Emerging Constitutional Conflicts and the Role of Courts

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Emerging constitutional conflicts and the role of courts

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 times...

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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 the government what law professor Alexander Bickel called "the passive virtues" of inaction. For example, when faced with a law suit raising a constitutional claim, they do not lightly conclude that the plaintiff has suffered an injury sufficient to confer "standing" to litigate their case. They tend to look for non-constitutional grounds on which to decide the case. Finally, if they must issue a constitutional ruling, they try to stick to the narrowest possible terms.

Advocates for a broader understanding of the Marbury statement tend to emphasize the hazards of unbridled democracy, the threats 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 achieve 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.

There is a lively debate about whether the president holds an "Office of Profit or Trust" within the meaning of the Constitution's Foreign Emoluments Clause. This clause prohibits the receipt of payments from foreign states by those who hold office under the Constitution. It can be interpreted 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.

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