

Judicial Restraint

Thank you for letting us see the enclosed article. I am afraid we are not going to be able to use it at this time. We do appreciate your sending it for our consideration, however.

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An editorial in the September 11 Washington Post expressed "unease" about a pending Supreme Court case on the ground that the case "illustrates an increasing tendency in our society to decide contentious issues, on which reasonable citizens of good will take irreconcilable positions, in courts rather than through the political process." This was viewed as troublesome because "the political process is usually quicker and less expensive than the legal process" and because judicial resolution means that "difficult political issues are settled by the least politically accountable of our branches of government."

Although I will refrain from commenting on the particular case which prompted the Post's observations, I join whole-heartedly in the general view that it is more desirable for contentious political issues to be resolved through the democratic political process than through the judicial process. Indeed, it has been a personal priority of mine as Attorney General to encourage the exercise of judicial self-restraint in order that such issues can be decided through political processes. Eleven months ago I announced that Department of Justice attorneys would promote the values of judicial restraint in their arguments in court. When appropriate, our attorneys have been urging courts to exercise self-restraint and avoid approaches which prompt intrusion into areas more properly the province of the other branches or the states. In addition, the Department has participated in the selection and appointment of men and women of quality to the federal bench who appreciate the limited nature of the judicial function and recognize, in Justice

Holmes' words, that legislatures are the guardians of liberty to the same extent as courts.

Our efforts to promote judicial restraint have been little cheered by the Post in the past, so it is somewhat surprising -- though gratifying -- to discover that the Post shares our underlying concern that the democratic political process is being foresaken for litigation and judicial solutions to society's problems. The Post should recognize, however, that this is a natural consequence of the excessive judicial activism it has often applauded in the past. Over eighty years ago the scholar James Bradley Thayer taught that when courts intervene to strike down laws "the people . . . lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Courts do and must exercise judicial review, but when they intrude on areas reserved to the democratically accountable branches they encourage the atrophy of those branches and weaken the democratic process. That must be viewed with the utmost concern by a free people who would govern themselves.