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6/18/81

JUDICIAL SELECTION CRITERIA

The President's criteria for federal juducial appointments is well established: excellence, competence and judicial temperament. As he has often stated, in filling these more important positions he will not seek only candidates who necessarily agree on every position, but rather who share one key view: The role of the courts is to interpret the law, not to enact new law by judicial fiat. With these conditions, he will be seeking candidates from all segments of the public.

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Draft of a Lecture on Judicial Restraint

J Clifford Wallace

It is assumed in some circles that the judicial philosophy that it is opposite of judicial activism and is sometimes associated with the phrase "strict constructionsim" is an unreasoned ideological reflex of a rock ribbed conservatism, insensitive to social concerns in general and the claims of the poor and minorities in particular. My purpose today is to undermine that stereotype. I will sketch the theory and practice of the judicial philosophy that is certainly not "activist" and that uses, at times, methods that might fairly be called strict constructionist. I will use the name "judicial restraint" for the overall philosophy. Judicial restraint, as I use the term, is not tied to any narrow sectarian politics, but rather is dictated by the Constitution, by values of liberty and democracy that are widely shared within our American society, as well as by concerns of legal predictability and judicial economy.

I

It will be no surprise if I start my discussion of the theory of judicial restraint with the Constitution. The Constitution sets the basic rules for the judicial enterprise. We must begin with the Constitution for the same reason that a chess instructor must begin with the rules of play. Unfortunately the judicial involvement is more complex than the game of chess, and the Constitution does not determine the limits of permissible judicial activity with quite the clarity or completeness that the rules of chess set the limits of permissible play. For this reason it is often necessary to bring supplemental resources to bear in reading the Constitution -- in particular history and political philosophy. The text on which these resources may be brought to bear is, of course, more extensive than the delineation of the judicial power in Article III. The doctrine of judicial review makes most of the provisions of the Constitution relevant to judicial activity. Of special importance are the

guarantees of individual rights and liberties found both in the body of the Constitution and the Amendments.

Although the language of the Constitution is not as reminiscent of John Locke as is that of the Declaration of Independence, the substance of the Constitution shows the influence of Locke's theory that the central purpose of government is the protection of individual rights. This fact establishes one element of any judicial philosophy. The courts must protect constitutional rights against infringement, even infringement by the legally elected representatives of the majority. This, then, is one respect in which the Constitution is not entirely democratic. There are limits on what the majority may do. The representatives of the majority may not, without going through the amendment process, pass a bill of attainder, establish cruel and unusual punishments, or make race a condition of sufferage. In practice, although not in pure theory,[1] amendment requires a super-majority. Thus, although the Constitution imposes no absolute limits[2] on

popular decision making, constitutional rights and structures do represent significant practical restraints on the scope of majoritarian democracy.

The Constitution has a number of devices designed at least in part to protect rights. The division of authority between the states and the federal government, for example, both ensures that certain basic rights will be respected throughout the territory of the United States and that a wide range of decisions affecting rights will be made by government at least somewhat less distant from the individual than is the central government. Moreover, the danger that government will infringe rights is diminished whenever there is more than one center of power. The oppressive potential of a unified government is total. In a federal system such total oppression is only possible with the close cooperation of the different centers of power. It is always less likely that two organisms will fall victim to a disease than that one will. Thus, our federal system wisely reserves all powers in the states except

for those delegated to the central government.

The division of authority among the three branches of the federal government was also designed to protect individual rights. The very separateness of the branches curtails the risk of oppression in the same fashion as does the division of power between federal and state governments.

Beyond this, however, the judicial branch was intended by the framers to have a special role in the protection of rights. This special role may in part have been set aside for the judicial branch because of a distrust of the other branches. The executive branch of government was probably most feared by the framers who had fresh in their minds the oppressive potential of a king. Neither was the legislature free of suspicion. The state legislatures during the confederation period had inspired widespread distrust. Many thought that the democracy was getting out of hand -- violating individual rights in an excessive zeal for equality. Oppression by the judicial branch was not so much feared by the

framers, presumably because in their experience with the colonial and state courts had been relatively benign. As is well known, Hamilton thought the judiciary the "least dangerous"[3] branch, and Toquevilla described it as the "weakest branch."[4] It perhaps explains why there is little express direction and restraint placed upon the judiciary in the document. This much, I take it, is uncontroversial. The partisans of both judicial activism and judicial restraint agree that there is an outer limit beyond which government cannot go without becoming subject to judicial intervention. The controversial question is just where those limits are and thus how extensive is the territory within which government can function without intervention by the courts.

