

NOT THE KING'S BENCH

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Speaking at a public birthday party for an icon, even if the honoree is one or two hundred years old, can be a surprisingly tricky business. Short of turning the party into a roast, it seems rude to criticize the birthday boy too harshly. On the other hand, it is at least as important to avoid unwarranted and exaggerated praise.¹ The difficult task, then, is to try to say something remotely new or interesting while navigating that strait.

The conference organizers did make it easier for me in one respect: My assignment does not involve those ideas for which *Marbury* is invoked as an icon. It is for others to wrestle in well-worn trenches with exalted arguments about judicial review and its overgrown descendent judicial supremacy, while trying to avoid unseemly criticism or fawning praise. I, on the other hand, am to address more technical issues involving section 13 of the Judiciary Act of 1789 and its provision granting the Supreme Court the power to issue writs of mandamus.

The proper interpretation of section 13 has continued to be of interest long after *Marbury*, largely because the question of judicial review of an Act of Congress only arises after that Act is interpreted. That is, a court must first interpret a statutory provision before it is confronted with the choice of whether to follow that statutory provision or instead follow a constitutional provision that would call for the case to be decided differently.

As anyone attending this birthday party already knows, the court in *Marbury* interpreted section 13 of the Judiciary Act of 1789 to provide the Supreme Court with original jurisdiction to issue the prerogative writ of mandamus to federal officers such

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1. See, e.g., Adam Nagourney & Carle Hulse, *Divisive Words: The Republican Leader; Bush Rebukes Lott Over Remarks on Thurmond*, N.Y. TIMES A1 (Dec. 13, 2002) (recounting President Bush's criticism of Senator Lott's comments at Senator Thurmond's one hundredth birthday party).

as Secretary of State James Madison, but refused to issue such a writ because to do so would exceed the original jurisdiction permitted the Supreme Court by Article III of the Constitution.

For years, scholars have contended that Marshall's interpretation of section 13 was seriously flawed, if not downright dishonest. Recent scholarship, however, has defended Marshall's interpretation of the statute as correct. My point today is not so much to attempt to resolve this dispute, but instead to suggest that what is particularly worth celebrating on *Marbury's* birthday is that the Supreme Court cared what that statute said, believed that what that statute said mattered, and rejected a view of itself as this nation's equivalent of the King's Bench.

I. SECTION 13 OF THE JUDICIARY ACT OF 1789

The Judiciary Act of 1789 was no minor piece of legislation. Although commonly known by that name, its formal name better reveals its importance, "An Act to establish the Judicial Courts of the United States." Until it was signed into law on September 24, 1789, the government under the new constitution had no judicial branch. Congress had convened on March 4, 1789, although obtaining a quorum took a bit longer, and President Washington was inaugurated on April 30, 1789.² But until Congress and the President acted to create the federal judiciary, it did not and would not exist.

This was obviously true as to the inferior federal courts, which are constitutionally optional. Unless and until the law-making process specified in Article I created inferior federal courts, there would be no such courts. But it is also true as to the Supreme Court, which the constitution requires but says remarkably little about, omitting even such obviously necessary specifics as the number of judges that constitute the Supreme Court. Until an Act of Congress spelled out such specifics, there would be no Supreme Court either.

The Judiciary Act of 1789, then, created the federal judiciary. It provided that the Supreme Court would consist of a chief justice and five associate justices.³ It divided the country into thirteen districts, with a district court and district judge for each

2. See THE ALMANAC OF AMERICAN HISTORY 153 (Arthur M. Schlesinger, Jr. ed., 1993).

3. Judiciary Act of 1789, § 1, 1 Stat. 73.

district.⁴ The districts were then grouped into three circuits, called the eastern, middle, and southern circuits.⁵ But it did not provide for the appointment of any circuit judges; the Supreme Court justices and the district judges were the only national judicial officers under the Judiciary Act of 1789. It did not even create circuit courts for each of these circuits, which is why we never hear of cases decided by the United States Circuit Court for the Middle Circuit. Instead, it provided for a circuit court for each district (other than the districts of Maine and Kentucky) consisting of two justices of the Supreme Court and the local district judge. The district courts were given jurisdiction of minor criminal cases, as well as admiralty and maritime cases,⁶ while the circuit courts were given jurisdiction of diversity suits, and suits by the United States (both subject to a five hundred dollar amount in controversy requirement), plus the entire range of criminal cases.⁷ The Supreme Court had appellate jurisdiction over certain civil actions decided by the circuit courts,⁸ as well as appellate jurisdiction over final decisions by state courts rejecting federal claims and defenses.⁹

All of these federal courts were given the power to issue all writs, "not specially provided for by statute," which were "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," and all of these judges were given the power to grant writs of habeas corpus to inquire into the cause of commitment of those in federal custody.¹⁰

4. Judiciary Act of 1789, § 2. Nine of the districts—the districts of New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia—were coextensive with state lines. The other four districts were created by subdividing two states into two districts each. The state of Massachusetts contained both the district of Maine and the district of Massachusetts, while the state of Virginia contained both the district of Kentucky and the district of Virginia. No district courts were created for Rhode Island or North Carolina, as neither state had yet ratified the new constitution.

5. Judiciary Act of 1789, § 4. The eastern circuit consisted of the districts of New Hampshire, Massachusetts, Connecticut and New York, the middle circuit of the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, the southern circuit of the districts of South Carolina and Georgia. The districts of Maine and Kentucky were not allocated to any circuit.

6. Judiciary Act of 1789, § 9. A minor criminal case was one "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted."

7. Judiciary Act of 1789, § 11.

8. Judiciary Act of 1789, § 22. Significantly, there was no appeal from a circuit court judgment in a criminal case.

9. Judiciary Act of 1789, § 25.

10. Judiciary Act of 1789, § 14.

The point of this thumbnail sketch of the Judiciary Act of 1789 is to provide context for *Marbury*, both by recalling how different the federal judicial structure at that time was from the structure we now seem to take for granted, and by situating section 13 of the Judiciary Act in the Act as a whole. Let us turn, then, to section 13 itself.

Section 13 of the Judiciary Act of 1789 provides:

And be it further enacted, that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under authority of the United States.¹¹

The key language for *Marbury*, of course, is in the final sentence, providing that the Supreme Court “shall have power to issue . . . writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

11. Judiciary Act of 1789, § 13. The punctuation and capitalization follow the version of the Act contained in the Statutes at Large, 1 Stat. 73, 80. Professor James Pfander reports that earlier and more historically accurate versions divide the provision regarding appellate jurisdiction from the provisions regarding *mandamus* by a colon or a dash rather than a semicolon, and capitalize the letter “A” in the provision regarding *mandamus*. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1539-46 (2001). Cf. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 296 (2002) (“offering what [the authors] immodestly think is the most comprehensive analysis ever written on the linguistic meaning and original understanding of the Constitution’s use of semicolons”).

Many scholars have argued that Marshall's interpretation of section 13 was wrong, and that Marshall should have interpreted section 13 not to apply in *Marbury* at all. If section 13 did not apply, of course, there would be no basis for reaching the constitutional question decided in *Marbury*. Indeed, for some, Marshall's interpretation of section 13 was so egregiously wrong that it can only be understood as a wilful misinterpretation of section 13 undertaken precisely in order to reach the constitutional question.¹²

There are two variants of this criticism.¹³ On the first variant, the mandamus power in section 13 applies only in cases within the Supreme Court's appellate jurisdiction. Since the provision regarding mandamus is contained in the same sentence as the provision regarding appellate jurisdiction, the mandamus grant could be understood as simply an aspect of that appellate jurisdiction. If the Supreme Court has appellate jurisdiction—because the case is one of the “cases herein after specially provided for”—then it may issue writs of mandamus to carry out that appellate jurisdiction. If not, it has no power to issue writs of mandamus. Since *Marbury* was not one of those appeals “herein after specially provided for,” this line of argument leads to the conclusion that there was no statutory basis for issuing the writ and *Marbury* should have lost without the court ever deciding a constitutional question.

On the second variant, the mandamus power in section 13 is a remedy available to the Supreme Court in both original jurisdiction cases and in appellate jurisdiction cases, but only if there is already a case properly before the court.¹⁴ As Professor Amar

12. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 389 (1982) (describing *Marbury*, including its interpretation of section 13, as “intellectually dishonest”). Cf. Susan Low Bloch, *The Marbury Mystery: Why Did Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 623-27 (2001) (suggesting that Marshall might have orchestrated the bringing of the case to the Supreme Court precisely in order to resolve the case as he did).

13. See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 15; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 446-47 (1996); EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 7-9 (1914); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 653 (1982).

14. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 453-64 (1989). In an article published shortly before this paper went to press, Professor Louise Weinberg attempts to defend *Marbury* from such criticisms. Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235 (2003). Rather than defend Marshall's statutory interpretation, however, she asserts that Marshall did not construe the statute at all. *Id.* at 1310 (“I am unable to locate the ‘statutory

puts it, “the mandamus clause is best read as simply giving the Court remedial authority—for both original and appellate jurisdiction cases—after jurisdiction (whether original or appellate) has been independently established.”¹⁵ This interpretation would likewise call for *Marbury* to lose on statutory grounds rather than constitutional grounds, because there was no other basis (independent of the mandamus clause itself) for him to invoke either the Supreme Court’s original or appellate jurisdiction. The difference is that this variant would read section 13 as permitting the Supreme Court to issue writs of mandamus in original jurisdiction cases, such as ambassador suits.

