment. There are, however, two important exceptions. The first is triggered by the involvement of special kinds of rights, designated as "fundamental," and the second comes into play where the legislature has classified persons according to categories designated as "suspect classifications." I will address only the fundamental rights exception.

Whatever the beginnings of the fundamental rights doctrine, I believe that it had its major modern impetus in *Kramer v. Union Free School District No. 15*.[5] That case held unconstitutional a New York statute limiting the vote in school board elections to persons who had school age children or who owned or rented real property. The successful challenge to the statute was brought by Morris Kramer, a bachelor stockbroker who lived with his parents in New York within the boundaries of Union Free School District No. 15.

Once again, the statute represented some choices that the New York Legislature had made. One competing point of view presented to the legislature was that government should leave the primary voice in selecting school policymakers to those persons primarily affected by the school board's decisions: parents and taxpayers, those whose children the schools served and those who paid the bills. The argument on the other side was that, because schools have such a pervasive influence and affect so many interests in so many ways, all qualified voters should be permitted to participate in the election of school board members. The competing interests were identified, the legislature had to make a choice, and it did so.

In contrast to *Williamson*, however, the court in *Kramer* held the statute unconstitutional.[6] The individuals who had prevailed before the legislature ultimately became the losers, and the group that had failed to make its case before the legislature eventually won. Why? Morris Kramer won because the right that he was asserting—unlike the right asserted by Lee Optical—was "fundamental."

The notion of fundamental rights has a very attractive ring to it, but analysis reveals that it is little more than a euphemism for substitution of judicial judgment for legislative judgment. I am not contending that all

5. 395 U.S. 621 (1969).
6. *Id.* at 622.

rights are equal in importance. Clearly they are not. The differences in importance of individual rights or interests will vary significantly from one person to another. To the extent that government is to draw generalities, its placement of some rights in a category preferred over others raises the real issue: which governmental entity is in the best position to say which of these interests ought to be in first place, which in second and third, and how much distance there ought to be between each of them?

I believe that the answer to this question has to be the legislature, for two reasons. First, the legislature has superior fact-finding ability. It is free to search out and rely on whatever facts it considers relevant, regardless of their source. Legislators are not bound—as courts are by the article III case or controversy limitation—to rely only on facts presented to them by the parties to a particular lawsuit. Second, legislators are responsible to the people. Who possibly can be better judges of the kinds of interests that are more important to American citizens than the American citizens themselves?

The unwisdom of leaving to the courts the determination of the comparative potency of individual rights, with the concomitant impact on legislative judgments, is borne out by how the courts have in fact performed that task. The basic proposition is that some rights are more weighty than others. In the less weighty category is the property-based, liberty-based right involved in *Williamson*, the right to pursue one's chosen profession. In the more weighty category is the right of a person to vote in a school board election even though he has no school age children and pays no taxes.

Assume this hypothetical: Morris Kramer and his parents move to Oklahoma where he continues to live in their home, but where he cannot work as a stockbroker because the existing brokers have succeeded in persuading the legislature that there should be a five-year residency requirement for Oklahoma stockbrokers. Assume further that Morris Kramer, who knows only the stockbrokerage business, is given a choice. He can either practice his profession or vote for the people who set policies for a school in which he has no children and for which he pays no taxes. Which of these two interests would Morris Kramer be likely to say is more important, more fundamental?

These considerations lead me to the conclusion that, while it is the courts that must mark out the dividing line between judicial lawmaking and legislative lawmaking, the courts should exercise that function in a way that maximizes preservation of the legislature's policy judgments. Judicial deference to the legislative judgment in most instances, but not where judicially declared fundamental rights are involved, ignores a basic separation of powers principle: that some governmental functions lie within the primary authority and responsibility of each branch and that each branch is, by its nature, best able to perform these functions. Courts act most securely within their preferred governmental sphere when they identify large principles of constitutional law. The "yes or no" questions concerning the existence or nonexistence of constitutional rights are the kinds of questions most clearly appropriate for judicial determination. As

the issues become more detailed and more specific, they frequently require more detailed and specific answers. This puts them more within the domain of what legislatures do most frequently and what they do best.

