Congress & the Constitution

# The Supreme Court and Congress

*What happens in Congress after the Court strikes down legislation?*

**By J. Mitchell Pickerill**

The Supreme Court occasionally strikes down acts of Congress as unconstitutional. In this article political scientist J. Mitchell Pickerill examines how Congress, since the 1950s, has responded to statutes invalidated by the Supreme Court. He provides empirical data and analysis of inter-branch relations, showing that Congress often achieves its original policy goals through revised statutes that meet constitutional standards.

When most Americans read that the Supreme Court has used judicial review to strike down federal legislation, they usually understand the Court's action as an invalidation of the legislation. In other words, the Court has undone the work of Congress and ended the life of the statute—kaput, poof, and it's gone. It is not surprising that this would be the common reaction: it is how the Court's power of judicial review is most commonly taught in high school, college, and even law school classes on the subject. However, what many deem to be conventional wisdom about the death sentence imposed on legislation by judicial review turns out to be false wisdom. The reality is that judicial review does not usually end the life of federal legislation, and Congress often responds to the Court by amending legislation to make it constitutional. This is an important insight into the balance of powers between the Court and Congress because that relationship is nearly always mischaracterized as one in which the Court has the final say over the constitutionality of a statute.

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## The Debate over Judicial Supremacy

The notion that the Supreme Court's constitutional decisions are the last word on the constitutionality of a statute springs from the theory of judicial supremacy. Judicial supremacy begins with the premise that pronouncements on the meaning of the Constitution are legal in nature. In a system that prides itself as being governed by the rule of law, it is imperative that law be applied consistently and equally. Therefore, it is essential to have a single, final interpreter of the law. Since Article VI declares the Constitution to be the "supreme Law of the Land," and the Supreme Court is the highest Court in the land, it necessarily falls to that Court to be the final arbiter of the Constitution. And because the Court is insulated

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from electoral politics, it is the best situated institution of the federal government to protect individual rights and minority interests from the tyranny of the majority. An important implication of judicial supremacy is that members of Congress have no legitimate role in challenging the Court's constitutional interpretations. Thus, when the Court strikes down legislation, the act has been permanently and irrevocably nullified.

A number of constitutional experts have challenged the role of judicial supremacy in the U.S. system of government. Arguments against judicial supremacy have been put forth as "coordinate construction," "departmentalism," and "tripartite" theories, and more recently as "the Constitution outside the Court" and "popular constitutionalism." These opponents of judicial supremacy argue that the Constitution is more than simply a legal document. It creates and structures political institutions as well as lawmaking and policy-making processes, and it establishes the parameters for federal power. In short, it structures political debates as well as legal ones. And the members of each co-equal branch of government take oaths to uphold the Constitution. Thus, members of Congress and presidents possess legitimate and sometimes necessary authority to interpret the Constitution on their own. From a democratic theory perspective, some even argue that as the people's representatives in a democracy, the constitutional interpretations of elected officials are superior to those of the unelected justices on the Court who are unaccountable to voters. From this point of view, the Supreme Court creates a problem for democracy when it invalidates legislation duly enacted by a democratically elected Congress.

There are several important implications of the debate over judicial supremacy, but perhaps the most important is an assumption made by both sides that the Court's exercise of judicial review denies the legislature its preferences by rendering legislation void. There are reasons to suspect that this assumption is faulty. Indeed, it is rare in the U.S. system of government that a single institution has the definitive, authoritative last word over a policy or law. For instance, the executive veto is often used by presidents not to kill legislation, but rather to force members of Congress to bargain with the president and draft legislation he finds acceptable. This is how President Bill Clinton forced a Republican Congress to modify key provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the Welfare Reform Act. Twice Clinton vetoed the legislation until the sponsors of the bill relented and revised the legislation in ways Clinton preferred. The bill Clinton signed into law was the third version passed by Congress—thus neither the passage of the original legislation nor the exercise of the veto was the final decision over the Welfare Reform Act.

It may be helpful to think about the Court's exercise of judicial review in the same way. Perhaps Congress can respond to the Court and modify legislation in a way that satisfies the Court's jurisprudential preferences in a manner analogous to how Congress modified the Welfare Reform Act to satisfy President Clinton's policy preferences. Some scholars have suggested that there are interactions between the Supreme Court and other branches of government—interactions that result in "constitutional dialogues" (Fisher, 1988). Thus, there is reason to believe that Congress might take action in response to the Supreme Court's exercise of judicial review.

