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Can Courts Save Us From Unconstitutional Government Conduct?

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Comments

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Constitutional Connections

We are living in a troubled time. Across the political spectrum, there is a great deal of concern that government officials have been derelict in honoring their oaths to support and defend the Constitution.

In such an environment, we should expect an uptick in constitutional litigation. And sure enough, many high-profile constitutional cases are making their way through the courts.

For example, from the left, there are challenges to the president's immigration and voter-fraud crackdowns, and also to his compliance with the Constitution's emoluments clauses. From the right, there are lawsuits alleging that some of the legal protections recently extended to members of the LGBTQ community violate constitutionally protected religious liberty.

It is therefore worth asking whether, in a time when many believe that the political branches have gone off the rails, the courts can save us.

Answering this question requires us to consider the extent to which the Constitution contemplates judicial remedies for constitutional violations. The answer is surprisingly complicated.

Any discussion of the topic begins with *Marbury v. Madison* (1803), where the Supreme Court first exer-

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Judicial review is a keystone of our constitutional system

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cised the power of judicial review – the practice of having courts decide whether laws passed by legislatures and acts committed by executive branch officials violate the Constitution.

In one of *Marbury*'s most famous passages, Chief Justice John Marshall justified judicial review by stating: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Essentially, Marshall was saying that a person's rights aren't worth much unless the government provides a remedy when they have been violated. And in all but the rarest circumstances, individualized remedies must come from courts.

So, Marshall argued, if we are committed to enforcing the Constitution, we must also commit ourselves to having *courts* decide the constitutionality of the work product of the other branches of government, and to craft appropriate remedies in response to perceived constitutional violations.

First-year law students quickly learn that Marshall's line of argument is more contestable – at least as a matter of logic – than it may first appear. Nonetheless, the practice of judicial review is a keystone of our constitutional system.

That said, it would be a mistake to conclude that the Constitution requires *every* violation of one of its provisions to invite a successful court action. Rather, despite *Marbury*, there are many situations where courts withhold remedies for constitutional violations.

First and foremost, courts will entertain constitutional claims only from persons who have standing, which means that they have been injured in some unique and individualized way by government conduct.

A person may be outraged by the president's decision to restrict immigration from certain Muslim-majority countries, or by Colorado's statute barring businesses from denying service to same-sex couples. But such outrage is not enough to permit the person to file suit.

Rather, any lawsuit must be filed by someone *personally* affected by the contested policy, such as a person whose Syrian relatives will be excluded from the country, or a business that is compelled to bake a wedding cake for a same-sex marriage ceremony. And sometimes, it is difficult to find a litigant who has been harmed in a personalized way by unlawful government conduct. The pending litigation regarding emoluments, for example, raises difficult standing issues.

Moving on, let's say there is a litigant with standing to assert a constitutional claim. Even so, *and even if the claim has merit*, there are many situations where a court will deny a remedy.

Roughly speaking, the law of judicial remedies for constitutional violations differentiates between situations where litigants complain about a *wholly completed* constitutional violation committed by a government actor, and situations where litigants say they are subject to an *ongoing* constitutional violation based on an unlawful law or policy that affects (or could affect) others.

In the former situation, where the harm cannot be undone, the only thing a court can do is to provide a substitute remedy. Examples of substitute remedies include the suppression of unconstitutionally obtained evidence, a money damage award, and a new trial untainted by the error that rendered an earlier trial unconstitutional.

But before ordering a substitute remedy, the court must apply doctrines designed to weigh its likely negative effects on the public – e.g., the suppression of evidence that might let a dangerous criminal go free – against the perceived need for a remedy. Often, these doctrines will compel the court to conclude that the costs of ordering a remedy are simply too high.

But in the latter situation, where the harm is ongoing, the court can issue a decree that stops it and declares unconstitutional the law or policy upon which it is based. Courts will not deny a remedy in such situations. Indeed, one of the basic functions of courts (and judicial review) is to deactivate unconstitutional laws and policies.

OK, finally, let's suppose that we have a litigant with standing who alleges ongoing harm from an unconstitutional law or policy. Even in such situations, the path to a remedy may be blocked.

Before holding that a coordinate branch of the federal government or a state is violating the Constitution, the court often must apply doctrines that require it to show *deference* to the governmental unit whose conduct is being challenged.

Under these deference doctrines, the court should not find a constitutional violation unless the underlying evidence of the violation is very clear. Thus, the Supreme Court will not lightly conclude that the president's "travel ban" is motivated by unlawful discrimination, and lower courts will not easily find that the president's voter-fraud commission is a sham.

So, can the courts save us from unconstitutional government conduct? The answer is, only sometimes. More often, any "remedy" lies in the next election.

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