Marshall’s interpretation of the statute has recently been defended by Professor Pfander. In part, Pfander’s argument is typographical: He observes that many critiques of Marshall’s interpretation rely (in part) on the close connection between the provision regarding appellate jurisdiction and the provision regarding mandamus, and contends that earlier and more historically accurate renderings of section 13 show a more forceful separation of the two provisions. In particular, these earlier versions depict the provision regarding appellate jurisdiction divided from the provision regarding mandamus by a colon or a

construction’ of which *Marbury*’s critics complain.”). Taking a startlingly strong version of the principle that statutes should be construed so as to render them constitutional, she contends that while “Marshall undoubtedly held that the mandamus clause of Section 13 would be unconstitutional if read as a jurisdictional grant, he did not so read it himself. He *could* not so read it himself, because, as he held, it would be unconstitutional if so read.” *Id.* at 1311 (emphasis in original). Under this approach, it is difficult to see how *any* statute could actually be unconstitutional: Any time an interpreter thought that a statute, if read in a particular way, *would* be unconstitutional, that interpreter *could* not read the statute that way. Yet in Weinberg’s hands, the principle is not used to avoid constitutional decisions, but instead to facilitate avowedly hypothetical constitutional decisions. That is, while Weinberg contends that Marshall did not and could not have construed the statute to bear an unconstitutional meaning, she also contends that Marshall simply accepted the statutory construction proffered by Lee as counsel for *Marbury*. *Id.* at 1321. (“Marshall simply accepted, for purposes of stating the problem, the best hypothesis as to jurisdiction that Charles Lee offered.”) She finds it perfectly appropriate—indeed, ordinary—for a court to simply accept a party’s construction of a statute and then test that construction against the constitution. The result is that the court renders a hypothetical constitutional ruling: “If you read the statute as authorizing jurisdiction in this case, *then* the statute would be unconstitutional.” *Id.* at 1334 (emphasis in original); *see id.* at 1339 (describing such hypothetical constitutional rulings as “the familiar rhetoric of constitutional rulings ‘as applied’”); *see also id.* at 1335-36 (arguing against what she views as excessive constitutional avoidance). Thus Weinberg effectively turns the principle of constitutional avoidance on its head, as if to say, “Don’t bother with statutory interpretation, just assume that the statute means what the litigant asserts it means and decide whether a statute thus interpreted would be constitutional.” This is not the place for a full response to Weinberg’s arguments; here I simply note that, in my view, to describe a decision as a hypothetical constitutional ruling serves to criticize, not defend, it.

15. Amar, *supra* note 14, at 456.

dash rather than a semicolon, and capitalize the letter "A" in the provision regarding mandamus.¹⁶

More substantively, Pfander observes that mandamus, as a "high prerogative writ" developed by the Court of King's Bench, was not "a judicial remedy for use in actions otherwise properly before the court," but instead a "freestanding source of judicial authority that suitors were free to invoke by petition to the court in the first instance."¹⁷ Specifically, as Blackstone put it, the prerogative writ of mandamus was "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."¹⁸ In this respect, it dovetailed with sovereign immunity: the king could "do no wrong," so that if wrong was done, "his ministers [were] accountable for it to the people."¹⁹ Indeed, Pfander notes that "lawyers in the late eighteenth and early nineteenth century would have found . . . an ancillary 'remedial power' understanding of the writ of mandamus quite mysterious."²⁰

While there is much to be said for Pfander's defense of Marshall's interpretation of section 13, as I noted at the outset, my goal here is not to attempt to resolve the dispute regarding the proper interpretation of section 13. Instead, what I celebrate today is that the *Marbury* court thought that the question of statutory interpretation mattered. The *Marbury* court did not simply declare itself the American nation's equivalent of the King's Bench, empowered by the constitution to issue prerogative writs, but instead treated its powers to issue prerogative writs as subject to legislative control.

16. Pfander, *Marbury*, *supra* note 11, at 1539-46.

17. *Id.* at 1524-25.

18. 3 WILLIAM BLACKSTONE, COMMENTARIES at *110; *see also id.* at *264-65 (prerogative writ of mandamus "issues from the court of king's bench, commanding, upon good cause shewn to the court, the party complaining to be admitted or restored to his office"); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L. J. 40, 53 (noting that writ of mandamus "expressly alleged a contempt of the Crown consisting in the neglect of a public duty").

19. 3 BLACKSTONE at *254-55. *See also* 1 BLACKSTONE at *239 (noting that if it appeared that the king had wrongly granted a franchise or privilege, the law "declares that the king was deceived," either by his agents or by persons who deceived those agents).

20. Pfander, *Marbury*, *supra* note 11, at 1524.

This may seem to some to be a celebration of the trivially obvious, and therefore hardly worthy of celebration. But it was not so obvious in 1803, and there are those today who do not treat it as obvious.

II. THE PATH NOT TAKEN

When former Attorney General Charles Lee, arguing in *Marbury's* behalf before the Supreme Court, turned from the factual issues to the legal issues, he did not begin with section 13. Instead, he began with the practice of the King's Bench, contending that the Supreme Court of the United States, like the King's Bench, must have the power to issue the prerogative writs of mandamus and prohibition:

This is the *supreme* court, and by reason of its supremacy must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of *mandamus* and prohibition. 3 Inst. 70, 71. Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power²¹

It was only after reviewing Blackstone's description of the writ of mandamus and arguing that the "appellate jurisdiction" provided for in Article III of the constitution should be taken in "its largest sense," and "broadest sense," that Lee turned to section 13.²² Even then, Lee did not treat section 13 as creating the power, but instead merely as "recogni[zing]" the power.²³

As Pfander has demonstrated, Charles Lee was far from alone in linking a "supreme" court with the King's Bench, and thereby to the power to issue the prerogative writs such as mandamus, habeas corpus, prohibition, quo warranto, and certiorari.

21. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146-47 (1803), *reprinted in* 1 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 45-46 (Kurland & Casper ed., 1978). Moreover, the Supreme Court had previously entertained at least three applications for mandamus to executive officials. *See* Pfander, *Marbury*, *supra* note 11, at 1573-74. *But see* Weinberg, *supra* note 14, at 1322-28 (attempting to reconcile these cases with *Marbury*).

22. *Marbury*, 5 U.S. at 147-48.

23. *Marbury*, 5 U.S. at 148.

State courts in numerous states had done so.²⁴ The key, however, was not the name of the court. Instead, as the Supreme Court later explained, the key was that "where the common law is adopted," the "highest court of original jurisdiction" was treated as the equivalent of the King's Bench with "general supervising power over all inferior jurisdictions and officers."²⁵ While each state did adopt the common law,²⁶ they were not consistent in the nomenclature for their courts. For example, in Pennsylvania, that "highest court of original jurisdiction" was called the "Supreme Court,"²⁷ but in Maryland, in contrast, it was called the "General Court."²⁸

Today, we tend to think of supreme courts as appellate courts at the apex of a judicial hierarchy, often with considerable discretion to select their own cases. At the founding, however, state supreme courts were trial courts, distinguished from other courts because they had broader (frequently general) subject matter jurisdiction and state-wide personal jurisdiction rather than circumscribed subject matter and personal jurisdiction.²⁹ They were not necessarily the highest court in a state, but might

24. Pfander, *Marbury*, *supra* note 11, at 1534-35 (citing authority from Maryland, Massachusetts, New York, Connecticut, Pennsylvania, Delaware, and Virginia).

25. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 621 (1838).

26. See, e.g., STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 57 (1991) (noting that "in time each state was to pass a statute indicating that the English common law, insofar as it was consistent with American institutions, was to be in force").

27. See Bernard F. Scherer, *The Supreme Court of Pennsylvania and the Origins of the King's Bench Power*, 32 DUQ. L. REV. 525, 525-29 (1994) (noting that the colonial Supreme Court in Pennsylvania was explicitly given the power of the King's Bench, and the 1776 Constitution provided that the supreme court would have "the powers usually exercised by such courts").

28. See MARYLAND CONSTITUTION of 1776, art. 56; see also *Kendall*, 37 U.S. at 631 (Taney, C.J., dissenting) (noting that "the general court was, in the state of Maryland precisely what the court of king's bench was in England").

29. See David E. Engdahl, *What's In a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L. J. 457, 473 (1991) (noting that the adjective "supreme" carried the connotation of "nationwide (or statewide) geographical competence"); *id.* at 503-04 (noting that "the hierarchical design of the judicial department taken for granted today is not the design with which our federal history began, and is by no means what the text of the Constitution requires"); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1180 n.139 (1992) (noting that the words "supreme" and "inferior" were probably used in the same sense in the Constitution as in Blackstone's Commentaries: to distinguish between courts "subject to narrow geographic and subject matter restraints" and courts not subject to such restraints). See also WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 35 (Wythe Holt & L.H. LaRue eds., 1990) (noting that "the basic court system structure in 1787-89 . . . was horizontal. There were different levels of courts, which meant by definition that some were 'superior' and some were 'inferior.' All were trial courts.") (emphasis in original).

be subject to another court's appellate jurisdiction, just as the House of Lords exercised appellate jurisdiction over the King's Bench.³⁰

While Marshall, following Lee, did discuss the nature of the writ of mandamus and invoke Blackstone before turning to the Judiciary Act, he did not make any assertion that the Supreme Court of the United States inherited the jurisdiction of the King's Bench, nor did he claim that it has any powers at all based on being the "supreme court." Instead, as soon as Marshall posed the question whether mandamus "can issue from this court," he quoted section 13 of the Judiciary Act:

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."³¹

30. See generally Engdahl, *supra* note 29, at 468-72 (describing the various state judicial structures at the founding). For example, "between 1780 and 1806, the Supreme Court of Pennsylvania was inferior to the High Court of Errors and Appeals of Pennsylvania." *Mayle v. Pennsylvania Dept. of Highways*, 388 A.2d 709, 711 n.8 (Pa. 1978). Similarly, prior to the New Jersey Constitution of 1947, the Supreme Court of New Jersey "possessed the Great Powers of the court of King's Bench in England," with the power to issue "the great prerogative writs of King's Bench," but was not the highest court. ARTHUR MURPHY, *THE COURTS OF THE STATE OF NEW JERSEY UNDER THE NEW JERSEY CONSTITUTIONS OF 1844 AND 1947* at 3 (1952). The 1947 Constitution created a new "Supreme Court" at the apex of a judicial hierarchy, N.J. CONST. art. 6, § 2, and a "Superior Court" with general state-wide jurisdiction in all cases, N.J. CONST. art. 6, § 3, ¶ 1, while providing that "prerogative writs are superceded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court . . . as of right, except in criminal cases where such review shall be discretionary." N.J. CONST. art. 6, § 5, ¶ 4.

