

THE HAROLD E. KOHN LECTURE

REGULAR (JUDICIAL) ORDER AS EQUITY: THE ENDURING VALUE OF THE DISTINCT JUDICIAL ROLE

*Leo E. Strine, Jr.**

I am flattered to be asked to give the inaugural Harold E. Kohn Lecture at Temple University Beasley School of Law. Harold Kohn was one of the last century's most accomplished lawyers, a master of complex litigation, a vigorous advocate for civil liberties, and a graduate of my alma mater. I am truly honored to deliver a lecture in his honor. I decided to honor the spirit of the lecture series by focusing my minutes with you on a subject that my experience as a judge might qualify me to discuss. In such a setting, someone like me can be most valuable by not pretending that we are skilled at regressions or the like.

In our time together, I am going to talk to you about judging itself, and the importance of judicial discipline to a well regulated, republican democracy. Although this topic has implications for all of us as citizens, it has a special importance for business itself, because the predictability and therefore efficiency that results when the law is interpreted in a good faith, neutral way is critical to the ability of businesses to create wealth.

In that vein, I come today to speak in favor of a judicial mindset that favors regular order over the episodic judicial grant of exemptions from required procedural expectations and the need to secure contractual rights at the bargaining table. I come today to advocate that judges use the imperfect tools we have to try to provide justice equitably—such as standards of review and principles of interpretation—consistently in like cases, and to avoid deviating from them when political pressures or other factors create a temptation for one-off situational departures. I come also to speak in favor of judges retaining our unique and difficult role, as a part of the government that does something uniquely different from the executive and legislative branches. By adhering to regular order, the judiciary does the most equity, because it upholds the reasonable expectations of citizens in a society governed under law that accords a high level of procedural due process and that now enables all its citizens a fair opportunity to participate in electing legislators and the leaders of our executive branches.

* Chief Justice, Delaware Supreme Court. The Honorable Leo E. Strine, Jr. delivered these remarks on October 9, 2014, at the inaugural Harold E. Kohn Lecture held at the Temple University Beasley School of Law.

Equity emerged in our legal tradition as a gap-filler to do justice in a world of unevolved institutions and where not all people were treated the same way in similar circumstances. Equity continues to have a vital role as a gap-filler and as a key default protection in relationships where one party is given broad discretionary authority over the property and rights of others.

But the equitable impulse is not, I will argue, a license for judges to apply personal, idiosyncratic views of the “right” in cases and thereby enable litigants who have failed to follow procedural rules or to obtain the contract they wanted at the bargaining table to get a result from a court that is at odds with what regular order would have produced. Nor is the power of courts to review decisions of the legislative and executive branches for conformity with the Constitution a license for judges to strike down rational decisions that the judges personally believe are socially harmful or for judges to originate themselves constitutional rights without a firm basis in the text or history of the constitution of our republic.

Judicial action of that kind erodes the ability of parties to fairly rely upon the procedural rules that exist to strike the right balance between fairness and efficiency in resolving cases. Judicial action of that kind erodes the ability of parties in commerce to freely enter into binding and fair commercial arrangements. Most of all, judicial action of that kind erodes the vigor of our republic, by undercutting the effectiveness and accountability of the elected branches of government by subjecting their rulings to judicial whimsy. Even worse, it reduces the ability of citizens to rely with confidence on the fact that we are a nation under law, laws that apply consistently and not arbitrarily. Not only that, judicial action of that kind taints the judiciary itself by reducing the judiciary to just another partisan actor, and the courts of justice to just another forum for a battle of ideological and partisan objectives, rather than a different kind of branch of government, uniquely committed to being above the fray and trying to render expert adjudications based on neutral and generally applicable principles of fair interpretation rather than personal predilections.

I emphasize the words “mindset” and “role” for a reason. I am not here today to debate whether a variant of the “originalist” or “constructivist” methods of constitutional interpretation should be adopted. What I fear about many of those who emphasize method is that their emphasis is in fact a cloak for a deviation from the proper mindset.¹ That mindset involves the recognition that the judge’s proper role is to

