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The Courts in Action

Explain how the exercise of judicial review in conjunction with life tenure can lead to debate about the legitimacy of the Supreme Court's power.

In Federalist 78 Hamilton's assessment of the judicial branch could not be clearer. The judicial branch would be "the least dangerous branch." Montesquieu had called the courts "next to nothing." Do not be seduced by Hamilton's humility here. The Supreme Court of the United States had a significant role to play, from the very beginning. As soon as Hamilton professed the court's lack of influence he described a power later to be attributed to Chief Justice Marshall and the landmark case Marbury v. Madison (1803). In Federalist #78 Hamilton described what we today call judicial review. What may look like judicial superiority, Hamilton acknowledged, would be a mistake. Nevertheless, the court would invariably have the power and authority to rule an act of Congress or the President unconstitutional. "No legislative act...contrary to the Constitution can be valid." Furthermore, Hamilton wrote: "No servant is above his master." Our master is not found in men but in our laws. And who decides what those laws mean? But of course, the courts. The least dangerous branch? You will need to decide.

The design of the judicial branch protects the Court's independence as a branch of government, and the emergence and use of judicial review remains a powerful judicial practice. An independent court, a court free from political persuasions, was hoped for by creating unelected judges, they are appointed. Federal judges also maintain their independence by serving life long terms. Yet few political scientists would deny that our Federal judiciary today serves as a policy making institution. The judicial branch is political, just like the other two. We should never underestimate the court's political significance. This threatens the court's legitimacy. Controversial or unpopular court decisions can also lead to challenges to the court's legitimacy and power that Congress and the president can address only through future appointments, legislation changing the Court's jurisdiction, or refusing to implement decisions.

Legitimacy is a serious dilemma for our federal courts. Without any formal means to enforce their decisions, the federal courts must worry about compliance. This is particularly salient as the rest of our political institutions are bogged down in extreme partisanship. If our court is perceived of as equally and predictably partisan, the reputation of the court will not only be tarnished but their opinions may result in a political response from the other branches. Congress can change court jurisdictions, affect their size and limit their pay. Worse, presidents can choose not to enforce court decisions. This makes courts irrelevant. Federal courts are vulnerable.

What to do? Thankfully our political socialization process predisposes our conditional loyalty. The relatively good will of the public remains strong. As one political scientist

has written, the court has maintained “a sufficient reservoir of institutional legitimacy.” More importantly, most citizens do not follow the court’s policy making decisions. The court can, and does get away with overtly political decisions. There is good news, however. The much-anticipated partisan revolution in the court has not happened. Presidents who have promised to pack the court have not been able to deliver substantive and regular partisan victories. Our current court appears to be sensitive to their legitimacy problem. Recent studies point to a court that rarely “opposes the major policies of the dominant alliance.” In other words, where public sentiment goes, so goes the court.

It may be unrealistic for the court to be completely independent, but legitimacy is more than essential. Legitimacy is imperative if good government is our goal. And in a democracy, legitimacy is in our hands. Otherwise the “least dangerous branch” can quickly turn into our most dangerous.