The older understanding of a "supreme" court has not been lost completely. For example, the Supreme Court of New York is a trial court, not the highest court in the state, and does have the authority to issue the modern-day descendants of the prerogative writs. See, e.g., *Sanford v. Rockefeller*, 35 N.Y.2d 547, 573 (1974) (Wachtler, J., dissenting) (noting that with "the modernization of our civil practice, article 78 was adopted to consolidate the prerogative writs into one type of proceeding"). There is nevertheless a tendency to view New York's terminology as an oddity, rather than as a surviving remnant of tradition.

Pfander argues that the House of Lords did not exercise appellate jurisdiction in prerogative writ cases. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1449 (2000).

31. *Marbury*, 5 U.S. at 173. At least under current principles of quotation, an ellipsis should have been included between the word "issue" and the word "writs" to indicate the omission of the intervening phrase concerning writs of prohibition. One should be hesitant, however, before accusing Marshall of deliberate distortion, considering that the Supreme Court at the time of *Marbury* lacked an official reporter, that the first official reporter, Henry Wheaton, was promised "any written opinions [the Justices] might prepare, or notes they might make in connection with their oral opinions," that the prior unofficial reporters frequently published what they could from "opinions . . . often extemporaneously delivered from only the most rudimentary notes," and that the Court did not provide for the filing of its opinions with its clerk until 1834. See Craig Joyce, *The*

He certainly did not claim that section 13 merely "recognized" the Supreme Court's inherent authority to issue prerogative writs.

Marbury's explicit holding is that Congress lacked the constitutional authority to bestow original mandamus jurisdiction on the Supreme Court, beyond the cases allocated by Article III to the Supreme Court's original jurisdiction. Implicitly, however, it indicates that whether the Supreme Court is empowered to issue a particular prerogative writ depends, in the first instance, on whether Congress authorized it to do so.³²

Subsequent decisions similarly make clear that the inferior federal courts cannot issue writs of mandamus without Congressional authorization.³³ When the Supreme Court in 1838 ultimately held that the Circuit Court for the District of Columbia had the power to issue mandamus to federal officers, it rested on two statutory provisions: one provided that the laws of Maryland—which had adopted the common law of England—were continued in force in that part of the district that had been ceded from Maryland,³⁴ and a second that gave that court all of the powers of the circuit courts created by the Judiciary Act of 1801.³⁵ At the same time, the Supreme Court observed that its

Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy, 83 MICH. L. REV. 1291, 1298 n.46, 1321, 1328, 1343 (1985); see also 6 THE PAPERS OF JOHN MARSHALL 164 (Charles Hobson ed., 1990) ("No manuscript of the [*Marbury*] opinion survives.").

32. Cf. James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 249 (1992) (noting that Marshall "quickly set aside the question of the availability of common law remedies . . . because the appropriate remedy was available by legislative provision").

33. *McIntire v. Wood*, 11 U.S. 504 (1813) (holding that the circuit courts lacked the power to issue writs of mandamus); *Smith v. Jackson*, 1 Paine 453, 22 F. Cas. 575, 576, No. 13,064 (C.C.N.D.N.Y. 1825) (refusing mandamus and noting that the circuit court "has not the like superintending authority over the district courts, as the king's bench in England, and the supreme court of this state have over inferior tribunals" and that "in the sense of the constitution, the circuit as well as the district courts are inferior courts, and their respective jurisdiction is pointed out by acts of congress"). Ironically, the author of the *Wood* decision, Justice William Johnson, while holding the circuit court, had previously issued a writ of mandamus to a collection officer, provoking a firestorm of criticism. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D. S.C. 1808) (No. 5,420); see GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 298-303 (1981). See also *McClung v. Silliman*, 19 U.S. 598 (1821) (holding that the state courts lacked jurisdiction to issue mandamus to federal officers).

34. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 619-20 (1838); see also *id.* at 621 (noting that the "common law has not been adopted by the United States, as a system in the states generally, as has been done with respect to this district").

35. *Id.* at 624-25 (concluding that the statutory reference was to the circuit courts created by the Judiciary Act of 1801, even though that act was repealed). Whether the same conclusion would have been reached in 1803 if *Marbury* had sought mandamus in

own power to issue mandamus was “not exercised, as in England, by the king’s bench, as having a general supervising power over inferior courts,” but rather only as provided by statute.³⁶

Habeas corpus. The idea, implicit in *Marbury*, that whether the Supreme Court is empowered to issue a particular prerogative writ depends, in the first instance, on whether Congress authorized it to do so, was made explicit just a few years later in another landmark case, *Ex parte Bollman*,³⁷ which involved a different prerogative writ, the prerogative writ of habeas corpus. Habeas corpus was a “high prerogative writ . . . issuing out of the court of king’s bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king’s dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.”³⁸

Erick Bollman and Samuel Swartwout were arrested on charges of treason and committed for trial by the circuit court of the District of Columbia for the County of Washington. Counsel for Swartwout, none other than Charles Lee again, petitioned the Supreme Court for a writ of habeas corpus. Counsel for Bollman, Robert Harper, did the same. Having lost in *Marbury*, Lee did not argue that since the King’s Bench had the power to issue the prerogative writ of habeas corpus, so too did the Supreme Court of the United States.³⁹ Instead, he analyzed the Ju-

the Circuit Court for the District of Columbia is unclear. Compare Bloch, *supra* note 12, at 617 (claiming that there is “good reason to believe Marbury and his colleagues would have prevailed in the Circuit Court”) with Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 52 n.271 (2003) (claiming that “it seems highly doubtful that the Court, in the politically charged atmosphere of 1803, would have upheld the authority of the D.C. Courts to order mandamus relief for William Marbury against James Madison”). Congress, of course, could have abolished the Circuit Court for the District of Columbia as easily as it did the circuit courts created by the Judiciary Act of 1801.

36. *Kendall*, 37 U.S. at 621-22. See also *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803) (quashing writ of error to General Court of Northwest Territory because Congress had not provided for Supreme Court review of decisions of that court); HASKINS & JOHNSON, *supra* note 33, at 621 (describing Clarke as “further evidence that all of the Supreme Court’s appellate jurisdiction was the product of a constitutional grant as implemented by legislative action; absent one or the other of these vital elements, the Court refused to expound a theory of residual superintendence of federal courts as a foundation for its jurisdiction”).

37. 8 U.S. (4 Cranch) 75 (1807). Indeed, in Kurland and Casper’s collection of landmark briefs, *Bollman* follows immediately after *Marbury*.

38. 3 BLACKSTONE at *131.

39. The closest he came was in arguing that since the Supreme Court derives its power and jurisdiction, “not from a statute, but from the constitution itself,” and “no act

diary Act in detail.⁴⁰ Harper, on the other hand, began his argument in terms much like those used by Lee in *Marbury*:

The general power of issuing this great remedial writ, is incidental to this court as a supreme court of record. It is a power given to such a court by the common law. Every court possesses necessarily certain incidental powers as a court. . . . These powers are not given by the constitution, nor by statute, but flow from the common law. . . . [T]he power of issuing writs of habeas corpus, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.⁴¹

Harper argued that the "question might be safely rested" on "this ground alone." When he turned to the statutory basis for the issuance of habeas corpus, section 14 of the Judiciary Act of 1789, he noted that the statutory argument was "not stronger indeed."⁴²

The court, speaking again through Marshall, emphatically rejected the argument that it could issue the prerogative writ of habeas corpus without statutory authorization. At the very outset, the opinion states:

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.

The court responded to counsel's argument by acknowledging that "resort may unquestionably be had to the common law," to determine the meaning of the term *habeas corpus*, but insisted that "the power to award the writ by any of the courts of the United States, must be given by written law." While the court put to one side whether statutory authorization was necessary for courts to exercise power "over their own officers, or to pro-

of Congress has taken . . . away" the Supreme Court's appellate jurisdiction, "[n]o legislative act is necessary to give powers to this court." 8 U.S. at 77.

40. 8 U.S. at 77-79.

41. 8 U.S. at 79-80; Kurland & Casper, *supra* note 21, at 57-58.

42. 8 U.S. at 83; Kurland & Casper, *supra* note 21, at 61.

tect themselves, and their members, from being disturbed in the exercise of their functions,” it was explicit that for the court to decide “any question between individuals, or between the government and individuals,” the power “must be given by written law.” It therefore framed the question for decision as “whether by any statute, compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case . . . has been given to this court.”⁴³

It concluded that just as section 13 of the Judiciary Act empowered the Supreme Court to issue the prerogative writ of mandamus to federal executive officials, so, too, section 14 of the Judiciary Act empowered the Supreme Court to issue the prerogative writ of habeas corpus.⁴⁴ In contrast to *Marbury*, however, the court found that section 14 could be utilized in *Bollman* as a constitutional exercise of the Supreme Court’s appellate jurisdiction because the writ sought “the revision of a decision of an inferior court.”⁴⁵

Prohibition. Prohibition was the “king’s prerogative writ . . . directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof . . . [because] the cause . . . does not belong to that jurisdiction, but to the cognizance of some other court.”⁴⁶ The Supreme Court similarly understood that its power to issue writs of prohibition was controlled by statute. Section 13 empowered the Supreme Court to issue the prerogative writ of prohibition to the districts courts, when those courts were proceeding as courts of admiralty and maritime jurisdiction.⁴⁷

By 1845, when moving for the Supreme Court to issue a writ of prohibition to a district court sitting in bankruptcy, counsel

43. 8 U.S. at 93-94. See Pfander, *Marbury*, *supra* note 11, at 1599 (noting that “Marshall’s decision to disavow the Court’s inherent supervisory powers runs parallel to his retreat to written law, and seems to anticipate his similar insistence in *Ex parte Bollman* that the power of the federal courts to issue writs of habeas corpus . . . must rest on statutory law”).