To find an answer to this question it is necessary to look to a second aspect of our Constitution -- its democratic side. The Constitution establishes the framework for a federal representative democracy and guarantees to the states a "Republican Form of Government."

It is true that the democracy of the federal government was structured by the founders to ameliorate what some of them saw as egalltarian excesses of democracy. The federal democracy, then, is a limited democracy both by virtue of the external limits, for example, the Bill of Rights, and because of the internal devices of indirect voting and representation. Only some of these internal checks on the federal democracy have subsequently been removed.[5]

Similarly the Republican Form of Government clause was doubtless intended to embrace a wide range of political forms of state governments. Nonetheless, the basic form of both the federal government and state governments was intended to be democratic in the broad sense. Citizens would make decisions, directly or indirectly.

In those cases in which it is controversial whether a decision by Congress, a state legislature, or elected officials falls within or without the permissible range of their discretion, it is useful to examine just what the value of

democracy is. If democracy is a fundamental value in our national life, then the region of legislative discretion is presumably larger than it would be if democracy were a minor value.

I will argue that democracy is, in fact, intrinsically and fundamentally valuable, and for that reason judges must be extremely cautious in taking decisions away from elected representatives and officials.

The opposing theory is that democracy is simply an instrumental value. On the instrumental theory, democracy is valuable only so far as it, as an instrument of government, produces substantively better decisions than would any other available decision procedure. This view has the corollary that democracy should be replaced by a benevolent dictator or a computer if one could be found that would make sufficiently good decisions.

If one believes that the value of democracy is only instrumental and if one runs across a congressional enactment

that is clearly unwise, then one would have a duty to correct the mistake if possible. A democratic decision procedure that is corrected when clearly wrong is a better decision procedure, instrumentally speaking, than the same procedure without the correction. It is fair to assume that no judge believes that he or she can correct all unwise enactments that come before the court. There must be at least an argument for unconstitutionality or a rationale for a transforming interpretation of the statute. If one believes in the instrumental theory of democracy, however, one will have a very considerable motivation to find the required constitutional argument or statutory rationale when faced with what is perceived to be a bad statute.

With a non-instrumentalist theory of democracy, by contrast, there is a value in democracy even when decisions fall short of the best possible -- indeed even when the majority makes a decision that is stupid or completely wrong headed. As a private citizen one may vote directly or

indirectly against bad legislation, while still believing that the majority, because it is the majority, has a right to mistaken. The majority does not have a right to make just any sort of mistake, of course, because there remain the constitutional limits. The non-instrumentalist, however, believes that aside from the Constitution restraints, it is better that the majority make the decision wrongly than that a judge make the decision rightly. As a judge, he or she will be careful to allow social policy to be developed only by the legislature. A judge who believes in the intrinsic value of democracy will, then, shrink from abrogating legislative decisions in borderline cases and will look for ways to uphold legislation rather than to strike it down.

That it is better for the majority to make a mistaken decision of policy, within broad limits, than for a judge to make a correct one is a corollary of the view that democracy has an intrinsic value. That is, the process by which the decision is made has greater value than the decision itself. I

hope that, on reflection, you will agree with this corollary. If not, however, or if your concept of our political intuition is somewhat unclear, let me give an argument for the intrinsic value of democracy.

The starting assumption of my argument is that liberty is intrinsically valuable. This assumption is very nearly an article of faith of our American political philosophy. It is better to be free and hungry than to be a well fed slave. We do think that, as general rule, people make better decisions for themselves than others would make for them, but this instrumental advantage of liberty is secondary. Freedom is necessary to a realization of what makes human beings human. To take away a person's power to make decisions, his autonomy, is an extreme measure -- only slightly less so than taking away the power to think.

