Habeas Corpus in Three Dimensions: Dimension III: Habeas Corpus as an Instrument of Checks and Balances

Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1153

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
Habeas Corpus in Three Dimensions
Dimension III: Habeas Corpus as an Instrument of Checks and Balances

Eric M. Freedman

Siggi B. Wilzig Distinguished Professor of Constitutional Rights, Maurice A. Deane School of Law, Hofstra University (Eric.M.Freedman@Hofstra.edu); B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University.

This article is copyrighted by the author, Eric M. Freedman, who retains all rights thereto. Permission is hereby granted to nonprofit institutions to reproduce this work for educational use, provided that copies are distributed at or below cost and identify the author and this publication.

I am solely responsible for the contents of this piece, including certain deviations from the forms prescribed by The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 20th ed. 2015) which have been made at my insistence in the interests of clarity and to facilitate document retrieval by future researchers. For clarification purposes I have also sometimes regularized the capitalization and punctuation in quotations from early sources.

By way of disclosure, I have served as a member of the legal teams pursuing writs of habeas corpus in several of the cases from the current century cited in this article. By way of acknowledgement, I have benefitted greatly from the insights of my co-counsel.

This work owes a special debt to the collegial support of John Phillip Reid and William E. Nelson of New York University Law School.

Much of the research underlying this article was conducted in the New Hampshire State Archives in Concord during a year-long leave generously funded by Hofstra Law School. The time would have been far less productive (and enjoyable) without the absolutely extraordinary assistance I received from Frank C. Mevers, then the State Archivist, Brian Nelson Burford, then the State Records Manager (now the State Archivist), and John Penney, Armand Dubois, Peter Falzone, William G. Gardner, Benoit Shoja, Pam Hardy, Georgia-Rose Angwin, and Stephen Thomas of the Archives staff. Milli S. Knudsen, a New Hampshire independent scholar who was volunteering at the Archives while I was there, and volunteer Karol Yalcin were responsible for finding a number of the documents that I have relied upon. My work on the New Hampshire materials has also been enriched by the insights of Mary Susan Leahy, Esq., Robert B. Stein, Esq., Eugene Van Loan, Esq., and Richard M. Lambert.

Copies of the documents from the New Hampshire State Archives that undergird my descriptions of the cases are available from the reference desk of the Hofstra Law School Library. Some of these records, including ones cited to Provincial Case Files and the Judgment Books of the Superior Court, have also previously been microfilmed by the Genealogical Society of Utah.
# Table of Contents

Project Overview.................................................................................................................. 253
I. Introduction: Habeas Corpus and the Independent Judiciary............................................... 253
II. Background: British Judicial Enforcement of Separation of Powers........................................... 257
   A. Allocation of Roles in British Governments.......................................................... 257
      1. The Governor and Council................................................................. 259
      2. The Sovereign.................................................................................... 263
III. Courts in the New Nation: A Tempestuous Beginning....................................................... 266
   A. The Populist Storms Batter Legal Structures............................................... 266
   B. The Storm Surge: Legislative Limitations on Judicial Autonomy................................. 270
      1. Architectural Arrangements............................................................... 270
      2. Wiping Out Courts Wholesale.......................................................... 272
      3. Pressuring Individual Judges............................................................... 275
      4. Re-deciding Cases............................................................................ 276
   C. Ex Parte Bollman and the Precatory Suspension Clause........................................... 278
      1. Political and Legal Background.......................................................... 278
      2. The Factual Background........................................................................ 279
      3. Arguments of Counsel........................................................................ 280
      5. Bollman’s Sea Mine.......................................................................... 288
IV. HandstothePumps............................................................................................................. 291
   A. Rebuilding Judicial Autonomy................................................................. 291
      2. The Dangers of Democracy................................................................. 296
      3. The Decline of Legislative Adjudication.................................................. 297
      4. The Commercial Need for Predictability............................................... 298
      5. The Election of Judges...................................................................... 298
   B. Jetsam: The Jury as Law-Pronouncer........................................................................ 299
V. Boumediene De-fuses Bollman’s Sea Mine....................................................................... 300