44. 8 U.S. at 94-100. See also *Ex parte Watkins*, 28 U.S. 193, 201 (1830) (stating that “the judicial act authorizes this court, and all courts of the United States, and the judges thereof, to issue the writ ‘for the purpose of inquiring into the cause of commitment’”).

45. 8 U.S. at 100-01. For an argument that *Bollman* was wrongly decided, see ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 29-45 (2001).

46. 3 BLACKSTONE at *112. See also de Smith, *supra* note 18, at 49-50 (noting that the prerogative character of prohibition “has been repeatedly stressed” and that the purpose of the writ is not so much to protect private interests but rather to ensure that the royal prerogative has not been violated by a departure from the prescribed order for the administration of justice).

47. Judiciary Act of 1789, § 13.

noted that "in the King's Bench this would be clearly a case for a prohibition," but admitted that the Supreme Court "does not possess, in such cases, an authority coextensive with that of the King's Bench."⁴⁸ He argued instead that the express grant of authority to issue writs of prohibition in admiralty and maritime cases was made "out of abundant caution," and that the Supreme Court could issue the writ of prohibition under section 14 because the writ was "necessary for the exercise of the Supreme Court's appellate powers."⁴⁹

The problem with this argument was that, under the statutory scheme then in effect, the Supreme Court did not have appellate jurisdiction over the district courts sitting in bankruptcy, making it difficult to see how the writ of prohibition was necessary to the Supreme Court's appellate jurisdiction. As Justice Catron succinctly put it, "By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ: that it has none to revise the proceedings of a bankrupt court is our unanimous opinion."⁵⁰

Counsel also contended that if the Supreme Court could not issue prohibition to a district court sitting in bankruptcy, then "its authority to revise the proceedings of inferior tribunals [and] to confine them within the limits of their jurisdiction . . . is so far completely nullified."⁵¹ The Court responded:

But it is objected, that the jurisdiction of the District Court is summary in equity and without appeal to any higher court. This we readily admit. But this was a matter for the consideration of Congress in framing the act. Congress possesses the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States; and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in their judgment best promote the public convenience and the true interests of the citizens. . . . Because there is no appeal given, it by no means follows, that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments either of the District or Circuit Court in criminal cases; and yet within the cognizance of one or both of those courts are all crimes and offenses against the United

48. *Ex parte Christy*, 44 U.S. (3 How.) 292, 306 (1845) (argument of Wilde).

49. *Id.* at 306-07.

50. *Id.* at 322 (Catron, J., concurring).

51. *Id.* at 307 (argument of Wilde).

States, from those which are capital down to the lowest misdemeanors, affecting the liberty and the property of the citizens. And yet there can be no doubt that this denial of appellate jurisdiction is founded in a wise protective public policy.⁵²

Thus, the Supreme Court refused to issue the prerogative writ of prohibition because Congress had not given it statutory authority to do so, even if that meant that the district court's decision could not be reviewed.

Quo warranto. Quo warranto, which makes it onto some (but not all) lists of prerogative writs,⁵³ was "in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right."⁵⁴ If available, it might have presented the best opportunity for the circuit judges who lost their supposedly life-tenured offices when the Judiciary Act of 1801 was repealed to challenge the constitutionality of the repeal. But the Judiciary Act of 1789 did not mention quo warranto, and none of the judges sought the writ.⁵⁵ Justice Chase,

52. *Id.* at 317 (opinion of the Court, delivered by Story, J.). The Court went further, adding, "[W]e know of no case where this court is authorized to issue a writ of prohibition to the District Court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789 . . . that is to say, where the District Courts are 'proceeding as courts of admiralty and maritime jurisdiction.'" *Id.* Under current law, the Supreme Court may issue writs of prohibition to district courts in aid of its appellate jurisdiction, derivative of the courts of appeals, over the district courts. *Ex parte Peru*, 318 U.S. 578 (1943).

53. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 802 (listing certiorari, quo warranto, habeas corpus, prohibition, and mandamus); de Smith, *supra* note 18, at 42 (giving detailed consideration to the "four main prerogative writs," not including quo warranto); ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* 498 (8th ed., 2002) (noting that the "principal extraordinary writs are mandamus, prohibition, habeas corpus, and certiorari").

54. 3 BLACKSTONE at *262.

55. Charles Warren reports that a "suit was instituted by one of the deposed Circuit Judges in the 3d Circuit in New Jersey, *Joseph Reed v. Joseph Prudden*, presenting the question of the constitutionality of the repealing Act of 1802, and the power of the Supreme Court Judges to sit in the Circuit Courts," but gives no further information about the case. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 272 n.1 (revised edition, 1926). This description is dubious, given that neither Reed nor Prudden were among the displaced circuit judges. For the names of the displaced circuit judges, see Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

Professor Wythe Holt states that the plaintiff was former Senator Jacob Read of South Carolina who had been appointed to the *district* court but "was denied his seat when the sitting district judge refused to accept the appointment" as circuit judge. Wythe Holt, "[I]f the Courts have firmness enough to render the decision:" Egbert Benson and the Protest of the "Midnight Judges" Against Repeal of the Judiciary Act of 1801, in *EGBERT BENSON: FIRST CHIEF JUDGE OF THE SECOND CIRCUIT (1801-02)* at 73 n.61 (Wythe Holt & David A. Nourse, eds., 1987). He adds that little is known about the

who thought the repeal unconstitutional, urged his Supreme Court colleagues to refuse to hold the circuit courts in place of the displaced circuit judges, in part because neither mandamus nor quo warranto was available as a remedy.⁵⁶

There was no scheduled session of the Supreme Court in which Chase could attempt to persuade his colleagues in person, Congress having effectively adjourned the Court from December 1801 until February 1803.⁵⁷ The Justices did, however, explain their views to each other by letter.⁵⁸ Chief Justice Marshall

suit—including why it was brought in New Jersey—and that “the New Jersey federal court records for this period have been discarded.” *Id.* This description is dubious as well. Two different newspaper accounts of the case, including the one cited by Holt, spell the plaintiff’s name “Reed,” not “Read,” and neither so much as mentions that the plaintiff was a former United States Senator or had been appointed as a United States District Judge. See NEW ENGLAND PALLADIUM, April 19, 1803; WASHINGTON FEDERALIST, April 23, 1803 (reproducing story from the Charleston Courier). Moreover, even apart from the implausibility of a former United States Senator from South Carolina seeking to litigate a dispute about a seat on the United States District Court for the District of South Carolina before a court in New Jersey, it is difficult to imagine how anyone appointed to an Article III judgeship in anticipation that the incumbent judge would vacate the office could think that he had any sort of claim to that office if the incumbent judge declines to vacate it. Finally, and quite tellingly, the case was brought in the October 1801 term of the circuit court, see *id.*; that is *after* the adoption of the Judiciary Act of 1801, but *before* its repeal in 1802.

Far more likely, then, the case was an ordinary private civil suit that, as filed, presented no question about the constitutionality of a repeal that had yet to occur. The constitutionality of the repeal subsequently arose because the case had been filed before a circuit court created by the Judiciary Act of 1801, Congress repealed that Act, directing (as the contemporary newspaper accounts put it) “that all proceedings in the 3rd Circuit shall be transferred to a Circuit Court to be holden by justice Paterson, and judge Morris, on the 1st of October 1802, for the district of New Jersey,” and the defendant “came before those judges . . . and pleaded against their holding cognizance of the action thus brought before them.” *Id.*

56. Letter from Samuel Chase to John Marshall, April 24, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 109, 113, also reprinted in HASKINS & JOHNSON, *supra* note 33, at 172 n.182. See also O’Fallon, *supra* note 32, at 248 (noting that the lack of a remedy for the displaced circuit judges “returns to one of the central issues of the repeal debate—whether the federal courts could have recourse to the common law”).

Eleven of the displaced circuit judges submitted memorials to the Senate asserting that they had been unconstitutionally deprived of their offices and compensation, and noting that their right to compensation, “will cheerfully be submitted to judicial examination and decision, in such manner as the wisdom and impartiality of Congress may prescribe.” *Id.* A Senate committee did present, without recommendation, a resolution calling on the President “to cause an information, in the nature of quo warranto, to be filed by the Attorney General against Richard Bassett, one of the [displaced circuit judges], for the purpose of deciding judicially on their claims.” HASKINS & JOHNSON, *supra* note 33, at 178-79. The proposal “triggered Republican sensitivities to the common law pretensions of the federal courts” and was defeated. O’Fallon, *supra* note 32, at 240, 248.

57. See O’Fallon, *supra* note 32, at 219, 239 (noting that as “a result” of Congressional alteration of the terms of the Supreme Court, “the next meeting of the Court would be after the Justices had to decide whether to resume their circuit riding duties”).

58. See Letter from John Marshall to William Paterson, April 19, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 108-09 (“It having now become apparent

noted his “strong constitutional scruples” against “the performance of circuit duty by the Judges of the supreme court,” but also his view that the constitutional question had been decided by past practice.⁵⁹ Justice Washington agreed that the question was settled by past practice,⁶⁰ as did Justice Cushing,⁶¹ and Justice Paterson.⁶² Observing that while the “burthen of deciding so momentous a question . . . would be very great on all of the Judges assembled,” an “individual Judge, declining to take a Circuit, must sink under it,” Justice Chase urged a meeting of the justices in Washington over the summer to discuss the question,⁶³ but no such meeting was ever held, and by the time they did meet in February of 1803, the individual justices had already held the circuit courts in place of the displaced circuit judges.⁶⁴

that there will be no session of the supreme court of the United States holden in June next & that we shall be directed to ride the circuits, before we can consult on the course proper to be taken by us, it appears to me proper that the Judges should communicate their sentiment on this subject to each that they may act understandingly & in the same manner.”). See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1782-94 (2003).