My argument for the intrinsic value of democracy is that democracy is an extension of liberty into the realm of social decision making. One cannot consistently be an

instrumentalist about democracy and believe that liberty is intrinsically valuable. Suppose that five co-owners of a building are in disagreement whether it should be painted white or blue. If there were only one person, he would be free to paint the building as he chose. His choice would not be frustrated. With five persons of differing opinions, however, it is inevitable that some choices will be frustrated. A majority decision minimizes the number of persons whose choices are frustrated. In this way it comes closest to the situation of a single free decision maker. In general, majoritarian democracy is more respectful of individual autonomy than is any other social decision procedure that guarantees a decision. Therefore, the same respect for human autonomy that underlies liberty underlies democracy as well, and estabishes its intrinsic value.

Liberty and democracy can, of course, come into conflict. The majority may vote to restrict liberty. To resolve this collision of the two intrinsic values, one must

answer the question: Which decisions are to be made individually and which collectively through the democratic process? The Constitution provides part of the answer to this question by establishing limits on the powers of Congress and the states. A great many questions are left over, however, which the Constitution does not commit either to the democratic process or to individual decision.

Consider a decision that really should, as a matter of sound political philosophy or moral theory, be left to the individual, but that is not reserved to the individual by the Constitution. Suppose further that Congress or a state legislature passes an act deciding the issue and thus taking it out of the hands of the individual.

There are, I believe, federal and state statutes of this description. They restrict individual liberty in ways that are unwise, although constitutionally permissible. Some would argue that in such a case, the judiciary should step in to vindicate the value of liberty on the basis that the

intrinsic value of democracy is outweighed by the intrinsic value of liberty.

The problem is in identifying just which is and which is not an unwise but constitutional limitation on liberty. I may be confident that such a statute is unwise. The legislature, however, may have been just as confident that the statute represented good social policy. Can it be said that judges are, as a group, better at making judgments of social policy than are legislatures? Certainly legislatures, with their committees, staffs, and their deliberative process, are institutionally better equipped to investigate the consequences of policy decisions than are the courts. Nor do I believe that a case can be made that by merely becoming a judge there is added widsom or better perception of what is socially better. Indeed, a judge's removal from the political process and a legislator's constant emersion in it provides him with closer exposure to the basic social needs of society.

There will undoubtedly remain cases where an

omniscient Being would see that the judge's instincts were better than those of the legislature. But a judge's own subjective confidence is a wholly inadequate substitute for neutral omniscience. A judge cannot act on the belief that he knows better than the legislature on a question of policy because that belief will never be properly justified -- even in those cases in which it happens to be true. Thus the assumption that in some cases the intrinsic value of democracy may be outweighed by the intrinsic value of liberty, or, analogously, by other values, does not provide a justification for judicial activism.

It might be wondered if there are not some possible legislative decisions which, although constitutional, are so horrible that any moral agent with the power to intervene is required to do so. Call to mind the regimes of Hitler or Stalin. Most would agree that judges would be morally justified in using a very wide variety of means, including some illegal means, against such regimes. That extreme example,

however, provides no assistance in discussing judicial activism and judicial restraint. It is not at all clear, for example, that there are any such horrible abuses of governmental power that would not be unmistakable violations of the Constitution. More generally, it is unclear that anything is to be gained by entertaining extreme hypotheticals that, in essence, convert the conscientious judge from judicial officer to resistance fighter. A judicial philosophy need not embrace situations in which the judge must cease to act as a judge.

The intrinsic value of democracy thus provides a general theoretical underpinning for judicial restraint -- an underpinning that is not undermined by the possibility that in a given case other values may be more important than that of democracy.

But the intrinsic value of democracy underlies only one aspect of judicial restraint. Another aspect follows from a concern for legal predictability and the coherence of the legal system as a whole. These values require following the

natural interpretation of statutory language and case law. They also require a general caution towards legal innovation.

