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The Role of the Judiciary

CLINT BOLICK

The idea of the judiciary as a watchdog for liberty is an often-overlooked part of our constitutional tapestry, but it was both breathtakingly original and breathtakingly radical in 1787. The idea that courts could invalidate a law or an executive action because it was contrary to the Constitution—this was an idea that really had never occurred to anyone before it occurred to our Founders. And yet it is vital to the preservation of our rights and to the notion of a government of defined and limited powers.

The very best exposition of what role the judiciary was intended to play in our constitutional republic was outlined by Alexander Hamilton in Federalist No. 78. Hamilton said:



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No legislative act . . . contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislative authority. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

That is the brilliant design that the Framers gave us for our judiciary. And in this regard, Hamilton called the judiciary “the least dangerous branch,” because in exerting its powers, it would only restrain the powers of the other two

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branches of government. But he did issue a very prophetic warning. He said that the judiciary would cease to be the least dangerous branch of government if ever it were to accrete legislative or executive powers.

The judiciary is called upon to be very robust and aggressive in striking down laws that are contrary to the Constitution, while at the same time, it is supposed to be very constrained with regard to the separation of powers. I call the first half of that equation “judicial activism”—in other words, a judiciary that is *active* in holding the other two branches of government to their limited and defined powers and in upholding the rights of the people.

I call the second half of the equation “judicial lawlessness.” And that is where the courts stray into creating law rather than simply interpreting and applying the law. One of the things that has surprised me in my brief tenure as a justice on the Arizona Supreme Court is how much effort I’ve devoted to the second part of that equation.

Our job is to figure out what laws mean. When Justice Antonin Scalia was last in

Phoenix, he said, “You know, a lot of the things that the legislatures pass are garbage, and we are required to interpret the garbage.” He said, “I consider us to be oath-bound, when we receive garbage, to return garbage in turn.” Garbage in, garbage out.

We are oath-bound to do that, but it is such a mighty temptation for a judge to say, “The legislature couldn’t possibly have intended what they *say* they intended through the legislation. Let’s just rewrite it a little bit.” We have to resist that temptation, and that part of the equation has occupied a lot of my attention.

But of course, it’s the first half of the equation, the policing of the legislative and executive branches, that really occupies the principal and the most vital role of the judiciary. And what I have to say about judicial activism, defined in that manner, is not that there is too much of it, but rather that there is not *nearly* enough of it.

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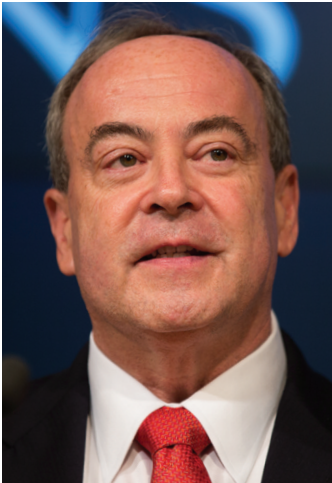
The government has grown exponentially in the last several decades. But the number of decisions striking down unconstitutional laws has not grown anywhere close to that. In fact, the U.S. Supreme Court is taking fewer cases than in decades past. So that means one of two things: either the judiciary is not playing its constitutionally intended role, or Congress is just not passing as many unconstitutional laws as it did. I leave it to you to figure out which one it is.

Every government official is pledged to uphold the Constitution. One of the things that just blows me away is reading legislative history from the 1860s and 1870s. Congress spent half of its time in legislative debates arguing about whether Congress had the authority under the Constitution to pass a particular bill, including the Civil Rights Act of 1866, which ultimately led to the 14th Amendment. When’s the last time you heard, other than Rand Paul, someone in Congress say, “Gee, I just don’t know whether we have the power to pass this!” In fact, think back to the McCain-Feingold law—you may remember that President George W. Bush said, “I have serious constitutional concerns about this bill, but I’m going to sign it anyway and let the courts sort it out.” To me that’s an abdication of a president’s constitutional oath. And it means that the judiciary’s role is even more important today than it was many years ago.