59. Letter from John Marshall to William Paterson, April 6, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 105-06. He also admitted that he would “be privately gratified if such should be the opinion of the majority,” observing that there was “no doubt . . . but that policy dictates this decision to us all,” while noting that judges “of all men” have “the least right to obey” the dictates of policy. Letter from John Marshall to William Paterson, May 3, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 117-18.

60. See Letter from John Marshall to William Paterson, May 3, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 117.

61. See Letter from John Marshall to William Paterson, June 11, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 120-21; HASKINS & JOHNSON, *supra* note 33, at 177 (quoting letter from William Cushing to William Paterson, May 29, 1802).

62. See Letter from Hannah Cushing to Abigail Adams, June 25, 1802 (incorporating excerpts of letter from William Paterson to John Marshall, ca. May 25, 1802), quoted in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 118 n.6. It does not appear that Justice Moore voiced support for Justice Chase. See Louis H. Pollak, *Marshall and the “Campaign of History,”* 131 U. PA. L. REV. 475, 482 (1982) (stating that Justice Moore disapproved of the suggestion that the justices not comply with the Judiciary Act of 1802); cf. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 479 (1983) (noting that Justice Moore “deserve[s] a high place in the ranks of the insignificant”); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 485-86 (1983) (“On an ex ante approach we might award the honors to Alfred Moore by acclamation. Justice Moore, who delivered one brief opinion during his four placid terms, showed every promise of setting a standard of passive irrelevance for centuries to come; only his resignation prevented him from fulfilling his pledge.”).

63. Letter from Samuel Chase to John Marshall, April 24, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 116; also reprinted in HASKINS & JOHNSON, *supra* note 33, at 177. See also Letter from John Marshall to William Paterson, April 19, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 108-09 (“This is a subject not be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious.”).

64. See Holt, *supra* note 55, at 16 (noting that the displaced circuit judges, con-

Thus it was anti-climactic when a judgment rendered by Chief Justice Marshall at circuit was upheld against a constitutional challenge (again argued by Charles Lee) six days after *Marbury*,⁶⁵ particularly since Justice Chase had argued to his colleagues that for a Justice to hold the circuit court depended on a prior determination that the repeal was valid.⁶⁶ While Justice Cushing rejected this inference, his reasoning underscores the unavailability of a remedy for the displaced circuit judges: "It is not in our power to restore to them their salaries or them to the exercise of their offices. Declining the circuits will have no tendency to do either."⁶⁷

The displaced judges never obtained any relief,⁶⁸ and quo warranto never emerged as a significant writ in Supreme Court practice.⁶⁹

strained by the decision of the justices to hold circuit court, did not attempt to hold the court themselves); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 78-79, 101-05 (2002); O'Fallon, *supra* note 32, at 239-40; Letter from John Marshall to William Paterson, May 3, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 117-18 ("If we determine certainly to proceed to do circuit duty it will I presume be entirely unnecessary to meet in August."). Professor Weinberg seems to think that the associate justices had resumed their circuit court duties in the spring of 1802, prior to the exchange of letters among the justices that same spring. Weinberg, *supra* note 14, at 1283 (stating that the associate justices "had resumed their circuit duties without consulting Marshall, in 1802, shortly after the repeal Act went into effect" and relying for this proposition on Marshall's April 6, 1802, letter to Paterson). While the repeal act was enacted on March 8, 1802, its effective date was July 1, 1802. Act of March 8, 1802, §§ 1-3, 2 Stat. 131. The first terms of the revived circuit courts were scheduled for the fall of 1802. Act of April 29, 1802, § 4, 2 Stat. 156, 157-58. See also *id.* § 9, 2 Stat. 156, 163 (providing for the transfer of cases to the revived circuit courts as of July 1, 1802). Thus while Marshall lamented in April 1803 that the June 1802 term of the Supreme Court had been canceled—so that there would be no session of the Supreme Court prior to the scheduled fall terms of the revived circuit courts—the exchange of letters occurred before the justices resumed riding circuit in the fall of 1802.

65. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

66. Letter from Samuel Chase to John Marshall, April 24, 1802, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 114; also reprinted in HASKINS & JOHNSON, *supra* note 33, at 175 ("If he executes the office of Circuit Judge, I think he, thereby, decides that the repealing act was constitutional. I conceive that he must, before he acts, decide, whether the repealing act was constitutional, or not. If he thinks it unconstitutional, he cannot act under it.") (emphasis omitted because the two sources differ). See also Holt, *supra* note 55, at 16-17 (noting that when prominent Federalist lawyers objected to the circuit court as reconstituted with a Supreme Court justice and a district judge, "[a]s if by prearrangement, in each case (save one [Stuart v. Laird]) the same thing happened: upon hearing the plea to jurisdiction and before it could be argued, the court adjourned overnight, consultation occurred between judges and lawyers, and the next day the plea was passed over or withdrawn without comment").

67. Letter from Hannah Cushing to Abigail Adams, June 25, 1802 (incorporating excerpts of letter from William Cushing to Samuel Chase) in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 31, at 116 n.5.

68. Indeed, at least one of them appeared as counsel before the revived circuit

Certiorari. The prerogative writ of certiorari “was essentially a royal demand for information.”⁷⁰ Certiorari was used to remove indictments “from any inferior court of criminal jurisdiction” into the King’s Bench, and was granted “as a matter of right” when claimed by the prosecutor.⁷¹ In addition, the writ of certiorari was used as a means of obtaining additional information about a case that was already before the court.⁷²

The Judiciary Act of 1789 did not specially provide for the writ of certiorari, so that the writ could only be used, pursuant to section 14, when “necessary for the exercise” of jurisdiction otherwise given.⁷³ Although we have become accustomed to the Supreme Court of the United States using the writ of certiorari to bring cases before it, it did not do so until Congress so authorized in 1891.⁷⁴ Until that time, the Supreme Court issued the writ of certiorari only “to supply imperfections in the record of a case already before it, and not, like a writ of error, to review the judgment of an inferior court,” nor “to bring up . . . for trial a case within the exclusive jurisdiction of a higher court.”⁷⁵

court which supplanted the very court to which he had been appointed even prior to the Supreme Court’s decision in *Stuart v. Laird*. Holt, *supra* note 55, at 23 (referring to Egbert Benson); see also *id.* at 74 n.65 (noting that William Griffith did the same afterwards).

69. The chapter of Stern & Gressman’s *Supreme Court Practice* devoted to extraordinary writs does not even mention quo warranto. See STERN, *supra* note 53 at 580-99. In 1820, the Supreme Court held, in an appeal from a decision of a circuit court, that quo warranto “could not be maintained except at the instance of the Government.” *Wallace v. Anderson*, 18 U.S. (5 Wheat.) 291, 292 (1820).

70. de Smith, *supra* note 18, at 45.

71. 4 BLACKSTONE at *315-16 (noting that where the defendant seeks certiorari, it may be granted “as a matter of discretion” and “therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of fact in any of the courts below”). See also *Ex parte Vallandigham*, 68 U.S. 243, 249 (1863) (observing that “where such certiorari is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases”).

72. de Smith, *supra* note 18, at 47 (noting that “where the record of the inferior court is alleged to be incomplete . . . certiorari issues to order the remainder of the record to be returned”).

73. Judiciary Act of 1789, § 14.

74. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649-57 (2000) (discussing the first statutory authorization for the use of certiorari to obtain jurisdiction over a case).

75. *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 380 (1893); *United States v. Young*, 94 U.S. (4 Otto) 258, 259-60 (1876) (noting that, in contrast to practice at common law, the Supreme Court of the United States used the writ of certiorari only as “auxiliary process . . . to obtain further information in respect to some matter already before it for adjudication”). See also 28 U.S.C. § 1447(b) (providing that a district court, in a case removed from state court, “may require the [removing party] to file with its clerk copies of all record and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.”)

In the certiorari context, the contrast between the Supreme Court of the United States and the King's Bench was made quite explicitly. In rejecting a motion for certiorari to review the proceedings of a military commission, the Court stated:

Our first remark upon the motion for a certiorari, is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. . . . In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a certiorari to have any indictment removed and brought before it; and where such certiorari is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress.⁷⁶

If it seems difficult to imagine the Supreme Court of the United States as the nation's equivalent of the King's Bench, consider that if one believed that the common law were part of national law, one might readily treat the Supreme Court as the "highest court of original jurisdiction" armed with the "general supervising power" of King's Bench through the use of the prerogative writs.⁷⁷ And recall that prior to *Marbury*, and for a time

76. *Ex parte Vallandigham*, 68 U.S. 243, 249 (1863). The Court also observed that it "was natural, before the sections of the 3d article of the Constitution had been fully considered in connection with the legislation of Congress . . . that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section [of the Judiciary Act of 1789] gave to this court a right to originate processes of habeas corpus [and] writs of certiorari to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation" of original jurisdiction. *Id.* at 252.

Clement Vallandigham was a "prominent Democratic politician and former Congressman" who had been arrested by Union soldiers "for an anti-war political speech." Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 107 (1998). He was convicted after trial before a military commission and sentenced to close confinement for the duration of the war, but President Lincoln changed the punishment to banishment to the Confederacy. *Id.* at 131. After using a blockade runner to leave North Carolina, he reached Canada and from there ran an unsuccessful campaign as the Democratic nominee for Governor of Ohio. *Id.* at 135. President Lincoln was referring to Vallandigham when he asked, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" *Id.* at 161. See also DANIEL FARBER, *LINCOLN'S CONSTITUTION* 170-71 (2003) (discussing *Vallandigham*).