I know of no better illustration than the Supreme Court's abortion cases over the past decade. In the first cases, *Roe v. Wade*[7] and *Doe v. Bolton*,[8] the Court could have simply made a large, "yes or no" judgment about whether a woman's decision to have an abortion is or is not constitutionally protected. In fact, the Court went further. It spelled out its holding in *Roe v. Wade* with a minuteness of detail more closely resembling a section of the Internal Revenue Code than an interpretation of the United States Constitution. Subsequent decisions[9] over an intervening decade have compounded the problem, as adversaries in the abortion controversy have periodically returned to ask the Court to fill in more detail, resulting each time in a set of rules increasingly more intricate and more detailed.

In its most recent abortion decisions, for example, one of the issues on which the Court focused is whether a state may constitutionally require certain abortion procedures to be performed in a hospital.[10] The argument on one side of this issue is that hospitals are safer. The responsive arguments are first, that the difference in safety is not very great, in some instances nonexistent, and second, that, in any event, hospitals are more expensive.

These kinds of judgments, involving safety versus safety, or safety versus cost, are paradigm legislative decisions. The Supreme Court's declaration in *Roe v. Wade* that a woman's decision to have an abortion is constitutionally protected raises serious questions. Whatever other criticism may be leveled against that decision, however, it was at least a "yes or no" issue. As the courts have moved farther out from that core question, the problems they have been called upon to solve have involved more than basic policy issues, such as choosing between the interests of the woman and the interests of the unborn child and other family members, such as the father. They have also taken on a new dimension of governmental decision, legislative in character, in determining, for example, which kinds of facilities and procedures are in fact safer, and whether the safety increment is worth the added cost in dollars.

In tacit recognition of the comparative disadvantage of courts to resolve these kinds of fact-bound public policy issues that reach far beyond

7. 410 U.S. 113 (1973).

8. 410 U.S. 179 (1973).

9. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (Court struck down Massachusetts statute requiring parental consent and notification in all cases in which minors sought abortions); Colautti v. Franklin, 439 U.S. 379 (1979) (Court struck down Pennsylvania statute containing an unconstitutionally vague viability determination requirement and vague requirements concerning the standard of care by one performing an abortion); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (Court upheld Missouri statute requiring patients to provide written consent to abortion and requiring doctors to keep certain records); Connecticut v. Menillo, 423 U.S. 9 (1975) (Court upheld Connecticut statute allowing criminal sanctions against non-physicians performing abortions).

10. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 103 S. Ct. 2517 (1983); Simopoulos v. Virginia, 103 S. Ct. 2532 (1983).

the litigants to the particular case, the Court in some of its abortion decisions, including the most recent ones, has in effect adopted the current views of professional medical associations.[11] The implications of this practice are very large and very wrong, extending far beyond the matter of deference to medical judgment concerning the comparative merits of different medical procedures and practices. Disagreement and debate within the medical profession concerning such things as hospital abortions versus non-hospital abortions and additional precautions that should be taken for late-term abortions undoubtedly contribute to medical progress. Whatever effect the prevailing view on these issues ought to have within the profession itself, hegemony of one medical view over another should not displace both the legislators' prerogative to make public policy choices and also the judges' prerogative to declare principles of constitutional law.

That is effectively what has happened in the abortion cases that are medically fact-bound. The Court is operating in an area in which declarations of unconstitutionality not only displace legislative policy judgment, but also turn on the kinds of legislative fact issues that courts are ill-equipped to handle. Rather than relying for the resolution of these facts on persons who have neither the authority nor the responsibility for governmental decision-making, and thereby forfeiting to them both the legislative and the judicial mantles, it would be far preferable to apply across the entire spectrum of constitutional adjudication a standard of review which upholds the legislative judgment, so long as it seeks to achieve a legitimate governmental end and does so in a way reasonably calculated to reach that end.

This is the general approach that, I submit, ought to be taken to the problem of overlap between the legislative and judicial functions.

11. *See, e.g.*, Roe v. Wade, 410 U.S. at 163; City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2495-97.