High court not final say on U.S. law

As a professor of political science I have followed the spectacle surrounding the Supreme Court and the Affordable Care Act with great delight — this is an educational opportunity. We in the U.S. tend to be woefully ignorant of our political institutions. According to a 2010 FindLaw national survey, only 16 percent could name the chief justice of the Supreme Court and only 1 percent could name all nine justices. A survey of RealClearPolitics.com over the last month shows a number of articles focusing on the court. Sadly the content of these stories, and comments posted online, display a misunderstanding of the court’s political nature — this lack of knowledge is more concerning than an inability to name justices.

In recent articles discussing the role of the court there is near universal acceptance the court has the final word interpreting the Constitution. Even President Obama came forward to defend judicial finality stating “the Supreme Court is the final say on our Constitution and our laws.” As a matter of constitutional law and practice, judicial finality is a myth. Contrary popular belief the power of judicial review — the power of the court to strike down actions of the other branches, as...

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Ryan Emenaker

well as states, for violating the Constitution — is not granted in the Constitution. Judicial review was granted to the court by itself, a power it simply announced it possessed in Marbury v. Madison in 1803. Thomas Jefferson decried judicial finality for turning the Constitution into “a mere thing of wax in the hands of the judiciary.” After appropriating this power in 1803, the Court failed to strike down an act of Congress until 1857. The decision in this case drew the ire of Abraham Lincoln who responded by resoundingly rejecting the concept of judicial finality. In a speech soon after the Scott decision, Lincoln argued court decisions were binding on the parties in that specific case, however these decisions need not set constitutional precedent for the president or Congress; as separate branches they retain independent authority to interpret the Constitution.

Alexander Hamilton wrote in Federalist 78 that the court is the “least dangerous” branch as it “has no influence over either the sword or the purse.” Hamilton acknowledged, in a way we fail to today, that this lack of power makes the court dependent. This dependency translates into the court rarely striking down acts of Congress. An examination of all congressional acts struck down by the court from 1803 to 2010, shows the court has invalidated less than one congressional act per year.

We may have independent judges with lifetime tenure. but we have a dependent judiciary. When the court gets too out-of-line with the other branches, the court has little power. After the Civil War, Congress worried civil rights legislation would be struck down, so Congress simply took away the court’s ability to hear appeals on the issue — Congress controls the court’s appellate jurisdiction. Throughout history Congress has raised and lowered the number sitting on the court to control decisions. These are only a couple of constitutional powers Congress has over the court.

Justices seem to be able to read the Constitution well enough to know it provides the other branches power to control their institution. The court has only struck down 167 acts of Congress in U.S. history. In many of these, the court’s decision was not final. In four cases, the Constitution was specifically amended to get around the court’s decision. In other cases Congress simply passed laws to override decisions. An original dataset I compiled examined the 41 acts of Congress struck down during the Rehnquist Court (1986-2005); 12 of those decisions were overridden by Congress. That means in 29.3 percent of those supposedly final interpretations of the Constitution, Congress simply passed legislation changing the outcome. Another study that looked at 1954-1997 noted that in 48 percent of cases, Congress acted to restore policies the Court invalidated. These studies directly challenge judicial finality.

The Court is one step in a constitutional dialogue among the states, Congress, and the executive branch. Separation of powers is the game that never ends. The Court will most likely announce its decision on the ACA in June — don’t expect this to be the end!

Ryan Emenaker is an Assistant Professor of Political Science at College of the Redwoods. He studies focus on judicial politics and separation of powers.

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