77. See PRESSER, *supra* note 26, at 243 n.51 ("Given the belief in most of the Supreme Court judges in the federal common law of crimes . . . it is difficult not to believe

afterwards, there were Supreme Court Justices who, while holding circuit court, did act as if they were judges of the King's Bench by adjudicating federal common law criminal prosecutions.⁷⁸

For example, in April of 1790, before Congress passed a crimes act, two men were indicted, tried, and convicted in the circuit court for the district of New York for conspiring to destroy a ship and murder her captain.⁷⁹ Similarly, in 1797, there were four prosecutions in the circuit court for the district of Massachusetts involving counterfeit bills of the Bank of the United States, which was not then a statutory crime.⁸⁰ In 1798, the circuit court for the district of Pennsylvania convicted a defendant for bribing a revenue commissioner, even though that was not, at the time, a statutory crime.⁸¹ Indeed, it appears that Samuel Chase was the only federal judge before 1800 to actually reject the idea of a federal common law of crimes.⁸²

Such common law criminal prosecutions were vehemently attacked by the Jeffersonian Republicans.⁸³ Jefferson once described the assumption of such a common law power as the worst thing the Federalists ever did:

that Marshall and his fellows could not have concocted a simple common law basis for the granting of the relatively simple relief sought in *Marbury*.”)

78. The King's Bench was “the principal court of criminal jurisdiction,” with “cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace.” 4 BLACKSTONE *262.

79. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 130 (1995).

80. See JULIUS GOEBEL, JR., 1 *HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* at 629-30 (1971); see also Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 *YALE L. J.* 919, 920 n.8 (1992) (listing federal common law criminal prosecutions); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 *U. PENN. L. REV.* 1003, 1042-73 (1985) (discussing early federal common law prosecutions).

81. *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766). See CASTO, *supra* note 79, at 141-47. Worrall was unusual in that sentence was imposed even though the two judges disagreed regarding the existence of a federal common law of crimes. See *id.* at 147; cf. Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 *WM. & MARY L. REV.* 643, 656 n.57 (2002) (explaining that this result may have been produced because “the jury had convicted and the Court divided evenly on the defendant's motion in arrest of judgment,” with the tie resulting in the denial of the motion).

82. PRESSER, *supra* note 26, at 43. See also 3 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: THE JUSTICES ON CIRCUIT 1795-1800*, at 322 (Maeva Marcus ed., 1990).

83. See Jay, *supra* note 80, at 1089 (“It would be an understatement to characterize the Republican reaction to the Federalist position on national judicial power that emerged in the late 1790's as vehement or caustic.”); HASKINS & JOHNSON, *supra* note 33, at 138-42, 159-63.

All their other assumptions of un-given power have been in the detail. The bank law, the treaty law, the sedition act, alien act, the undertaking to change the state laws of evidence in the state courts by certain parts of the stamp act, &c., &c, have been solitary, inconsequential, timid things, in comparison with the audacious, bare-faced and sweeping pretensions to a system of law for the US without the adoption of their legislature, and so infinitively beyond their power to adopt.⁸⁴

Indeed, the debate over federal common law crimes was central to the controversy surrounding the Sedition Act and therefore to the 1800 election. Federalist defenders of the Sedition Act contended that the Act, by permitting truth as a defense and empowering the jury to decide law as well as fact, stood as an improvement of the common law of sedition that would otherwise be available, while Republicans argued that to treat the common law as part of federal law would mean that the national government was not a government of limited and enumerated powers.⁸⁵

Once Jefferson took office in 1801, such prosecutions "were effectively precluded" because his "coalition had made such a political issue of common-law crimes."⁸⁶ When an indictment for common law sedition was brought and reached the Supreme Court in 1812, Republican Attorney General William Pinkney refused to argue the case, and the Supreme Court viewed the rejection of federal common law crimes as "long since settled in public opinion."⁸⁷ The Court held, without recorded dissent, that

84. Letter from Thomas Jefferson to John Randolph, Aug. 18, 1799, reproduced in *THE PORTABLE THOMAS JEFFERSON* 479, 480 (1975); see also HASKINS & JOHNSON, *supra* note 33, at 139 (reproducing excerpts of the letter). James Monroe stated his hope that "the period is not distant when the sovereignty of the people will be so well established, understood and respected as to make a known hatred and hostility to that sovereignty, by avowing the application of the English common law to our Constitution . . . good cause for impeachment." Letter from James Monroe to John Breckenridge (Jan. 15, 1802), quoted in 1 WARREN, *supra* note 55, 229-30.

85. See, e.g., Rowe, *supra* note 80, at 936-41; PRESSER, *supra* note 26, at 66-99. See also *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 251 (Marvin Meyers ed., 1973) (if the common law is part of federal law, subject to legislative revision, "it then follows that the authority of Congress is coextensive with the objects of common law; that is to say, with every object of legislation; . . . The authority of Congress would, therefore, be no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever."). See also O'Fallon, *supra* note 32, at 237 (noting that the debate over the repeal of the Judiciary Act of 1801 reflected that "the willingness of some federal judges to assert the applicability of the common law of seditious libel . . . had infuriated the Republicans, whose newspapers were the primary target of Federalist prosecutions").

86. CASTO, *supra* note 79, at 162.

87. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

even if the national government had the “implied power to preserve its own existence,” it “would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual, in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.”⁸⁸

Viewed from this perspective then, *Marbury’s* rejection of the prerogative writ of mandamus is a precursor to *Bollman’s* insistence that federal courts can issue the prerogative writ of habeas corpus only as authorized by Congress, and *Hudson & Goodwin’s* rejection of a federal common law of crimes. They stand together (along with lesser known cases involving the prerogative writs of prohibition and certiorari, and the failure to develop any Supreme Court quo warranto practice) as a rejection of the view that the Supreme Court (or its justices holding circuit courts) inherited the power of the King’s Bench. For that reason, I say happy birthday to *Marbury v. Madison*.

III. REJECTING THE ATTEMPT TO REVIVE THE KING’S BENCH

Some may view this basis for celebration as a celebration of the obvious, and a rather thin excuse for joining a party.⁸⁹ Maybe

88. *Id.* at 33-34. Notice how the language used to describe the view rejected—in “violation of the peace and dignity of the sovereign power”—echoes the language used to describe the power of the King’s Bench to adjudicate common law crimes: *contra pacem domini regis* (against the peace of the lord the king). See BLACK’S LAW DICTIONARY (7th ed. 1999) (entry for “against the peace and dignity of the state”); *id.* (noting, under entry for “King’s peace,” that “at one time . . . every indictment charged the accused with an offense ‘against the peace of our Sovereign Lord the King’”) (quoting EDWARD JENKS, THE BOOK OF ENGLISH LAW 134 (P.B. Fairest ed., 6th ed. 1967)). As Blackstone explained, what in other countries was called the “code of criminal law,” was “more usually denominated with us in England, the doctrine of the pleas of the crown: so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offense.” 4 BLACKSTONE *2. “All offenses are either against the king’s peace, or his crown and dignity; and are so laid in every indictment.” 1 BLACKSTONE at *258.

Four years after *Hudson* and *Goodwin*, Justice Story attempted to resurrect the question, but the Attorney General declined to argue the case, and the Court chose not to draw *Hudson* and *Goodwin* into doubt. *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). See also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1404-12 (2001) (discussing *Hudson* and *Coolidge* as examples of judicial compliance with federal lawmaking procedures).

89. See CHARLES A. WRIGHT, ET AL., 16B FEDERAL PRACTICE AND PROCEDURE § 4005, at 103 (1996) (“Clearly Congress has power to limit appellate writ jurisdiction,

so; I have vowed to remember that the simple and the everyday are cause for celebration.

Yet if celebrating this aspect of *Marbury* is celebrating a commonplace, it is a commonplace that does sometimes seem to be overlooked. For example, Akhil Amar praises the *Marbury* decision for “fashion[ing] judicial relief for a violation of a statute,” a phrasing that seems to suggest that the court did not view section 13’s authorization of mandamus as necessary.⁹⁰ The authors of Hart and Wechsler similarly assert, albeit limited to the context of original jurisdiction, that “no statutory authorization is needed if issuance of an extraordinary writ would constitute a proper exercise of original jurisdiction.”⁹¹

More generally, much of the debate concerning Congressional control over the Supreme Court’s appellate jurisdiction seems to assume that the Supreme Court has the inherent power to select its own cases through the writ of certiorari. In a recent attempt to shift that debate, James Pfander argues that the constitution requires that the Supreme Court have a sufficient arsenal of prerogative writs to maintain its supremacy over all inferior federal courts.⁹² In his view, just as the King’s Bench exercised supervisory authority over inferior courts in England through the prerogative writs, and state supreme courts did the same in the United States, the Supreme Court of the United

just as any other branch of appellate jurisdiction.”). Even as robust a supporter of federal judicial power as Robert Pushaw has stated that in “contrast to the sovereign prerogative of the King’s Bench to issue writs, American federal courts had authority to use prerogative writs only to the extent permitted by Congress.” Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 481 n.172 (1994); see also Pushaw, *supra* note 53, at 741 (noting that Americans rejected the English notion that “courts were part of the executive branch and thus entitled to share in the king’s prerogative”); *id.* at 753 n.76 (noting that *Marbury* “nowhere suggested that Congress lacked constitutional power to regulate prerogative writs”); *id.* at 827-28 (noting that “whereas the King’s Bench exercised the Crown’s prerogative to grant extraordinary writs, America had no ‘President’s Bench’ with inherent power derived from the executive. Thus, the federal judiciary’s writ authority depends upon a statutory grant, as both Congress and the Court have always recognized.”).

90. Amar, *supra* note 14, at 447. This phrasing also sidesteps the obvious point that *Marbury* obtained no relief from the Supreme Court.

91. RICHARD FALLON ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312 (5th ed., 2003). Cf. *Kentucky v. Dennison*, 65 U.S. 66, 98 (1861) (treating mandamus as “nothing more than an action at law between the parties,” not “as a prerogative writ,” and therefore within the Supreme Court’s power to “regulate and mould the process it uses” in original jurisdiction cases, “without any further act of Congress to regulate its process or confer jurisdiction,” but holding that federal courts, including the Supreme Court, lack power to order the Governor of a State to deliver up fugitives from justice as required by the Extradition Clause), *overruled by Puerto Rico v. Brandstad*, 483 U.S. 219 (1987).