Judicial restraint is further justified by legal economy and the fact that many disputes are better resolved in a non-judicial setting. Litigation does not produce wealth. On its civil side, it is primarily a means of redistributing wealth, and a very expensive means at that. No other nation devotes as much of its resources to litigation as we do. In this era of international competition it is doubtful that this is the race we should wish to win. Judicial restraint addresses this problem by being cautious about jurisdiction and the extension of causes of action.

Finally, judicial restraint is justified because it tends to protect the independence of the judiciary. When courts become engaged in social legislation, it is nearly inevitable that voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators, then it

follows that they should be elected like legislators. The touchstone of an independent federal judiciary has been its removal from the political process. The trade off, however, was that judges would restrain themselves from the area reserved to the other separate branches. Judicial restraint is thus most consistent with the overarching twin values of the independence of the judiciary and the separation of powers.

II

So much for the theory of judicial restraint. I would now like to say something about its practice. By way of summary, the overall and abstract conception of judicial restraint, as I understand it, is that in order to avoid usurping the policy making role of democratically elected bodies and officials, a judge should always be slow to declare statutes or governmental actions unconstitutional and hesitant to supplement or modify statutes in construing them. Coming at it from a different direction: courts should make as little policy as possible consistent with deciding properly presented

controversies. As a corollary, courts should be vigilant for the possibility that a controversy is not, in fact, properly presented, and resist the temptation to decide broader than the issue actually before the court.

To be a little less abstract, I would like to consider a judicially restrained approach to statutory interpretation, common law, and the Constitution.

A. Statutory Interpretation.

The basic principle of judicial restraint in statutory interpretation is deceptively simply: stick close to the statutory language. If the statutory language is clear and the result does not seem to be one completely unanticipated by the legislature, then relying upon the language of the statute is relatively uncontroversial. [cases] The more difficult case is where the statute is either unclear or applies, if read literally, to a situation in a way that it is at least doubtful that the legislature intended.

Suppose the statute is clear but applies to the fact

situation before the court in a way that was probably unforeseen by the legislature. Here the judge must hold to the statutory langugage unless the result is so untowered that there can be no doubt that the legislature would have altered the statute if they had foreseen the case. I assume that nearly all judges follow this prescription. Judicial restraint counsels the judge to be slow to engage in speculation about what the legislature would have thought had something been brought to their attention. Put another way, judicial restraint requires caution in concluding that the legislature did not intend what it wrote.

With a criminal statute the judicially restrained approach to vagueness and ambiguities looks first to the constitutional vagueness doctrine. If that doctrine is not implicated, unclarity should be eliminated in line with legislative intent. I assume that this much is, again, uncontroversial. The question becomes more difficult when the judge cannot be confident about legislative intent or believes

that the legislature had no intent that would clarify the vague or ambiguous portions of the statute. Assuming that there is no prior case law on the point, it is inevitable in this situation that to the extent the judge decides the issue, the judge will "make some law." When this occurs, judicial restraint seems to me to counsel the following principles:

(1) Clarify only so much of the statute as is necessary to decide the case before the court.

(2) Clarify the statute in the fashion that the legislature probably would have, had the unclarity been brought to their attention.

(3) Follow common law principles of statutory construction.

(4) Clarify the statute so as to make the least innovation against the background of prior law -- especially innovation in extending causes of action.

I will forego a thorough discussion of the third of these principles -- common law construction methods. In a few

minutes I will take up the topic of the application of judicial restraint to the common law from which it should follow how the third principle should be employed. For the most part, common law construction principles are intended to reproduce the intent of the legislature. Therefore, principle (3) will usually be a more specific form of principle (2).

The second and fourth of the principles may at times lead in opposite directions. For example, if the statute creates a right of action, the fourth principle counsels that the statute be clarified without expanding the scope of the cause of action. If, however, it appears a little more probable than not that the legislature intended the expanded cause of action in the unclear area, then the second principle counsels the more expansive interpretation. This conflict should be resolved in a particular case by weighing the probability of one's speculations about legislative intent against the magnitude of the innovation. A higher probability of legislative intent is necessary to support a larger

divergence from prior law. Factors to be considered in evaluating the magnitude of the departure from prior law include economic effects -- society wide, on the parties and the courts -- and the degree to which practitioners and the public would find the innovation surprising.

