Emerging Constitutional Conflicts and the Role of Courts

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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
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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 unconstitutional. Advocates for the latter, more restrained view say that such occasions are few and far between, and that the judiciary should not necessarily involve itself in controversies that implicate political issues such as these.

Advocates for judicial restraint say that courts 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.

Judges holding the restrained view tend to favor the Constitution's maxim: "The power of judicial review is exercised by the Courts in the helping hand of the People, who hold power in the political branches."

History teaches, they say, that robust exercises of the power of judicial review are anathema. And it is a political virtue when the judiciary does not involve itself, they say, in controversies that implicate political issues such as these.

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