1. In a draft that is expressly labeled tentative, Professor Sunstein makes the point that there are many approaches to interpreting the Constitution (his primary focus), statutes, and other texts, but for any approach to be genuinely interpretative, it does have to involve “fidelity to authoritative texts,” in the sense of making “the text the foundation for interpretation” and trying to give that text a sensible meaning in the context of the dispute before the court. Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, at 2, 13 (Aug. 30, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489088. Professor Sunstein points out many methods can be deemed interpretative if they are used in a genuine, good faith way as an attempt to interpret the text and apply its meaning (itself a contestable proposition of interpretative debate) to a specific dispute, in circumstances that the text’s drafters may often have not precisely foreseen. *Id.* He argues that because the drafters could not foresee the circumstances in dispute, and thus, the text cannot provide a clear answer, the interpretative method must ultimately be defended “on the ground that it makes the relevant constitutional order better rather than worse.” *Id.* at 17. My focus today relates to this subject, but it addresses an embedded problem, which is the question of judicial good faith and mindset. If a method of interpretation is merely used to mask that a judge is deciding cases on the basis of his personal political preferences, then interpretation is not occurring. Instead, interpretative reasoning is being advanced to justify a result that the

give just effect to the intentions of others, for example, those who were elected to legislate statutes and sign them in to law, or those who crafted constitutional provisions, in a sensible way. This is a complex endeavor, of course, especially when the provision open for interpretation is not clear on its face or in context, and when intervening interpretations, history, and relevant context have evolved requiring the provision to be given effect in a society and situation that is often far different than the drafters of the provision could have imagined.

If, in the interests of fair disclosure, I had to confess to any approach myself, I would tend to call myself an adherent to what Judge Posner has aptly called “pragmatic realism.”² As I understand that approach, when the most traditional tools of judging point to a sensible result—giving effect to plain meaning, to commercially understood terms, etc.—judges should use them. But most of all, in more difficult cases when there is no clear answer even after applying those tools, judges should engage in a good faith effort—one that involves setting aside personal ideology—to make the Constitution and laws enacted by the other Branches and accepted by the populace function in a sensible, just way that respects the purposes that those sources of law serve, even when the judge himself might disagree with them.³ That is, the judge at all times should be mindful that what he is doing is distinct from that which elected officials charged with crafting statutes do. At all times, he must remember that those of us in robes who are charged with trying to faithfully, if necessarily, imperfectly, discern how law made by others apply to specific human disputes that the lawmakers themselves often could not have specifically envisioned.

In this lecture, I will explore a few areas that exemplify my concern that the public may rightly sense a lapse in the Judiciary’s commitment to its distinct role in our republic. Because this is a lecture and not a book, I will do so tersely in each case, trusting that this sophisticated audience is familiar with the context.

* * *

I begin with two words that often evoke groans on the part of law students and lawyers: civil procedure. But civil procedure is incredibly important to the equity-enhancing role of our courts. Since the 1930s, the United States has embraced a system of civil procedure that has elevated full access to plaintiffs and broad access to information over efficiency concerns, such as cost and speed.

Plaintiffs are subject to liberal pleading standards. Plaintiffs receive fulsome—and I mean that in all senses—discovery. There are very few procedural snare traps so long as a litigant promptly corrects a prior pleading or asks for more time.

This nation takes legal claims seriously. No nation can rival the depth and breadth of American state and federal decisional law. And it keeps coming. Some commentators cry that a war crimes tribunal should be set up because the United States Supreme Court has put some rigor in the pleading standard by requiring plaintiffs to plead facts that, if true, plausibly support a cause of action. That this sort of modest burden can generate spirited disputes domestically shows just how committed we are to providing access to the courts.

judge in fact reached on other grounds.

2. See generally RICHARD A. POSNER, REFLECTIONS ON JUDGING 5–6, 167 (2013).

3. See generally *id.* at intro., ch. 4, and ch. 8.

And that I suppose is my basic point. The rules of civil procedure in the United States are difficult to characterize as unfair, when viewed from any comparative, international law perspective. The injustices of the American judicial system seem more obviously to be the excessive length and cost of litigation in the United States, rather than that it sets up difficult obstacles to the presentation of worthy claims at all. Indeed, the very opportunity plaintiffs receive to raise claims lightly and seek evidence gives defendants a corresponding chance to raise defenses and explore all possible information, and may therefore boomerang on less well-heeled litigants facing wealthier adversaries.

There are, of course, many debatable issues regarding the balance struck by American civil procedure rules, and whether there are alterations that should be made. Should a plaintiff have to meet a plausibility or a conceivability standard, if they truly are different? Should all cases routinely involve electronic discovery? Just how many times does a federal securities plaintiff get to amend? (The last question seems to be answered, thus far, as “at minimum, Three!” One dismissal motion a year for three years! That’s what we in the U.S. call litigation reform).