92. Pfander, *Jurisdiction-Stripping*, *supra* note 30, at 1500-11.

States, by virtue of being a supreme court, must have the constitutional prerogative to supervise inferior federal courts.

Pfander acknowledges that *Marbury* foreclosed the possibility of the Supreme Court of the United States acting as the King's Bench with regard to issuing prerogative writs to executive officers. While he also acknowledges that *Marbury* (for mandamus) and *Bollman* (for habeas) treat the power to issue prerogative writs as subject to Congressional control, he mourns these as "limit[ing] our conception of the Court's function."⁹³ He ignores the Supreme Court's rejection of any analogy between its own powers and the supervisory powers of the King's Bench in *Kendall* (mandamus), *Christy* (prohibition), and *Vallandigham* (certiorari).⁹⁴ And he makes no attempt to suggest any inherent power in the Supreme Court to issue quo warranto.

Apart from these historical and doctrinal problems with Pfander's claim, there is a fundamental textual difficulty. In his view, the judicial power of the United States exercised by the Supreme Court has three forms: original, appellate, and supervisory.⁹⁵ He admits that a "literalist" might object that the "supervisory powers of the Supreme Court operate functionally as part of the Court's appellate jurisdiction."⁹⁶ The difficulty is deeper than this, however. After listing the cases and controversies within the federal judicial power, Article III allocates some of those cases to the Supreme Court's original jurisdiction and then provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."⁹⁷ That is, Article III, by its terms, treats "all the other Cases" as a part of the Supreme Court's appellate jurisdiction—and therefore subject to Congressional regulations and exceptions. By defining the Supreme Court's appellate jurisdiction to embrace "all the other Cases" that are not allocated to its original jurisdiction, it simply leaves no room for a third category.⁹⁸

93. Pfander, *Marbury*, *supra* note 11, at 1599.

94. He does discuss *Kendall*, but not its rejection of the analogy. *See id.* at 1597-98.

95. Pfander, *Jurisdiction-Stripping*, *supra* note 30, at 1508-09.

96. Pfander, *Jurisdiction-Stripping*, *supra* note 30, at 1508.

97. U.S. CONST. art. III, § 2 (emphasis added).

98. The only way to find a third category is to posit a notion of "judicial power" that "extend[s]" beyond the cases and controversies listed in Article III. *See* Pfander, *Marbury*, *supra* note 11, at 1599. But section 2 of Article III demonstrates "that the judicial power created and vested by Section 1 will only 'extend' to nine specifically delineated categories of cases or controversies. This enumerated and finite list is written so as to make clear that it is to be an exclusive list, just like the exclusive list of congressional powers in Article I, Section 8." Steven G. Calabresi, *The Vesting Clauses as Power*

Finally, it must be remembered that the prerogative writs, as their name implies, have their conceptual roots in royal prerogative.⁹⁹ As Blackstone put it, the royal prerogative consists of "those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. . . . [T]he prerogative is that law in case of the king, which is law in no case of the subject."¹⁰⁰

Grants, 88 NW. U. L. REV. 1377, 1394 (1994). See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992) (stating that Article III, section 2 "delineates the absolute limits on the federal courts' jurisdiction"). Indeed, if the "judicial power" somehow extends beyond the cases and controversies to which Article III, section 2, says that the "judicial power shall extend," then the entire body of constitutional law which insists on limiting the federal judiciary to the enumerated cases and controversies is for naught. Three Justices once suggested that Congress may utilize its Article I powers to authorize Article III courts to decide matters beyond the enumeration in Article III, section 2, see *National Mutual Insurance Co. v. Tidewater*, 337 U.S. 582, 599 (1949) (Jackson, J., announcing the judgment of the Court), but every other justice emphatically rejected this view. *Id.* at 604 (Rutledge, J., joined by Murphy, J., concurring in the judgment but noting, "I strongly dissent from the reasons" given in Justice Jackson's opinion); *id.* at 648 (Frankfurter, J., joined by Reed, dissenting) (arguing that "if courts established under Article III can exercise wider jurisdiction than that defined and confined by Article III, . . . what justification is there for interpreting Article III as imposing one restriction . . . —the restriction to the exercise of 'judicial power'—yet not interpreting it as imposing the restrictions that are most explicit, namely, the particularization of the 'cases' to which 'the judicial Power shall extend'?"); *id.* at 642 (Vinson, C.J., joined by Douglas, J., dissenting) (noting that the "appellate jurisdiction of this Court is, in fact, dependent upon the fact that the case reviewed is of a kind within the Art. III enumeration").

The power of courts to promulgate rules of procedure pursuant to a legislative delegation of authority is not itself the exercise of judicial power. *Mistretta v. United States*, 488 U.S. 361, 388-89 (1989). Instead, such lawmaking power has been justified as a permissible extrajudicial activity. *Id.* at 389-90; *cf. id.* at 417 (Scalia, J., dissenting) (treating such lawmaking as ancillary to the exercise of judicial powers). See also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."); *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (using the power granted in section 17 of the Judiciary Act of 1789 "to make and establish all necessary rules for the orderly conducting business in the said courts" as an example of a permissible delegation of Congressional power). *But see* *Pushaw*, *supra* note 53, at 759 n.100 (noting that "legislative delegation of adjective lawmaking had been commonplace for centuries" in our legal culture, but that the Supreme Court "has never supplied a full explanation"); MARTIN H. REDISH *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 170-71 (2d ed., 1980) (arguing that the Rules Enabling Act is unconstitutional).

99. *de Smith*, *supra* note 18, at 40 (noting that the "name indicates that it is a writ especially associated with the King"); *id.* at 40-41 (noting that while not all prerogative writs were originally issued only at the suit of the king, it is "nevertheless true . . . that when in the seventeenth and eighteenth centuries, these various writs came to be called 'prerogative', it was because they were conceived as being intimately connected with the rights of the Crown").

100. 1 BLACKSTONE at *232.

The prerogative writs were issued in the king's name, by the king's courts, to vindicate the king's interests.

To gain some perspective on the status under our constitution of the prerogative writs, then, consider our constitution's treatment of royal prerogatives more generally.

- In order to "support his dignity and maintain his power," the king had various fiscal prerogatives.¹⁰¹ Under our constitution, Congress has the power to "lay and collect Taxes,"¹⁰² and all bills to do so must originate in the House of Representatives.¹⁰³

- The king had the "sole power of sending ambassadors to foreign states, and receiving ambassadors at home."¹⁰⁴ Under our constitution, the President "shall receive Ambassadors,"¹⁰⁵ but needs the "Advice and Consent of the Senate," to appoint ambassadors.¹⁰⁶

- The king had the power to make treaties, leagues, and alliances, as well as the "sole prerogative of making war and peace,"¹⁰⁷ and "directing the ministers of the crown to issue letters of marque and reprisal."¹⁰⁸ Under our constitution, the President may make treaties, with the advice and consent of the Senate, "provided two thirds of the Senators present concur,"¹⁰⁹ and Congress is given the power to "declare War," and to "grant Letters of Marque and Reprisal."¹¹⁰

- The king had the "prerogative of rejecting such provisions in parliament, as he judges improper to be passed."¹¹¹ Under our constitution, the President has the veto power, but Congress may override that veto by a two thirds vote of each house.¹¹²

- The king had the "sole power of raising and regulating fleets and armies,"¹¹³ and the power to command a subject not to

101. 1 BLACKSTONE at *271-326.

102. U.S. CONST. art. I, § 8. The President's compensation may not be either "en-
creased nor diminished during the Period for which he shall have been elected." U.S.
CONST. art. II, § 1.

103. U.S. CONST. art. I, § 7.

104. 1 BLACKSTONE at *245.

105. U.S. CONST. art. II, § 3.

106. U.S. CONST. art. II, § 2.

107. 1 BLACKSTONE at *249.

108. 1 BLACKSTONE at *250.

109. U.S. CONST. art. II, § 2.

110. U.S. CONST. art. I, § 8.

111. 1 BLACKSTONE at *253.

112. U.S. CONST. art. I, § 7.

113. 1 BLACKSTONE at *254.

leave the realm or to return to it.¹¹⁴ Under our constitution, Congress has the power to "raise and support Armies," and to "provide and maintain a Navy."¹¹⁵

- As the person injured by a crime, the king had the prerogative of pardon.¹¹⁶ Under our constitution, the President has the power "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."¹¹⁷

- As the fountain of honor, office, and privilege, the king had the prerogative of "erecting and disposing of offices," as well as "conferring dignities and honours," converting aliens into denizens, and erecting corporations.¹¹⁸ Under our constitution, the President has the power, with the advice and consent of the Senate, to appoint officers to offices "which shall be established by Law,"¹¹⁹ but "[n]o Title of Nobility shall be granted by the United States."¹²⁰ Congress has the power to "establish an uniform Rule of Naturalization,"¹²¹ and, where necessary and proper to carry out any of the national government's powers, to erect corporations.¹²²

- As the arbiter of commerce, the king had the prerogative to establish markets, regulate weights and measures, and coin money.¹²³ Under our constitution, Congress has the power to "regulate Commerce with foreign Nations, and among the several States," and to "coin Money, regulate the Value thereof . . . and fix the Standard of Weights and Measures."¹²⁴

- As the head of the national church, the king had the inherent prerogative to convene and dissolve ecclesiastical synods or convocations.¹²⁵ Under our constitution, "no religious Test

114. 1 BLACKSTONE at *256. Cf. *Haig v. Agee*, 453 U.S. 280, 292 (1981) (noting that "[p]rior to 1856, when there was no statute on the subject, the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States."). See Patricia Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 126-29 (2002) (discussing executive authority regarding passports).

115. U.S. CONST. art. I, § 8.

116. 1 BLACKSTONE at *259.

117. U.S. CONST. art. II, § 2.

118. 1 BLACKSTONE at *262-63.

