The Washington Post

Posted at 12:51 PM ET, 04/24/2012

Supreme Court follies: What pundits and activists get wrong

By Jennifer Rubin

With Obamacare, campaign finance reform and the Arizona immigration law reaching the Supreme Court, there has been a lot of silly and just plain inaccurate writing about the court and what it does. I will take a stab at addressing a handful.

1. *"It would be judicial activism to strike down Obamacare."* In an excellent op-ed on the topic, David Rivkin and Lee Casey write: " 'Judicial activism' is one of those agreeably ambiguous terms that can support almost any criticism of the courts. Under our constitutional system, judicial activism entails judges rewriting rather than interpreting the laws, exercising 'will instead of judgment,' in Alexander Hamilton's phrase."

They point out, "As the Supreme Court has consistently ruled in the past, the Constitution gives Congress only limited and enumerated powers. However vexing a particular problem may be, Congress can address it using only those powers. If its preferred solution requires the exercise of a power it was denied, such as a general police power, then Congress must think again. If, as in this case, Congress persists in adopting legislation that goes beyond its constitutional authority, the courts must invalidate it. That is not judicial activism. It is the fulfillment of the judiciary's constitutional duty."

2. *"It would be ruinous if the Supreme Court split 5-4."* I had a law professor back in the day whose pet peeve was unanimous decisions. He would tell us: "They're always badly reasoned, usually wrong." There are exceptions, of course. What he meant was that all the justices can blow a decision and perhaps the absence of a dissent makes their reasoning flabby. On this I agree with my colleague Charles Lane, who points out, "Decades worth of data show that it does not ebb and flow with the short-term popularity of its decisions, much less with the size of a court majority. Rather, the justices are esteemed because of their perceived expertise, the relative impartiality of their deliberations (compared to the political branches) and because the court symbolizes 'the rule of law.' But what if the court seems to split 5 to 4 along partisan lines, as some predict for the health-care case? Even that would not erode its standing, as long as most people either agree with the outcome or generally see the court as final arbiter even when they disagree with it."

This was what engendered the blowback to Obama's fingerwagging at the Supreme Court, and his hasty retreat. The public actually does think the court does its job well.

3. *"The Arizona case is a slam dunk.*" For a time I actually thought this to be the case. After all, the Constitution specifically grants the federal government power over international affairs. But after reading through split decisions on the case as it made its way up to the Supreme Court, it becomes clear that there is nothing clear in the least about "preemption," the legal principle by which federal law can either displace state law in an entire field or conflict with and therefore invalidate state law.

Ilya Shapiro argues that the Arizona law demonstrates that "there's a difference between what's constitutional and what's good policy. S.B. 1070 was crafted to mirror federal law rather than asserting new state powers that interfere with federal authority over immigration. That's why lower courts only enjoined four of its provisions and why the Supreme Court would not be wrong to resurrect even those four. . . . Well, immigration is the most obvious place where my constitutional and policy views diverge. The ultimate solution here isn't for the Supreme Court to strike down the states' lawful if misguided legislation, but for Congress and the president to enact a comprehensive national reform."

I'll be reading the briefs and listening to the arguments, but I would suggest this is a *much* harder, closer call than Obamacare.

4. "*Conservatives have politicized the Supreme Court by appointing right-wingers to the bench*." Well, let's be honest here. As the Supreme Court has moved into numerous contentious policy areas (gay marriage, abortion, affirmative action, etc.) — in some cases inappropriately, conservatives argue — the stakes have gotten very high. Presidents of both parties go to great pains to select justices who have a judicial philosophy agreeable to the president and who will give him the results he wants. Needless to say, Republicans have a mixed record (e.g. Justice Souter, Justice Stevens). But both sides do it and have gotten proficient over the years in figuring out who is a strict or original constructionist (and therefore unlikely to come up with new rights not explicitly set out in the Constitution, to import international law or to read out of existence certain provisions because we have to "keep up with the times") and who is a nonoriginalist. Justice Ruth Bader Ginsburg famously remarked in public that she would use international law because she will to look for "good ideas" anywhere. Thunk, goes Justice Antonin Scalia's head on the table.

5. "*When the Supreme Court decided Citizens United, it was siding with 'big corporations*.' " Unfortunately this bit of anti-constitutional propaganda was propounded by the president. In reality, the case was about the First Amendment. And it applied to labor unions as well. And it was decided by Justice Kennedy, hardly a dogmatic justice, in an exhaustive opinion discussing the protections accorded to core, First Amendment speech. When the Supreme Court has upheld various incarnations of campaign finance reform in the past, it wasn't targeting rich donors or being anti-challenger. It was, to the dismay of Sen. Mitch McConnell (R-Ky.) and other First Amendment purists, elevating other government interests (e.g. anti-corruption) over the complete freedom of political speech and activity. Thankfully, McConnell didn't throw spitballs at the Supreme Court.