For today, though, my intent is not to engage with these less central questions, but to argue that a premise that is both less contentious, but more fundamental, has a logical consequence. That premise is this: No person of sound reason could claim that American rules of civil procedure are illegitimate, in the sense they are not the result of a good faith decision-making process of a representative democracy that has torn down its worst barriers to access. The American approach to civil procedure is one designed to do equity, to take the sport and caprice out of pleading. Debates about its wisdom should therefore be had in the appropriate forums, by addressing proposals for change to the societal organs charged with adopting and amending the rules of civil procedure. And that premise is crucial and has an important, logical consequence, which is this.

I honestly do not understand the continued indulgence by the judiciary of litigants who fail to follow legitimate rules of civil procedure. When a plaintiff files a complaint and faces a dismissal motion, why should he not be obliged to amend promptly at that time rather than getting to ask for a new chance when he loses and when all the costs of handling the first motion to dismiss have been needlessly incurred? If a plaintiff knows that she must plead demand excusal, knows that a statutory books and record action can help in that process, why should she be allowed to waste the resources of the courts, the defendants, and the other investors by rushing to court with a poorly crafted complaint, lose a motion to dismiss and then be allowed to go back and do what she should have done from the get-go? Why are parties allowed to sit quietly by in the teeth of a summary judgment motion, not seek additional discovery under Rule 56(f), and ask the trial judge for a do-over after they have lost or, even worse, raise issues for the first time on appeal? Why do appellate courts allow litigants in a case not involving fundamental rights such as liberty or parental rights, to raise issues on appeal that were not fairly presented to the trial court? Why do gun shy trial judges put their fear of reversal above enforcing the rules of procedure in their courts?

Adults recognize that rights come with responsibilities. Litigants make strategic and tactical choices in reliance upon the rules. Judges who excuse parties from following clear rules of civil procedure often justify themselves as seeking to do equity, to do case-specific justice. But when judges deviate from fair, neutrally applicable rules, do they really do equity?

Everyone who ever coached or played a sport and lost a game knows what it feels like to want a do-over. If I had only done this, only done that. That pass, that substitution, that formation, if I could only change it all. I would get a different result.

Sports are far less forgiving than the rules of civil procedure. Does a plaintiff get to have the court accept all her well-pled facts as true in addressing a motion to dismiss? Yes. Does a plaintiff get to freely amend to address a motion to dismiss? Yes. Do parties have a broad right to discovery in order to prove or defend a claim? Yes. Do parties have a chance to defend a summary judgment motion by showing that discovery could turn up evidence defeating the motion? Yes. Is there a right to seek reargument of a trial judge's ruling? Yes. May a party seek to reopen a judgment for newly discovered evidence that could not have been discerned in a timely way with the exercise of reasonable diligence? Yes.

Given these and other procedural protections, I do not grasp the equity of excusing litigants from compliance with the rules.

The inequities that result are obvious, but seem to be lost on judges tempted by sob stories, or afraid that the appellate court will be. The inequities include but are not limited to: 1) forcing the parties who have played by the rules, shaped their strategy by the rules, and made tactical and strategic judgments by the rules to suffer a do-over or even worse, an outright loss based on foul play—that is, an argument or issue or evidence that was not fairly and timely presented; 2) reducing the predictability of all litigation, thereby generating more disputes and costs, as litigants believe they can game the system; 3) reducing trial courts to moot courts, and diverting scarce judicial resources to non-binding run-throughs where litigants can rehearse their claims knowing that they get a second chance later; 4) making real the claims of America's international competitors that our legal system is out of control and indulges parties who wish to enmesh opponents in years and years of costly litigation practice as an economic weapon; 5) pricing less affluent litigants out of the system, by creating a system that lacks certainty and timely procession to closure, thus advantaging litigants who are less price sensitive; and 6) making trial judges gun shy to enforce the rules, because bending the rules, rather than enforcing them, is the safe way to go.

Equity demands that all litigants follow the normal rules. Otherwise, courts will be unable to afford everyone the same equal treatment. Litigants seeking one fair shot will have their chances diminished because others have exhausted the system's capacity for patient consideration. The more adamant and resourced a litigant is, the more he will demand. That is not equity, it is the exact problem equity arose to address. Rather than equitable rules of neutral application governing all, certain litigants are allowed more justice than others, necessarily rendering their litigation adversaries recipients of less than ordinary justice, and undermining the overall fairness and efficiency of our entire system of justice. Doing equity requires judicial discipline, self-restraint, the willingness to hold litigants accountable for complying with rules of general applicability. Situational justice is not equity, it is the palliative, the breakfast mush of the timid conscience, for judges unwilling to do the hard work of equity, by upholding fair rules of civil procedure of general applicability. By refusing to excuse the failure of parties to play by the rules, courts promote equity by demonstrating that the judicial system provides equal treatment to all, and is not just the plaything of litigants with the resources or the talent to sell a sob story to secure special treatment.