119. U.S. CONST. art. II, § 2.

120. U.S. CONST. art. I, § 9.

121. U.S. CONST. art. I, § 8.

122. U.S. CONST. art. I, § 8. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

123. 1 BLACKSTONE at *263-67.

124. U.S. CONST. art. I, § 8.

125. 1 BLACKSTONE at *269.

shall ever be required as a Qualification to any Office or public Trust under the United States,"¹²⁶ and the first amendment added that "Congress shall make no law respecting an establishment of religion."¹²⁷

• The king had the prerogative to convene the parliament, prorogue it for a time, or dissolve it.¹²⁸ Under our constitution, the President "may, on extraordinary Occasions, convene both Houses, or either of them,"¹²⁹ but without regard to presidential summons, "Congress shall assemble at least once in every Year."¹³⁰ Moreover, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting,"¹³¹ with the President's adjournment power arising only "in Case of Disagreement between" the Houses.¹³²

In short, our constitution allocates the royal prerogatives between Congress (or a House thereof) and the President, and usually divides the prerogative in a way that both Congress and President have a role.¹³³ While the precise allocation between Congress and the President has been a matter of dispute since at least Washington's Neutrality Proclamation in 1793,¹³⁴ that long-

126. U.S. CONST. art. VI.

127. U.S. CONST. amend. 1.

128. 1 BLACKSTONE at *146, 180.

129. U.S. CONST. art. II, § 3.

130. As originally adopted, the constitution provided that "such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." U.S. CONST., Art. I, § 4. The twentieth amendment reiterated that "Congress shall assemble at least once in every year," but changed the default date to January 3. U.S. CONST. amend. XX.

131. U.S. CONST. art. I, § 5.

132. U.S. CONST. art. II, § 3.

133. The only prerogatives that are for the President alone are the power to receive foreign ambassadors and the power to pardon offenses against the United States. The President has a role, through the recommendation power of Article II, section 3, and the veto power of Article I, section 7, in those prerogatives that may appear at first blush to be assigned exclusively to Congress.

134. In the wake of Washington's Proclamation, Alexander Hamilton published a series of essays in defense of presidential power under the pseudonym Pacificus, and was answered by James Madison writing as Helvidius. See THE LETTERS OF PACIFICUS AND HELVIDIUS (1845) with THE LETTERS OF AMERICANUS (Richard Loss, editor, facsimile reproduction 1976). One of Madison's arguments was that Hamilton must have borrowed his conception of presidential power from the "power of making treaties and the power of declaring war" being "royal prerogatives in the British government." *Id.* at 62 (Helvidius No. 1, Aug. 24, 1793). See also David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 4-11 (1996); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 745-48 (1997).

standing dispute should not distract us from the point most relevant here: None is allocated to the judiciary.

Indeed, the only prerogative writ mentioned in the constitution—the writ of habeas corpus—was the one that had departed most from its royal roots, having been turned against the king himself.¹³⁵ Yet, as we have seen, even the writ of habeas corpus, which our constitution protects against suspension,¹³⁶ cannot be issued by the Supreme Court without Congressional authorization.

Consideration of one last royal prerogative should make clear that our constitution does not bestow any prerogative

135. See de Smith, *supra* note 18, at 53 (asserting that it was “sound politics” to associate habeas corpus “with the King’s personal solicitude for the welfare of his subjects” and noting that the value of habeas “became enhanced during the constitutional struggles of the seventeenth century—albeit, paradoxically, as a safeguard of the liberty of the king’s political opponents—and it came to be regarded, with Magna Carta, as the greatest bastion of individual liberty”); 1 BLACKSTONE at 131 (“if any person be restrained of his liberty . . . by command of the king’s majesty in person . . . he shall . . . have a writ of habeas corpus, to bring his body before the court of king’s bench . . . who shall determine whether the cause of his commitment be just . . .”) (citing the Habeas Corpus Act of 1679). See also Farber, *supra* note 76, at 161 (noting that the “whole thrust of English history had been to move the power [to suspend habeas] to Parliament; it was not a power the king possessed at the time of American independence”); *Ex parte Merryman*, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (“The most exciting contests between the crown and the people of England, from the time of Magna Carta, were in relation to the privilege of this writ. . .”).

136. U.S. CONST. art. I, § 9. Thus even though federal courts may not issue writs of habeas corpus without statutory authorization, Congress may be constitutionally obligated to provide some means by which the writ is available. See *Bollman*, 8 U.S. at 95 (“It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared ‘that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.’ Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.”).

Note that the Constitutional Convention first discussed and adopted the suspension clause in the context of a debate concerning the judiciary article, see JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 541 (reprinted Ohio University Press, 1984), but the Committee on Style moved it to the article dealing with legislative power. See Farber, *supra* note 76, at 160-61.

In addition to being constitutionally protected, habeas corpus is unique in another way: It “has always been asymmetrical The prisoner always can sue for the writ, but the warden can’t bring a declaratory judgment suit against the prisoner.” Argument of Henry P. Monaghan at 3, *Felker v. Turpin*, 116 S. Ct. 2333 (1996) (No. 95-8836). Unlike the other prerogative writs that could be used by the Supreme Court to restrict liberty by constraining more libertarian inferior courts, habeas corpus operates as a liberty-enhancing ratchet. To the extent, then, that the point of insisting on a supervisory power in the Supreme Court is to protect liberty, it misses the mark. Supervisory power in general may protect or reduce liberty.

power on the judiciary. As the fountain of justice, the king had “alone the right of erecting courts of judicature.”¹³⁷ Under our constitution, Congress has the power to “constitute Tribunals inferior to the Supreme Court.”¹³⁸ While the Constitution itself establishes that there shall be a Supreme Court,¹³⁹ it is Congress that is given the power to “make all Laws which shall be necessary and proper for carrying into execution . . . all other Powers vested by this Constitution . . . in any Department” of the United States—including the judicial power vested in the Supreme Court.¹⁴⁰

Without support from prerogative writ practice and the analogy to the King’s Bench, Pfander’s argument must rely directly on the constitutional requirement that any court established by Congress be “inferior to the supreme Court.”¹⁴¹ The requirement of inferiority may, however, refer to status, or breadth of geographic and subject matter jurisdiction, or even the obligation to follow precedent.¹⁴² Yet even if this constitutional requirement of inferiority refers to a relationship of hierarchical power, so long as Congress provides that *some* judgments of any court it creates can be reviewed by the Supreme Court in *some* way (and not vice versa), such a court is “inferior to” the Supreme Court.¹⁴³

So understood, the requirement of inferiority dovetails with the constitutional provision for Supreme Court appellate jurisdiction in all cases not allocated to its original jurisdiction, “with

137. 1 BLACKSTONE at *257.

138. U.S. CONST. art. I, § 8.

139. U.S. CONST. art. III, § 1.

140. U.S. CONST. art. I, § 8. Cf. *Marbury*, 5 U.S. at 147 (argument of Charles Lee that the power to issue mandamus is “a beneficial, and a necessary power”).

141. U.S. CONST. art. I, § 8; see also U.S. CONST. art. III, § 1.

142. Calabresi & Rhodes, *supra* note 29, at 1180 n.139 (noting that the words “supreme” and “inferior” were probably used in the same sense in the Constitution as in Blackstone’s Commentaries: to distinguish between courts “subject to narrow geographic and subject matter restraints” and courts not subject to such restraints); Evan Caminker *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 838 (1994) (arguing that supreme-inferior relationship requires following precedent). Cf. *Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (stating that in the context of the appointments clause of Article II, “whether one is an ‘inferior’ officer depends on whether he has a superior,” not on whether one has a lower rank or less important responsibilities).

143. Professor Caminker asserts that “basing the Court’s constitutional supremacy solely on its powers of reversal demands that the Supreme Court have plenary appellate jurisdiction over every case.” Caminker, *supra* note 142, at 832. But within the context of a particular judicial hierarchy, if there are situations in which A can reverse the judgments of B, and B can never reverse the judgments of A, then B is inferior to A, even if there are many situations in which A cannot reverse the judgments of B.

such Exceptions, and under such Regulations as the Congress shall make."¹⁴⁴ That is, a court created by Congress that is subject to *some* appellate review by the Supreme Court—in whatever cases that Congress has not excepted from such review—is inferior to the Supreme Court. Some might view it as “absurd” to treat a court as “inferior” to the Supreme Court if the Supreme Court could review its judgments only in (say) patent cases—just as Henry Hart suggested fifty years ago that some might view it as “absurd” to treat as an “exception” to the Supreme Court’s appellate jurisdiction a statute that excluded everything except patent cases.¹⁴⁵ Significantly, it was at precisely this juncture that Hart insisted that it was possible to “lay down a measure” that would limit Congressional power while avoiding the claimed absurdity: “The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”¹⁴⁶

Shorn of reliance on the analogy to the prerogative powers of the King’s Bench, then, the argument for a constitutionally required supervisory power in the Supreme Court ultimately depends on a conviction that the Supreme Court has some “essential role.”¹⁴⁷ And the response on *Marbury*’s two hundredth birthday is the same that Hart’s co-author Herbert Wechsler gave to Hart:

[T]he plan of the Constitution for the courts . . . was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power. . . . Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the

144. U.S. CONST. art. III, § 2.

145. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953).

146. *Id.*

147. See Pfander, *Marbury*, *supra* note 11, at 1602 (stating that “Article III may contemplate a special role for the Supreme Court of the United States as the constitutionally mandated leader of a hierarchical judicial department”). *But see* Pfander, *Jurisdiction-Stripping*, *supra* note 30, at 1501 (concluding that his approach is preferable to Hart’s “essential function” approach).

land. That is, at least, what *Marbury v. Madison* was all about.¹⁴⁸

CONCLUSION

Whatever else one thinks about *Marbury*, it rejected a vision of the Supreme Court as a court that inherited the prerogative power of the King's Bench. It recognized that, under our republican constitution, the federal judiciary lacks any prerogative not given it by the representatives of the people. Happy birthday.

148. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).