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Emerging Constitutional Conflicts and the Role of Courts

John M. Greabe
University of New Hampshire School of Law, john.greabe@law.unh.edu

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Additional Information
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JOHN GREABE
Constitutional Connections

In *Marbury v. Madison*, decided in 1803, Supreme Court Chief Justice John Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is."

Marshall made this statement in the course of explaining why the court should not enforce a federal statute that conflicted with the Constitution. The statement thus served to justify the practice of judicial review. But what if anything does it imply about how *actively* courts should seek to define constitutional boundaries?

Does the *Marbury* statement merely seek to justify a straightforward choice-of-law principle – i.e., that courts must enforce superior law (such as constitutional law) when faced with situations where superior and inferior laws conflict?

Or does it suggest that the courts should play a special role in maintaining our constitutional equilibrium – i.e., that interpreting the Constitution is a particularly *legal* exercise in which judges have special expertise? If the latter meaning was intended, the statement might well be taken as a judicial call to action.

Throughout its history, the Supreme Court has at times embraced the former view, and at other

SEE **CONSTITUTION** D3

How actively should courts seek to define constitutional boundaries?

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times the latter.

Advocates for the former, more restrained view emphasize that it functions as a pro-democracy default rule. And they see this as a good thing.

When a court exercises judicial review, it tells Congress, the executive branch or a state to refrain from action that is under way or to take some action that is not being taken. Either way, a democratically accountable institution is told that it cannot do what the people (presumably) want it to do, or that it must do what the people (presumably) do not want it to do.

Advocates for judicial restraint say that such occasions should be kept to a minimum. It is destabilizing when courts tell democratic majorities that they cannot have their way. And it can be dangerous when courts do so with frequency or without sufficient sensitivity to the political consequences.

Note that this view does not necessarily involve a limited conception of the breadth of constitutional rights. One might well believe, for example, that the Constitution should be broadly read to protect a right to abortion or to same-sex marriage while simultaneously believing that the judiciary should be cautious about involving itself in controversies that implicate issues such as these.

Judges holding the restrained view tend to favor what law professor Alexander Bickel called "the passive virtues" of inaction. For example, when faced with a lawsuit raising a constitutional claim, they do not lightly conclude that the plaintiff has suffered an injury sufficient to confer "standing" to litigate the case. And if the plaintiff does have standing, they tend to look for non-constitutional grounds on which to decide the case. Finally, if they must issue a constitutional ruling, they tend to state it in the narrowest possible terms.

Advocates for a broader understanding of the *Marbury* statement tend to emphasize the hazards of unbridled democracy, the threat posed by political dysfunction and the need to protect minority rights. They argue that if the Constitution is to endure, there must be a method for operationalizing it when its limitations are viewed as inexpedient by those who hold power in the political branches.

History teaches, they say, that robust exercises of the power of judicial review are necessary to keep us, in the words of John Adams, a "government of laws, and not of men." Judges are by training inclined toward the vindication of principle. And the framers gave federal judges lifetime tenure and salary protection precisely because they saw a need for a branch of the federal government to take the long view.

We appear to be headed into a period that will be rife with constitutional conflicts. Some of these conflicts will become lawsuits. How will the courts respond? How should they respond?

Just this week, a government accountability organization filed a lawsuit claiming that, by failing to divest from ownership of businesses that receive payments from entities owned by foreign governments, President Donald Trump is violating the Constitution's Foreign Emoluments Clause. This clause prohibits a person holding "any Office of Profit or Trust" from accepting any "Emolument" from a foreign state.

There is a lively debate about whether the president holds an "Office of Profit or Trust" within the meaning of the clause and, if so, whether a payment received by his one of his businesses constitutes an "Emolument." But the case also presents a significant threshold question: whether the plaintiff organization has suffered an injury sufficient to give it the standing to litigate these issues.

The organization claims that President Trump's unconstitutional conduct is causing it to divert resources from other government accountability projects in order to monitor him. Is this enough to confer standing? In deciding this question, the court will have to define and apply the concept of "injury." But it also will be giving a new gloss to Justice Marshall's old maxim about the scope of the judicial role.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)