The tireless efforts of Hofstra law librarian Patricia Ann Kasting and of my assistant Joyce A. Cox are everywhere reflected in these pages.
Project Overview

This is the third of three planned articles in a project whose overall title is “Habeas Corpus in Three Dimensions.” The first installment discussed the importance of habeas corpus as a common law writ. The second piece considered the significance of the fact that American habeas corpus until the first decades of the nineteenth century was embedded in a system of multiple constraints on government power. This article broadly overviews habeas corpus within the horizontal aspect of the system of checks and balances that developed here subsequently.

I. Introduction: Habeas Corpus and the Independent Judiciary

“Separation of powers” differs from “checks and balances.” One protects individual liberty by allocating particular governmental powers to specific branches. The other protects individual liberty by having each branch restrain the others. Part II.A makes this point and Part II.B shows that allocation of powers, enforced by judges, was an established feature of British government in the North American colonies. The concept of allocation of powers “passed uncontroversially into American law.”

Checks and balances, though, was a new idea and its

3 See Eric M. Freedman, Habeas Corpus as a Legal Remedy, 8 NE. U. L.J. 1 (2016) [hereinafter Freedman II].
4 See infra note 7 (discussing this limitation).
5 As Markus Dubber has observed, the historical literature on habeas corpus has neglected the question of how the English writ was incorporated over time into “American legal institutions and practices,” and how this issue bears on “the oft-invoked but rarely-substantiated notion of ‘Anglo-American’ law.” Markus D. Dubber, The Schizophrenic Jury and Other Palladia of Liberty 11, (Apr. 12, 2015) (unpublished manuscript) (on file at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593563).
6 Freedman II, supra note 3, at 72.

Federalism as a conscious means of structuring government for the protection of rights was also a new idea. In “the compound republic of America” a “double security arises to the rights of the people” because there are checks and balances operating vertically as well as horizontally. See THE FEDERALIST, No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). See also Coleman
acceptance was not possible until the judicial branch established its republican legitimacy. As Part III.A describes, "judicial independence got off to quite a rocky start in the new nation both because the judges were so closely identified with the Crown and because the common law they administered had no plainly visible democratic source." The result was rampant legislative interference with judicial decision-making (Part III.B), built into the initial architecture of judicial systems (Part III.B.1) and often furthered by abolishing disfavored courts (Part III.B.2), by pressuring individual judges (Part III.B.3), or by intervening in specific cases (Part III.B.4).

The notion of an independent judiciary that restrained the other branches was still aborning in 1807, when John Marshall stated in dicta in *Ex Parte Bollman* — quite wrongly as a matter of both British history and American constitutional law—that federal courts had no inherent authority to issue the writ of habeas corpus in the absence of legislation granting them that power. As Part III.C emphasizes in recounting *Bollman*, the opinion was delivered at a time when the judicial branch was substantially subordinate to the others, "a period of profound uncertainty, experimentation, and


10 *8 U.S. (4 Cranch) 75, 93-94 (1807).*

contingency.”

In succeeding decades, the shifting theoretical and institutional structure of checks and balances came to rest.

Part IV.A describes the converging forces which resulted in the judiciary, after a period of struggle on multiple fronts, establishing its institutional independence from the legislature and solidifying a cultural expectation that executive officers would comply with judicial decisions. This accomplishment came at a cost: juries lost autonomy inside the judicial structure, and their power was weakened permanently (Part IV.B).

