

The role of the judiciary in our system of government is limited. While its role and its independence are essential to the proper functioning of our tripartite system of government, the courts cannot be the solution to society's ills, and the independence of the courts provides no license for them to be free-wheeling. And, of course, parties should not be able to establish social policy through court action, having failed to persuade the legislative branch or the executive branch of the wisdom and correctness of their preferred course. Courts are to be arbiters of disputes, not policy makers. As has been said many times, the role of the courts is to interpret law and not to make it. My own beliefs about these issues have been formed over many years, and find their roots in the beginning of my legal career.

Beginning during my two years as a Federal district court clerk, I was taught by the judge for whom I clerked, Judge Joe E. Estes, the importance of Federal courts' keeping to their limited role. His first task – and therefore mine in assisting him – in every case before him was to examine whether the case was properly in court. Was there a party with standing? Did subject matter jurisdiction exist? Was venue proper? These were all questions – and all related questions going to whether the court had subject matter jurisdiction – that he wanted answered before any others. If the answer was “no” to any of them, the case was dismissed promptly. These basic rules of Article III impose a clear responsibility on courts to maintain their limited role.

“Judicial activism” can result from a court's reaching beyond its intended jurisdiction to hear disputes that are not ripe, not brought by a party with standing, not brought in the proper court, or otherwise not properly before the court because of the case's subject matter. An additional element of judicial restraint is to be sure only to decide the case before the court, and not to reach out to decide unnecessary questions. The courts have the essential role of acting as the final arbiter of constitutional meaning, including drawing the appropriate lines between the competing branches of government. But that role is limited to circumstances in which the resolution of a contested case or controversy requires the courts to act.

As I entered private practice, I grew to appreciate even more the importance of predictability and stability in the law, and came to believe that those values are best served by a rigorous and focused approach to the law. For the legal system to be predictable, the words are vital – whether they are agreed upon by parties to a contract or are the product of legislative compromise. Many times in practice I found myself stressing to clients the importance of getting the words *exactly* right if their interests were to be protected in the future. Legal practice also taught me the importance of stability in the law. A lawyer must be able to advise her clients based upon the existing case law. Courts should give proper consideration to the text as agreed upon, the law as written, and applicable precedent. Then our system of justice can achieve appropriate stability,

clarity, and predictability. Those values cannot be effectively pursued unless the law and the facts determine the outcome of a case, rather than the identity of the judge before whom a case is brought. Time and again, I saw that principle in real world cases. The importance of the rule of law, as opposed to peculiarities of specific judges, was just as critical in small matters involving individuals as it was big litigation involving millions of dollars.

“Judicial activism” can occur when a judge ignores the principles of precedent and stare decisis. Humility and self-restraint require the judiciary to adhere to its limited role and recognize that where applicable precedent exists, courts are not free to ignore it. Mere disagreement with a result is insufficient to justify ignoring applicable precedent, but reconsideration under appropriate circumstances is also necessary. There are clear examples, like Brown v. Board of Education, where revisiting precedent is not only right, it is prudent. Any decision to revisit a precedent should follow only the most careful consideration of the factors that courts have deemed relevant to that question. Thus, whether the prior decision is wrong is only the beginning of the inquiry. The court must also consider other factors, such as whether the prior decision has proven unworkable, whether developments in the law have undermined the precedent, and whether legitimate reliance interests militate against overruling.

As my career progressed, I became an elected official charged with legislative power. In that role, I was able fully to appreciate the difference between the role of those who are to make the law and those who are to interpret it. On the Dallas City Council, we dealt frequently with the legal issues facing the City, and with the legal and constitutional implications of our actions. We set policy for the City by, among other devices, passing ordinances. We understood our role, and we expected the courts to understand theirs – part of which was to respect the policy-making prerogatives of the City Council. There was a vast difference between our vote as a policy matter to prevent the desecration of the American flag, and the job of the courts (including the Supreme Court) to rule whether such an ordinance was constitutional.

Finally, my time serving in the White House, particularly as Counsel to the President, has given me a fuller appreciation of the role of the separation of powers in maintaining our constitutional system. In that role, I have frequently dealt with matters concerning the nature and role of the Executive Power. And by necessity my work has required that I deal with the power of Congress in relation to the Executive. The remaining, and essential, component in our system is of course the power of the Judiciary. The Judicial Branch has its own role to play in the separation of powers. It is part of the system of checks and balances. In interpreting the law in the course of deciding contested cases and controversies, the Supreme Court holds the Executive and Legislative Branches to their respective constitutional roles.

Judicial review by the Supreme Court, including determining the meaning of the Constitution and declaring unconstitutional the actions of another branch of government, is a tremendous power exercised by judges who are not accountable to the electorate. Because their power is so great, and because it is largely unchecked, judges must be

vigilant in exercising their power in a humble, prudent, and limited way. The courts must always be ready to decide cases according to the Constitution and laws of the United States, and to do so fairly and without regard to the wealth or power of the litigants before them. But it is just as important for the courts to stand ready *not* to decide in instances that do not call for a decision.

My experience working for Judge Estes provided another valuable lesson. He decided every case according to the law and facts, and he did not worry about the potential for a negative reaction to his decisions. He felt no pressure to please anyone. His only lodestar was the law. The example of Judge Estes helped to instill in me an appreciation for the importance of judicial independence that has only grown stronger over time. Criticism of courts that overstep their role is justified. We must zealously guard, however, the independence of the courts. While legitimate criticism of judicial activism is healthy, even essential, we must be wary of unduly criticizing judges merely because we disagree with the result in a particular case. Judges are given life tenure and independence to shield them from the potential tyranny of the majority. While life tenure and independence should not be a license to usurp the rule of law in favor of a rule of man, they provide an essential structural protection to ensure that judges are able to make decisions based only on the fundamental vision of the Founders – the rule of law.