B. Common Law.

Judicial restraint and common law are uneasy confederates. A modest common law could grow up in a system typified by judicial restraint, but a robust common law is a sign of judicial activism -- the making of law by judges looking to social policy. Thus judicial restraint would seek to cut back common law where such a change is not itself too activist. The Erie doctrine, for example, is a victory of judicial restraint, radically limiting the domain of federal common law. In most settings, an Erie holding which in a very large scale overrules common law will constitute too sharp a break with legal expectations to be compatible with the doctrine of judicial restraint. This would have been true of

Erie had it eliminated federal common law and put nothing in its place. Because, however, Erie substituted for the eliminated federal general law the already established law of the states, its degree of innovation falls within the bounds of judicial restraint.

The opportunity to cut back on common law arises much less frequently than does the opportunity to extent common law. In general, judicial restraint will be slow to expand common law causes of action. Such extensions should be resisted unless the extension is so natural that the failure to extend would unreasonably upset legitimate expectations. This is true even when the extension is perceived to be in the common good. (Brief discussion of Bevins.)

Common law defenses and common law doctrines restricting the exercise of jurisdiction are in a somewhat different posture. The extension of these doctrines will be in line with the axiom of judicial restraint that the courts are being used in too wide a range of cases. Defenses and

doctrines limiting the exercise of jurisdiction may, however, tend either for or against deference to the elected branches, depending upon the case. For example, a common law doctrine having the effect of keeping plaintiffs out of court for whom Congress intended a judicial remedy would be contrary to judicial restraint's democratic axiom. There is, then, no simple rule for the application of judicial restraint to cases extending common law defenses and restrictions on the exercise of jurisdiction. The questions to be asked in each case are:

(1) Does extension of the doctrine protect or undermine the proper authority of elected state and federal law makers and officials?

(2) Does extension of the doctrine tend to remove from the courts disputes better resolved in a non-judicial setting?

C. Constitutional Law.

Constitutional law is perhaps the realm in which questions of judicial activism and judicial restraint are of

most interest. Because constitutional law involves the interpretation of a legal document in the light of prior case law, it combines the considerations involved in the statutory and common law contexts. If there were no common law legacy, judicial restraint would apply to constitutional interpretation just as it does to the interpretation of statutes. Drawing on the discussion of statutory interpretation, and temporarily assuming away the existence of case law, I would tentatively suggest the following principles:

(1) Stand by the clear language of the Constitution unless doing so is manifestly counter to the framers' intent.

(2) Clarify unclear constitutional language in line with the framers' intent where ascertainable with reasonable certainty.

(3) If neither of the prior principles applies, clarify unclear constitutional language so as to select among the plausible alternative readings that which minimally restricts the discretion of elected law makers and officials.

(4) If none of the prior principles apply, clarify unclear constitutional language in line with the best estimate of the framers' intent or in the manner most congruent with prior expectations.

This approach does not directly take into account the often cited "growing constitution" school of interpretation -- current social attitudes. I do not contend that current social attitudes could never be relevant to constitutional interpretation. I find no constitutional language, however, that explicitly builds current social attitudes into the Constitution. But it is at least conceivable that the framers intended that some clauses of the Constitution be read as if they contain variables ranging over social attitudes. No doubt many adhere to that position. For example, the facially clear language of the First Amendment has been held to have a hidden variable for community standards as applied to obscenity. [cases] Similarly, it has been argued that the due process and equal protection clauses of the Fourteenth Amendment are

variable with respect to evolving social standards.

Although it is always possible that the framers intended to write this sort of flexibility into the Constitution, in the absence of constitutional language to that effect, the burden of historical proof should be on those who assert that the framers intended a "growing" constitution.