* * *

I now turn to what I see as an analogous viral strain. This is the related deviation from regular order that occurs when judges employ what I call the “MSU” doctrine in lieu of adhering to accepted, traditional judicial norms of decision-making. Rather than sticking to the standard of review or other interpretative principles applicable to the type of case before them, the judges loose themselves from these constraining binds and free themselves to deliver what they no doubt view as case-specific justice. They “make stuff up.” Depending on your mood or frame of mind, another word than stuff may pop into your head.

But precisely because the judges have shorn the constraints of applying neutral principles of decision-making, they necessarily introduce the potential for inequity, by treating some cases as special, as involving a reason to deviate and reach a result that cannot be explained in terms of generally applicable standards that would govern similar cases. Admittedly, standards of review and other interpretative principles are flawed, imperfect tools, being human-made. But they reflect the good faith struggle of many jurists facing many different cases over many years to come up with sound methods for addressing certain types of cases or legal situations in a reasoned, balanced way. Indeed, these standards often have built-in safety valves, to ensure their equitable application. When these neutral methods of decision-making are forsaken or distorted in a so-called “hard case,” judicial whim, rather than genuine equity, dictates the outcome, rendering the law both less predictable and less fair.

I am confident that the MSU doctrine can be glimpsed in more than a few areas of law. I mention three now, one involving contract law, one involving corporate law, and, lastly, most worryingly, in public law, where there is a recent judicial willingness to override the judgments of the political branches, by calling their actions arbitrary and capricious or by “originating” new areas that are now off limits to legislative action by dint of judicial fiat, in spite of generations of regulation and settled conduct by the political branches, often approved as lawful by prior judicial precedent. Many of these recent decisions read like one side of a congressional debate, where an appellate majority, convinced of its own policy wisdom, simply declares the contrary policy reasoning of a legislative or administrative body unlawful, with no firm rooting in constitutional or statutory text, legislative history, or judicial precedent.

Let me begin with the more profane categories that involve laws addressing the hurly-burly of a capitalist society.

* * *

A context where judges’ personal predilections to do situational justice presents a constant danger of inequity is when judges are asked to address claims that a commercial party’s conduct, despite not being prohibited by the express terms of a detailed, lengthy contract, is instead prohibited by its interstices.

The fact that parties can enter into binding, predictable arrangements called contracts is a vital enabling factor for wealth creation in our society. When sophisticated parties take months to spell out their obligations in a detailed, complex agreement, courts should be reluctant to improvise by indulging claims based on the notion that a party to a 75 page, single-spaced agreement did not breach an express term, but somehow violated a duty implicit in that dense draft. Putting to the side the need for a new presumption against the existence of microscopic interstices in single spaced drafts, a judicial willingness to lightly accept such claims has several negative consequences that are, in my view, inequitable.

For starters, when judges imply duties that are not set forth in carefully constructed contracts, they reduce human freedom. When an arms-length agreement specifically addresses what parties cannot do in excruciating detail, the conduct it does not address is that which remains open for free action, within the bounds of positive law. Judicial additions to contracts that restrict human freedom subject commercial actors to arbitrary incursions, not justified by any lack of capacity by the complaining party to have gotten a written contractual prohibition in the first place. Furthermore, such judicial free-ranging in the name of situational justice raises the cost of contracting, by requiring parties to say not only what they mean to address and prescribe, but also to say what they do not mean to address and prescribe.

Beneficial arrangements may be eschewed because of a fear that courts will imply more than the parties put down on paper. By being disciplined in enforcing contracts as written between sophisticated parties, courts enforce real equity by requiring parties wishing to restrict another's freedom of action to do so at the right time, while at the bargaining table, and by permitting market participants to proceed with the confidence that they will be subject to only those duties specified or clearly implied by the actual language of the parties' bargain.

