Supreme — Or Just One of Three?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

Viewers of the July 22, 2015 Rachel Maddow Show on MSNBC probably thought that Ms. Maddow's interview with former Senator (and presidential candidate) Rick Santorum was just another argument about same-sex marriage.

But the Maddow/Santorum exchange was nothing less than a disguised reenactment of an ongoing dispute about just how "supreme" the U.S. Supreme Court really is.

At one point, Santorum asserted that, notwithstanding the Supreme Court's recent ruling that same-sex-marriage equality is the law of the land, Congress could pass a bill *outlawing* same-sex marriage. As Santorum put it: "Congress can pass anything it wants to pass. Just because the Supreme Court said, 'well, we don't think this is right' doesn't limit the Congress's ability to pass any law…."

An incredulous Maddow shot back that Santorum was "fundamentally wrong on civics." Once the Court interprets the Constitution, Maddow contended, Congress could not then pass a law to the contrary. Most of Maddow's viewers probably shared her doubts about what seemed a radical and newly minted doctrine defying the rule of law.

Yet, although it's declining in popularity, the theory that federal courts are just one of three branches with equal power to interpret and apply the Constitution according to their own lights is hardly radical or new-fangled. It's supported by some strong arguments. And it has a relatively distinguished history – at least, if you consider Presidents Thomas Jefferson, Andrew Jackson, and Abraham Lincoln "distinguished!"

During various tugs of war with the Supreme Court, the three presidents argued that, as Jackson put it:

> "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, not as it is understood by others….The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."

Jackson, Jefferson, and Lincoln didn't deny the Supreme Court's right to enter judgments binding on the parties and lower courts. Rather, what the three presidents – and others like Santorum – reject is the view that, once the Court rules, Congress and the president immediately lose the right to pass laws, issue executive orders, etc., based on a contrary constitutional understanding.
Of course, any congressional or presidential action out of step with a Supreme Court ruling might be struck down later in a Court challenge leading to the judicial equivalent of "read our lips!" And much of the time, Congress or the president has little incentive to pursue self-defeating legislative strategies. Sometimes, however, the importance of the issue or the likelihood that the Court will change course (especially with changed personnel) might embolden non-judicial officials to pursue the Santorum strategy. A "constitutional dialogue" (or even a grudge match) among the branches of the national government is arguably consistent with the Framers' failure to spell out the exact role for the Court and the Framers' strong preference for checks and balances.

All this is heresy to those holding the now-more-prevalent view that the Court is "supreme in the exposition of the law of the Constitution." The justices described themselves that way in 1959 when they decided *Cooper v. Aaron*, a case not directly involving the issue of the Court versus other

national branches. This view of the Court as the ultimate constitutional interpreter also has strong arguments to support it. Prime among these is the contention that constitutional rights are just too important to be at the mercy of inter-branch rivalry.

The bottom line? Disputes about the ultimate reach of the Supreme Court's authority to interpret the Constitution are of long vintage and not yet fully resolved.

So, even if Host Maddow and Guest Santorum didn't know it, they were standing in for the 1959 *Cooper* justices and the 1832 sentiments of President Jackson. Ultimately, they were voicing prominent polarities likely to last for as long as we have a democracy based on majority rule and separated national powers, coexisting with judicial review.