It has sometimes been argued that a constitution is by its very nature a growing document; the Framers could not intend otherwise -- because they could have no intent to put the future into a straitjacket. This is extremely tenuous historical evidence upon which to base such an all inclusive constitutional theory. More importantly, it does not seem to be very probable that the Framers would make the Constitution so difficult to change by amendment, but make it so easy to change by reference to sociological surveys.

In addition, it is independently difficult to square the beliefs of the Framers' generation in self-evident truth and inalienable rights with the normative relativity of the

growing constitution theory. The relativity of truth and morals would have made no more sense to the Framers than it would have to John Locke, which is to say that would have made no sense at all. In short, I strongly suspect that the growing constitution is a 20th century theory -- anachronistically projected back onto the 19th and 18th centuries.

There is also a naive faith in progress about the growing constitution theory. The idea that the constitution changes with changing public opinion seems relatively benign if one expects public opinion to become more enlightened with the passage of time. If, however, one expects public opinion to become more enlightened with the passage of time, it is not clear that one would want a constitution at all. Why not simply have a democratic body without any restrictions on its decisions -- like to British Parliament? Why should a less enlightened past put <u>any</u> restrictions on a more enlightened future?

It would seem that constitution making assumes a less

than complete optimism about future political progress. In this light, consider the possibility that, due to various tragic circumstances, our country is shaken by a wave of bigotry and racism. Are we to assume that the drafters of the Fourteenth Amendment intended that the meaning of the equal protection clause would change under these circumstances -- losing its bite? It is a good deal more likely that in addition to the precise problem facing them, they intended the Fourteenth Amendment as a protection against possible future changes in the composition and thereby the racial views of the infranchised electorate.

It might appear at this point that I am involving myself in an inconsistency. Earlier I argued in favor of judicial restraint by citing the intrinsic value of democracy. Now I argue against the "growing constitution" theory by citing the Framers' fears of future electorates. There is, however, no inconsistency. The Constitution, the Framers' intent, and our proper attitude towards the Constitution all have

democratic as well as non-democratic aspects. There can be no doubt that the Constitution establishes outer bounds on conduct. What I have been arguing just now is that there is no good reason to believe that the Framers intended those bounds to change with time -- short of amendment. Having concluded that the bounds are stationary, however, still does not establish where they are located. The democratic component of judicial restraint encourages finding those bounds to be less, rather than more, restrictive of democratic activity if that is compatible with the language of the Constitution and the evidence of the Framers' intent. In fact, there is much less reason to think that the constitutional limits must change with time if they did not cover too large a territory to begin with. A constitution is properly a document with relatively little content. It guards the most vital political structures and most fundamental human rights in an unyielding and changeless way. It is because it intrudes on later democratic decisions only in the most important respects, that it deserves

to be taken so seriously when it does speak. A constitution interpreted so broadly that it plays the same role as social legislation must change as social conditions change. There is, however, no need for such a constitution. We have Congress and the state legislatures to write laws in the light of changing conditions. Thus the democratic aspect of judicial restraint is complimentary to the view that the Constitution was intended to "grow" only through amendment.

So far, in discussing constitutional interpretation, I have operated under the enormously simplifying assumption that there is no case law. For better and worse there is case law, a great deal of case law. Much of it is sound in terms of the canons of judicial restraint. Some of it is not.

For the judge, and especially the judge below the Supreme Court, the case law is a given, even when it is wrong. [e.g. Roe v. Wade?] Judicial restraint that did not follow binding precedent would not be worthy of its name. There is a difference, however, between following precedent and extending

it. Predictability and system are increased when a precedent is extended to an analogous set of facts. The closer the analogy, the more judicial restraint will tend to favor the extension. This is only a tendency, however. If the extension runs counter to the principles of constitutional interpretation of judicial restraint, that will provide a reason for refusing to extend the precedent. Whether extension of the precedent is the judicially restrained course of action, all things considered, will depend upon the closeness of the precedent, together with its degree of wrongness. In making the determination, the rationale of the precedent must be taken into account, because the rationale is relevant to considerations of predictability and system.