There is a lapsarian tendency in the judiciary to expand the implied covenant and to use it as a license for judges to reach what they deem to be a case-specific just result, to enforce the contract as the trial judge's or appellate panel's heartstrings believe it *should* have been written. Jurists subject to this tendency also tend to freely gut or minimize the effect of contract provisions such as non-waiver clauses clearly requiring any waiver to be in writing or non-reliance clauses saying the parties disclaim any reliance on any non-contractual representations and warranties. Sometimes core contractual terms are sloughed off by courts as "mere boilerplate," a very strange type of reasoning that relegates to the category of "to be ignored," those contractual provisions so fundamental and important that they tend to appear in substantially similar form in all contracts. Oh, boilerplate, we can just ignore that!

Regular order in contract interpretation—i.e., a consistent adherence to settled interpretative principles focusing closely on the meaning of the contractual words—allows all players a fair opportunity to make mutually beneficial bargains on predictable terms. When judges twist interpretative doctrine to shape case-specific results, they do not do equity in its true sense. They give certain parties more than is due to them, and undermine the reliability of voluntary contracts for all.

* * *

That is all true in the pure corporate law context, to which I turn now. Even when judges are called on to exercise equity jurisdiction in its core form—such as determining whether a corporate fiduciary has breached her fiduciary duties—judicial discipline in the form of a desire to deliver a result in a particular case can lead judges not to apply the same standard of due process to all cases. In other words, to make stuff up.

The equitable overlay to American corporate law is part of its genius, the key to allowing directors to manage corporations under broad enabling statutes rather than highly prescriptive codes. But precisely because so much of corporate law involves judicial articulations of fiduciary duty principles, judges caught up in the moment sometimes mistake their role. Forgetting that any condemnation of a legally permissible act on the grounds of inequity requires a finding that a fiduciary breached

his equitable duties in a specific manner, judges moved by the moment or feeling political pressures untether themselves from that disciplinary pre-requisite and occasionally spew forth oxymoronic statutes of judge-made equity law.

Per se rules of equity that proscribe in all circumstances conduct that is specifically permitted by statute, regardless of whether the directors have breached their fiduciary duties, narrow the freedom of action granted by the legislature and undercut the reliability of corporate law. With the decline of defined benefit pension plans and the resulting dependence of ordinary Americans on the success of the public equity markets, corporate debacles have become more politically salient than ever. Business unavoidably involves risk and the need to proceed in the face of uncertainty and even excellent managers can make decisions that go way wrong—think the “New Coke.” The business judgment rule exists in large measure to constrain judges from second-guessing disinterested business decisions, and thereby stifling the willingness of corporate fiduciaries to innovate, to be creative, to be bold—the essence of what often fuels important new sources of economic growth. When judges forget that, and bend concepts such as gross negligence, financial interest, or good faith because of the potential unpopularity of adhering to the business judgment rule in a specific case, they undermine the wealth-creating basis for the rule.

Likewise, when judges forget that the equitable overlay exists to protect stockholders from overreaching by fiduciaries, and does not exist to protect fiduciaries from the exercise of electoral and other rights by stockholders, the entire framework of corporate law is turned on its head. Instead of using equity as a cautiously-employed and focused shield to protect stockholders from directors misusing their broad statutory powers for improper purposes, equity becomes a weapon against the stockholders, wielded by a judiciary that is unconstrained by the electorate and revealed by its own actions to be unconstrained by the discipline of adhering to the traditional structure of corporate law.

Real equity demands that legally authorized actions by directors not be condemned as inequitable unless the directors have been found to have breached their fiduciary duties of loyalty or care, on the basis of equitable principles that the court would apply in all cases. Real equity requires that stockholders be able to exercise their electoral and other rights unless those rights conflict with a statutory, legislatively-made or contractual, party-made restriction on that freedom, not an equitable, judge-made restriction.

* * *

I come now to the last category, which involves the dangers to societal equity when unelected judges view themselves as having a broad license to second-guess policy decisions made by the legislative and executive branches of government. There is little doubt that in some important moments, our judiciary has played a vital role in promoting a more equitable society, by, for example, declaring de jure racial discrimination in public schools an equal protection violation in 1954. Even considering the reality that de jure racial discrimination should have been difficult, if not impossible, for anyone in good faith to linguistically reconcile with the 14th Amendment of the Constitution, a point made by Justice Harlan years before *Brown*,⁴

4. See *Plessy v. Ferguson*, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting).

one can admit that the judiciary's all too belated enforcement of the plain words of the 14th Amendment helped make our republic more legitimate, by for the first time giving all citizens a fair chance to elect their representatives and all citizens equal protection of the laws. Of course, had the judiciary had the courage and good faith to enforce the clause as written in the first place, rather than hiding behind a morally and linguistically perverse doctrine that was waiting for George Orwell's birth to be labeled properly—as separate but equal—that it plainly knew to be a cloak for racial subordination because it knew what was provided for black people was never equal, then our black citizens may not have had to endure another century of oppression. But my task today is not to revisit or reargue that shameful part of our past, but to discuss where we are right now. And where exactly is that? In a nation that has taken major and long overdue strides to rectify its past practice of race and sex discrimination, and where remaining areas of discrimination, for example, against people who are gay, are being rapidly addressed by the political branches themselves.