## What Really Happens to Invalidated Statutes?

In order to assess the relationship between the Court and Congress over constitutional matters with a little more precision, I collected data on Court decisions invalidating federal legislation and tracked what happened to the legislation after the Court decision (Pickerill, 2004). From the beginning of the Warren Court in 1953 through 1997, the Supreme Court struck down 74 separate federal statutory provisions. However, most of those statutes are currently "good law." That is, they are operable and are being applied (or capable of being applied) by the executive branch and/or appropriate administrative agencies. One reason is that Congress often times responds to the Court to revive the provisions struck down by the Court. If members of Congress are committed to the policy in a statute that has been struck down, they may save the policy in one of three ways: they may amend the Constitution, in effect overruling the Court; they may pass an amendment to the legislation; or they may repeal the old and pass new legislation. As of 2000, Congress has responded to the Court in one of these three ways for 36 (48%) of the 74 statutory provisions. Only once, however, has Congress amended the Constitution; Congress passed and the states quickly ratified the 26th Amendment lowering the national voting age to 18 after the Court struck down relevant provisions in *Oregon v. Mitchell* (1970). On the other hand, Congress amended statutes in response to judicial review 27 times, and it repealed the legislation and replaced it with new legislation eight times.

In amending or replacing legislation declared invalid by the Court, Congress *usually* modifies statutory lan-

*continued on page 27*

**Why Courts & Congress Collide**
*continued from page 9*

When they are wasteful in their spending, they are accountable to a congressional appropriations process. When they are inefficient in their administration, they are accountable to congressional oversight. And when judges make bad decisions, they are accountable to Congress, the media and the public, all of whom enjoy a first amendment right to criticize —publicly and harshly—the decisions judges make.

Whether a given episode is better characterized as an inappropriate threat calculated to intimidate, or appropriate criticism calculated to promote accountability, remains open to perennial debate. Perhaps that is a good thing. By preserving a constructive tension between judicial accountability and judicial independence, we preserve a dynamic equilibrium between courts and Congress that has served our nation well for over two centuries.

## For Further Reading

Fish, Peter. *The Politics of Federal Judicial Administration*. Princeton, N.J. Princeton University Press, 1973.

Geyh, Charles Gardner. *When Courts & Congress Collide: The Struggle for Control of America's Judicial System*. Ann Arbor: University of Michigan Press, 2006.

Katzmann, Robert A. *Courts & Congress*. Washington, D.C.: Brookings Institution, 1997.

**The Supreme Court and Congress**
*continued from page 11*

guage in a way that reflects the holding in the Supreme Court decision. For example, in *Buckley v. Valeo* (1976), the Supreme Court struck down various provisions of the Federal Election Campaign Act (FECA). FECA was an early attempt by Congress to regulate election campaigns, and especially to limit the influence of money in campaigns. In short, Congress had placed certain limits on campaign contributions and expenditures, and it created the Federal Election Commission (FEC) to enforce FECA. The FEC was to consist of commissioners appointed by the president, the Speaker of the House, and the President Pro Tempore of the Senate. But the Supreme Court held that many of the limits on contributions and expenditures violated the First Amendment's rights to free speech and freedom of association, and that the appointment of some of the commissioners by members of Congress violated separation of powers principles, in particular the "appointments clause" of Article II, which gives presidents alone that power. Less than a year after the *Buckley* decision was handed down, Congress repealed the relevant provisions of FECA and replaced them with new statutory language. The new version of FECA regulated only those contributions and expenditures that the Court said could be regulated in the *Buckley* decision, and in the manner prescribed by the Court. In addition, none of commissioners of the FEC would be appointed by members of Congress under the new version of FECA. In other words, Congress kept FECA alive by, in essence, codifying the Court's holding. There are a few instances in which Congress revives legislation in ways that are less deferential to the Court—but only a few.

Yet another type of congressional response to judicial review involves the ultimate deference to the Court by repealing the legislation without any attempt to save it. Congress has repealed 10 (14 percent) of the 74 statutory provisions at issue here. For example, in 1950, Congress passed the Subversive Activities Control Act (SACA) in an effort to fight communism—or the "Red scare"—in the United States In *Aptheker v. Secretary of State* (1964) and *Albertson v. Subversive Activities Control Board* (1965), the Court struck down different provisions of the statute. Those provisions were later repealed by Congress, and the SACA is no longer in effect.

## FOR DISCUSSION

What does the term "judicial supremacy" mean? Does the Constitution provide for judicial supremacy? for judicial review?

When the Supreme Court strikes down an act of Congress, what are some of the ways that Congress might respond?

When coequal branches of government such as Congress and the Supreme Court disagree, how are these disagreements resolved?