The other thing that has made it so vitally important is the growth of the administrative state. The courts traditionally have been deferential to democratic processes and have assumed that the best way to correct a bad law is the democratic process. But what if the democratic process is nowhere to be

found in an enactment that is passed by people who are there for life, or at least until their pensions mature? This is the unelected administrative state.

You would think that the judiciary would be incredibly concerned about the regulations that come out of these administrative agencies, and would police them vigilantly. And you would be utterly wrong in that assumption, because exactly the reverse is true. This is the so-called Chevron Doctrine that was given to us several decades ago, in which the courts said, “The administrative agencies exercise expertise that we, as judges, couldn’t possibly acquire, and therefore we will be *extra* deferential to the rules that are produced by bureaucratic agencies.” I am happy to say that the Chevron Doctrine is not applicable in the state of Arizona.



We need judges who are vigilant about policing the other branches of government and protecting individual rights. And what that means is that it matters a great deal who our judges are, and even more to the point, what their judicial philosophies are.

To me there is only one legitimate school of constitutional interpretation, and that is textualism. Textualism views the Constitution as a contract, and judges are oath-bound to enforce the terms of that contract as the parties intended the contract to be enforced. And textualists like me believe that the best way to figure out that intent is not by going back and reading newspapers or legislative debates, but by reading and applying the words of the text.

Textualism has several corollaries, and I’ll mention three of them. First, textualists do not interpret the Constitution selectively. We enforce every word. Contrary to Robert Bork, there are no “ink blots” in the Constitution.

Thus, for example, we don’t just enforce the parts of the Bill of Rights that we particularly like. We enforce the Second Amendment, but we also enforce the rights of criminal defendants. You often find that that’s an issue in which some who call themselves textualists depart from their own philosophy. But *true* textualists will enforce all the provisions of the Bill of Rights. Just last week, for example, we held four to three that when police put a GPS device on your car, they need a warrant. So I’m happy to say that our Arizona Supreme Court does vigorously enforce the Fourth Amendment.

The second corollary is that although *contexts* change, the meaning of the

Constitution does not.

In the case of the GPS, we had to confront the question: Is there a reasonable expectation of privacy for someone who was not the owner, but a person who shared driving responsibilities with the vehicle's owner? And under U.S. Supreme Court precedent, to answer that question, we needed to determine whether the expectation of privacy is "one that society is prepared to recognize as reasonable." How on earth are we supposed to figure that out? Do we take a poll? Do we have a focus group?

The answer to the question may vary from today to tomorrow, because society may change its mind—which means that the constitutional meaning today will be different than the constitutional meaning tomorrow, which means that the Constitution has been amended, not through the incredibly onerous process that the Constitution sets forth, but by judicial fiat. That, to me, is nonsensical, and it is beyond any scope of appropriate judicial power.

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That doesn't mean that the First Amendment doesn't apply to the electronic media. Of course it does—the context changed, not the meaning. The Framers couldn't possibly have imagined GPS devices, but they *could* and *did* imagine the threat of tyranny that will come when you allow police to surveil people without a warrant.

And the third corollary is that the text of the Constitution controls, not our precedents that interpret that language. We take an oath to our state and national constitutions, not to the doctrine of *stare decisis*. But I find that a lot of times when courts get a constitutional question, the first thing they do is look at their precedents interpreting that provision, and then they make their decision in accord with that. And I understand that, because you want the orderly development of the law. But what if the precedents are inconsistent with the language of the Constitution? It's our job to align our precedents to our constitutions, not to align our constitutions to our precedents.

It falls to all of us to protect our constitutional liberties. Some of us are oath-bound to do that, and others of us do it as a matter of morality, as a matter of desire to leave for our children and for our grandchildren a country at least as free as the one that we inherited. ■



SCHOLAR PROFILE

John Mueller

JOHN MUELLER is a senior fellow at the Cato Institute. He is also the Woody Hayes Senior Research Scientist at Ohio State University. A leading expert on terrorism, he is the coauthor (with Mark G. Stewart) of *Chasing Ghosts: The Policing of Terrorism*. Other books by Mueller include *Overblown* and *Atomic Obsession*, along with multiple prizewinning books analyzing public opinion during the Korean and Vietnam Wars.

