

Taxes and the “Least Dangerous Branch”

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

Hearing so much discussion about what if any tax bill Congress will pass and how the Administration is affecting tax-policy deliberations reminds me of an eternal verity about the federal judiciary – namely, that Supreme Court justices and lower federal judges do not play a comparably significant or primary role in setting tax policy. For that matter, the judiciary is conspicuously absent from most of the big-ticket policy issues of concern to Americans, including federal-government taxing, spending, budgeting and monetary policy; setting the rules for a wide array of other domestic policies, including about the environment, worker safety, and consumer protection; defining crimes and establishing punishments; and deciding how to deploy the military and conduct foreign policy.

Sure, courts play an occasional fill-in-the-blanks role on these high-profile issues. Once the political branches adopt overall policies, courts at times interpret how particular laws, executive orders and regulations apply in specific circumstances. More rarely, courts are asked to decide whether the laws, executive orders and regulations of the other branches are *constitutional*. (One example is the 2012 decision that the Obamacare individual mandate, construed as a tax, fell well within constitutional taxation limits.)

But these exceptional forays into economics, crime and military and foreign affairs prove the rule that judges are not heavy hitters in the game of policy formation.

This insight not only is important in keeping the judicial role and impact in perspective. It’s also critical to defending the judiciary, during the founding period and now, against charges that having unelected, life-tenured judges in a position to counter the actions of elected branches is inconsistent with democracy.

Soon after the Framers drafted the Constitution in Philadelphia in 1787, opponents voiced concerns about an overly powerful judiciary. In explaining why the newly created separate and independent judicial branch need not be feared, the author of Federalist Paper No. 78 (whom historians believe to be the current toast of Broadway, Alexander Hamilton) emphasized that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” As Hamilton elaborated, “[t]he Executive...holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society.” Hamilton also noted that the federal judiciary lacks any separate enforcement *power* and is ultimately dependent on the backup (or at least the grudging acquiescence) of the political branches for ensuring “the efficacy of its judgments.” (I echoed this point in my May 2017 podcast, “An Independence Dependent upon Others.”)

Recent judicial defenders have used the “least dangerous branch” theory to rebut the objection that judicial review inappropriately distorts the constitutional system of checks and balances. Defenders argue that, because judges do not generally set policy or countermand the political majorities who do, this compensates for the times when they must legitimately check political officials to protect against the tyranny of the majority.

Finally, this “least dangerous branch” theory explains why the federal judges feel the need to give substantial deference to political judgments when they decide legal merits. And it clarifies why judges have developed an extensive network of “justiciability” doctrines to avoid even reaching legal merits, if second guessing elected officials on domestic or foreign policy can be avoided.

In fact, the Supreme Court’s recent refusal to decide challenges to the second Trump Administration travel ban (on grounds that the challenges were “moot” when the ban technically ended) may be just the latest example of this stay-out-of-policy impulse at work!