What is strange and disturbing to me, however, is that with a more legitimate Congress, with more legitimate state legislatures, and with more legitimate executives, the traditional judicial reluctance to upset the decisions of the political branches, rather than being reinforced and strengthened by the sounder basis for deference that now exists because of the enfranchising of citizens regardless of sex, race or ethnicity, seems instead to have been relaxed and in some cases abandoned. Respect for generations of prior judicial decisions, respect for the political branches, and respect for the public's ability to order their affairs in reliance upon settled interpretations of constitutional and statutory text, are lightly put aside by judges confident that their novel view of things should supplant the decisions of those accountable to the electorate. I confess to being worried that the more constant use of the MSU doctrine in the public law context is beginning to generate justified skepticism on the part of the public that judges are just another form of partisan political actor, but garbed in robes that cloak and obscure their true agenda.

Why do I say that? In public law cases involving the business law area alone, the last five years have seen a number of eyebrow raising decisions that seem to involve judges willing to advance their policy preferences over the determinations of duly-authorized legislative or administrative agencies. The ease with which these judges can invent—originate in the sense of a novelist, if you will—new constitutional rights undiscovered for 200 or more years, determine that the decisions of a specifically-empowered administrative agency are arbitrary and capricious despite evidence of years of study of a voluminous record, or tell an enforcement agency how to use its authority, is disconcerting to me. In some of these cases, the policy end of the judge is one that I share as a citizen. But that does not mean that I find favor with the decisions. To the contrary, it matters immensely who makes a decision in a republic, if we are to truly remain a republic. Judges who do not show respect to the legitimate authority of the legislative and executive branches threaten equity in a fundamental way, by undermining the rule of law itself. Policy battles should be won at the ballot box, in the electoral and legislative process. The policy whim of a momentary judicial majority is not justice, it is caprice and the opposite of equity.

If a judge is not inclined to defer to the policy determinations of the political branches in the absence of any failure of equal participation by all affected citizens and to resolve all doubt in favor of upholding their judgments, he makes himself into an

unelected and unaccountable lawmaker, willing to dictate to his society on the basis of his own preferences. Such a mindset enervates the strength of our republic, making citizens skeptical about the fairness of the system as a whole, leading them to view political participation as a waste of time because judges will do what they want, and to see the judiciary itself as just another bunch of self-interested partisans.

The judicial role is a unique one. That role necessarily involves upholding the ability of litigants, including the government itself, to take action that the judge himself may not view as ideal or even moral, but that is not prohibited by positive law, when interpreted using principles applicable to all like contexts. The judge's role is to neutrally enforce the rules of the game of what is now an essentially open and inclusive participatory democracy.

When judges adhere to their role, they do justice by each and everyone, which is the essence of equity. When judges adhere to their role, they emphasize the central ideal of our republic, which is that those directly elected by the citizens are the primary lawmakers and are accountable for their wisdom to the electorate.

The judicial pursuit of personal policy goals contradictory to those set legitimately by the right political branch players is a misuse of authority, a subtle form of tyranny of its own, corrosive to the fundamentally equitable vision that animates our republican form of democracy.

On a more profane level directly relevant to business, when particular judges act as if they were licensed to create the law anew, rather than interpret it based on neutral principles that give weight to our history and prior generations of law, they diminish the reliability of the law for those seeking to pursue business opportunities. Unless the law is bigger than any of us who are judges, even disciplined judges will be tempted to respond to a fellow court's activism with activism of our own. What will be left is a less predictable and legitimate system of legal constraints for businesses to base their planning and operations on.

The role of the judiciary in enforcing regular order in society is obviously vital, as regular order in that context means enforcing the laws that regulate our conduct toward each other. But the judiciary cannot credibly enforce regular order if it does not adhere to regular order itself. Regular order may not always be popular, and it sure isn't sexy. But it is vital to doing real equity in a republican democracy. It is also critical to wealth creation.