You recently coauthored a White Paper with Mark Stewart on public opinion and counterterrorism policy. Could you explain what you found?

We found that there has been little erosion in fears about terrorism in the years since 9/11 as measured by public opinion polls. This is a little surprising. There has been nothing close to a repetition of 9/11—scarcely any terrorist act before or after, in war zones or outside, has visited even one-tenth as much destruction. And the death toll in the United States from Islamist terrorism has been but six per year since 2001. In addition, official and media alarmism on the issue have declined at least somewhat over the years; Osama bin Laden has been dispatched; and the United States, in an effort to reassure, has massively increased its domestic counterterrorism spending. This persistent post-9/11 fear does not stem primarily from a response to terrorism itself, but rather from the international nature of Islamist terrorism. There was a decline in fear after the large attack in 1995 at Oklahoma City by a domestic terrorist. Fear of Islamist terrorism is more like that inspired by domestic communists during the Cold War—in both cases there was a perceived link to a foreign conspiracy or movement.

How can libertarians put the risk of terrorism into perspective for those who think we live in a deeply unsafe world?

It won't be easy. If people want to be afraid, nothing will stop them. Even if terrorism becomes less frequent in the United States, there may be little change: there was little decline in fears about domestic communists over the

decades even though they made little news after the 1950s. However, this suggests that policymakers have the freedom to spend counterterrorism money in a manner that best saves lives rather than one that seeks to reduce fears that may have become perpetual and are perhaps unfathomable.

Over the course of your career studying international relations, what are some of the most striking trends you've observed?

The most important is what didn't happen: a major war between developed countries, aka World War III—history's greatest nonevent. One was repeatedly expected in the years after World War II and during most of the Cold War. I published a book in 1989 about the "obsolescence of major war," an idea that has come to seem less crazy as time has passed. Also impressive has been the decline in international war as traditionally defined: two countries going after each other over territory or some issue like that.

How did you end up at Cato?

I found it a good fit. Cato has been the only think tank to fully oppose military adventurism by the United States in this century and in the previous one. It also has a gratifying tendency to put any threats by terrorism or other international hazards in context rather than routinely inflating them as is so fashionable in other think tanks and in DC in general. I was able to get my first article on terrorism, "A False Sense of Insecurity?," published in Cato's *Regulation* in 2004, at a time when official, elite, and media hysteria about the subject was standard. ■

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Thanks to Cato's Sponsors, civic-minded people throughout the world understand that the ideals that animated the American Revolution are alive today, and that substantial numbers of Americans, including growing numbers of young people, believe in those principles.

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Generous Sponsors have also recently planned gifts in their estates to support Cato's educational programs, such as the Bastiat Scholarship for students to attend Cato University programs. We thought you'd enjoy hearing directly from a few graduates of recent Cato University sessions:

Thank you for giving me such an inspirational and educational liberty event. I am very humbled and take your investment in me very seriously. I look forward to doing the same for someone in the future.

—NATHANIEL

Cato University: College of Law



Thank you for providing the chance to gain some insight into the fundamentals of law. I'm one of the youngest students, as I'm still in high school, and the Cato Institute has not only taught me the ideas of liberty, but the idea to pursue my dreams as well. Thank you once again, one day I'll be in your place and I will sponsor a student who desires to secure a future.

—HIBAN

Cato University: College of Law

From the bottom of my heart, I would like to thank you for the generous gift of this sponsorship. This conference has played a crucial role in forming my philosophy and influencing my ambitions, so I can't thank you enough for making this possible.

—ELISE

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This 2018 summer session, being held at the beautiful Rancho Bernardo resort, is an energetic exploration of the historical and philosophical foundations of our nation, and the powerful perspective they provide on liberty and justice, wealth and poverty, individual rights, and the rule of law in America.

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