The Washington Post

A litmus test for the next Supreme Court justice

Sep 25, 2020

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WASHINGTON – Courts' rulings can shape national life. Judges' dissents from courts' rulings can persuade future judges, thereby shaping future rulings. Occasionally, however, even a judge's concurring opinion can clarify thinking about the role of judges in the supervision of democracy. It is serendipitous that a few weeks before the nation entered the current chapter in this perennial debate, Justice Clint Bolick of Arizona's Supreme Court delivered an opinion concurring with his court's ruling except for its embrace of "the presumption of statutory constitutionality." The details of the case, in which Arizona's court overturned a state statute, are unimportant to Bolick's argument, which is this:

For every American, a courtroom should be a level playing field, with the law blind to the "identity, power, and resources of the litigants." This is not, however, the reality when an individual challenges a statute's constitutionality. The tilted field favors the government — meaning legislative majorities — because federal jurisprudence invented, and Arizona and other states have reflexively adopted, the presumption of constitutionality. This imposes disadvantages on those mounting constitutional challenges.

In Arizona, Bolick says, challenges trigger several "cardinal rules." One is that (this language is from an Arizona Supreme Court ruling) the "burden is on him who attacks [the] constitutionality of legislation." Another rule is that "generally, every legislative act is presumed to be constitutional," and courts must indulge, in favor of the act's validity, the legislature's professed or implied intention to accord with the state constitution.

For years, a third rule was that the state Supreme Court would "not declare a legislative act unconstitutional unless satisfied beyond a reasonable doubt of its unconstitutionality." This rule has undergone several modifications, the most important being that when a law burdens the exercise of "fundamental rights" (e.g., freedom of speech or religion), "any presumption in its favor falls away." This is, however, problematic because courts can bestow, by whatever criteria they prefer — criteria not found in texts of the U.S. Constitution or state constitutions — "fundamental" status on some rights but not on others.

Bolick says there is a twofold rationale for a presumption of constitutionality. One rationale is that state legislators have sworn themselves to constitutional fidelity. The other is that without the presumption, courts' policy preferences might displace those of legislatures. But, Bolick says:

“Neither the federal nor state constitution suggests an elevation of legislative or executive power over individual rights. To the contrary, both constitutions establish the protection of individual rights as a core purpose.”

In Federalist No. 78, Alexander Hamilton wrote that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” However, the presumption of statutory constitutionality has this practical consequence: Although the members of all three branches of government swear constitutional oaths, legislatures enjoy practical primacy.

But as Bolick says, only the courts can be the ultimate arbiters. Otherwise, legislatures will be the judges of the scope of their own authority. The presumption of constitutionality means that individuals “face a judicially manufactured uphill battle any time they challenge an infringement of their rights.” And the presumption permits “the legislature’s self-interested determination of its own constitutional authority.”

The Cato Institute’s Clark Neily notes that between 1954 and 2002, the U.S. Supreme Court invalidated 0.65 percent of the laws Congress passed (103 of 15,817), 0.5 percent of federal regulations and less than 0.05 percent of state laws. Those who praise such judicial passivity must implausibly assume, as Neily says, that government “hits the constitutional strike zone” at least 99.5 percent of the time. How likely is this?

Judicial passivity has been encouraged by decades of reflexive conservative denunciations of “judicial activism.” These denunciations have been paired with celebrations of “judicial deference” to legislative majoritarianism, on two dubious assumptions. One is the anti-constitutional assumption that the scope of many rights should be defined by majorities, not defended by courts. The other is the unempirical assumption that what most legislatures do most of the time is responsive to majorities rather than to compact factions with narrow agendas.

So, do not be deafened by the cacophony of furiousness surrounding the U.S. Supreme Court. Listen carefully when Senate Judiciary Committee members question the person nominated to fill the court’s vacancy. Republican and Democratic legislators will seek different assurances concerning results from the court’s consideration of various controversies. How many senators will eschew result-oriented jurisprudence and reject the presumption of statutory constitutionality concerning what they do? Few, if any.