III

The theory of judicial restraint may at times sound a little radical -- although I would say it is radical only in the etymological sense of going back to the roots of our judicial heritage. Its underlying values are not those of any

particular political party or ideology but the values of liberty, democracy, legal publicity, predictability and system, and judicial economy. By its very nature there can be nothing radical about the practice of judicial restraint. It requires that one play the game with strict attention to the rules. Its model of the judge is more that of a neutral technican of the law than that of a moral reformer. Judicial restraint only rarely permits one simply to overturn the law made by activist judges. This fact obviously gives activist judges a certain advantage, because their innovations will often be retained, although little extended, by judges who deplore them.

It would be difficult to classify, in each instance, whether a judge is a judicial activist or one who believes in judicial restraint. But clearly there is a difference between the two philosophies. The philosophy of judicial restraint simply urges that the judge bear in mind the value of deference to democratically elected officials and law makers, as well as the values of system and predictability. In addition, the

philosophy urges against innovation for the sake of innovation and the substitution of the judge's own moral and political values and sociological theories for those of our elected representatives. It charges a judge with the humility to recognize his or her personal limitations. It seeks to restrict litigation to those disputes best resolved by litigation.

Judicial restraint has the consequence that the courts will not be able to right every wrong -- even every genuine wrong. We can take consolation in the fact that the states and the other branches of the federal government are set up to handle many of the evils now beyond the proper reach of the courts. Some wrongs, however, will not be righted. In part that is the human condition. In part it is a price we must pay for a system that does a better job overall of preserving our fundamental values than would a system making use of judicial activism's quick fix.

FOOTNOTES

1. In principal a minority can amend the Constitution -- because only a bare majority in each of three-fourths of the states need approve. The citizens of the remaining one-quarter of the states, which might be the most populous states, might unanimously disapprove.

2. There is one exception. Article V prohibits depriving a state of equal sufferage in the Senate without consent of the state. Presumably this clause of Article V must itself be unamendable as well as the relevant parts of Article I, section 3.

3. The Federalist No. 78.

4.

5. [footnote on Hamilton's reply to Brutas.]

My presumption--correct or incorrect--is that at this time, you do not want to press substantive Constitutional issues, although I think there are times and places in which this can be done.

Were it possible, would a Justice on the Supreme Court be remiss in his duties if he consciously crafted every decision in a way that ensured its applicability to the facts then before the Court, but to no others or to as few other factual settings as possible? Does he have a duty to frame his decision in such a way as to give guidance to lower courts in future cases or should this be a concern at all? At what point, do you think, does a Justice or the Court in effect render an advisory opinion? Can you cite examples where this happened with the present Court?

What in your view is the role of precedent at the Supreme Court level? Are Justices necessarily bound to the decisions of prior Courts? Given your particular perceptions of the role of a Justice, and of the Court, can you envision yourself saying to the other members of the Court, "this is terrible for the Country, but under our prior decisions, we have no other choice."

Define "strict construction", as it applies to Constitutional interpretation. Do you consider yourself a strict constructionist? (William Douglas was a strict constructionist on many matters) it's important to discern precisely what the candidate believes this to mean)

Does a Supreme Court Justice have an obligation to consider whether implementation of a decision seemingly mandated by the Constitution is practically possible, and if he decides not, to adjust his decision accordingly.? Or is it his duty solely to decide what the Constitution requires and let others be concerned with its implementation?

Should the press play a role in the decision-making process of an individual Justice, and if so, how would you characterize its role?

What might your personal reflective process be were it to evolve that you alone consistently dissented from decisions of the Court?

Is the role of the Court in the Constitutional scheme fulfilled when the Court repeatedly reaches only plurality decisions?

With whom on the present Court do you believe that your views are most compatible? On prior Courts?

How might your role as a Justice on the Court differ from what it is now?

Does the Constitution mandate anything beyond legal equality?

Are there any family or interpersonal relationships that might lead you to consider early retirement?

Had the Framers of our Constitution set about to choose Justices for the Court or to include specific criteria within the text of the document itself, what do you think they might have looked for or included?

If you adhere to the belief that the times dictate the proper choice for the Court, what kind of person is most needed at this time? Why?