Once the idea of judicial independence as an aspect of checks and balances had become accepted legally, respectable intellectually, and defensible politically, the judicial branch should have reclaimed in the context of habeas corpus its inherent authority to police the limits of executive power, this time in order to enforce structural as well as individual concerns. But the Supreme Court proved


(14) This does not necessarily mean “judges.” As recounted in Freedman I, supra note 2, at 600 n.47, 600-01, 603 & n.58, there are numerous examples from the early national period of jury trials in habeas corpus actions or their functional equivalents. Moreover, actions of that kind should not be considered in isolation from other legal remedies for wrongful imprisonment (e.g. public and private criminal prosecutions, damages actions for false imprisonment or malicious prosecution), in all of which the jury played a central role. See Freedman II, supra note 3, at 32-67. Cf. Douglas A. Berman, Making the Framer’s Case, and a Modern Case, for Jury Involvement in Habeas Adjudication, 71 OHIO ST. L. J. 887, 912-15 (2010) (relying on jury control over law in founding era to support jury participation in modern statutory habeas proceedings). Discussions of the evolution of the jury’s role appear infra in note 97 and Part IV.B.


(16) See Bond v. United States, 564 U.S. 211, 222-23 (2010) (unanimous) (noting that checks and balances serve to protect both the liberties of the individual
hesitant to repudiate Bollman’s dangerously flaccid view of the writ, notwithstanding that history and policy alike called upon it to take that step.\(^\text{17}\)

Finally, as Part V describes, in 2008 in Boumediene v. Bush,\(^\text{19}\) — a landmark ruling that put it on the right side of history — the Court recognized habeas corpus as an instrument for the enforcement of checks and balances,\(^\text{20}\) and the power to issue it as inherent in


Earlier, even Fay v. Noia, 372 U.S. 391 (1963), a famous ode to the writ delivered by Justice Brennan, explicitly reserved the question of whether it was “the Framers’ understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ,” although commenting that “[t]here have been some intimations of support for such a proposition in decisions of this Court.” Id. at 406.

\(^{18}\) See Halliday & White, supra note 7, at 683; Eric M. Freedman, The Bush Military Tribunals: Where Have We Been? Where Are We Going?, 17 Cr. Just. 14, 20 (2002). See also Dan Poulson, Note, Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act, 35 Hastings Const. L.Q. 373, 398 (2008) (“[I]f the Great Writ is to have any meaning as a formidable restraint on tyranny and arbitrary confinement, it must be free from substantive limitation by the body that most fears it.”).

\(^{19}\) 553 U.S. 723 (2008).

the Article III judicial role. This welcome development dispelled a
distorted vision of the past that held the potential to cloud clear
thinking in facing the problems of the future, including those posed
by the struggle against terrorism.21

II. Background: British Judicial Enforcement of Separation of
Powers

A. Allocation of Roles in British Governments

Although it is sometimes loosely said that the English system
had no separation of powers, this is imprecise.22

"Separation of powers" as we know it today consists of:

(a.) assigning duties to the government instrumentality best
able to perform them, taking into account both efficiency and policy
considerations. Thus, for example, courts not cabinets should try
criminal charges against individuals. This concept, whose focus is
at the level of the particular governmental action at issue, might be
called “allocation of roles.”23

(b.) assigning duties to various branches in furtherance of the
structural purpose of having them limit each others’ power.24 This
concept, whose focus is at the architectural level, is encapsulated in
the American term “checks and balances.” Its premise, in general, is
that requiring interaction between the branches before any problem
can be finally disposed of will lead to decisionmaking that is both
substantively sounder and more consistent with the goals of a

of a tripartite system of government in which each branch checks and balances
the others.”) (footnote omitted); infra Part V.

21 See FREEDMAN, supra note 18, at 19.
22 This paragraph and the one that follow are drawn from Freedman II, supra
note 3, at 71-73. The terminological vagueness described in the text is quite
common, extending to the Court and commentators on its work, see, e.g., infra
note 261 and accompanying text.
23 Aziz Huq has given this principle the name “institution matching.” See Aziz
24 See THE FEDERALIST No. 51, at 320-22 (James Madison) (Clinton Rossiter
ed., 1961) (advocating “giving to those who administer each department the
necessary constitutional means and personal motives to resist encroachments
of the others . . . . Ambition must be made to counteract ambition. The interests
of the man must be connected with the constitutional rights of the place.”).
representative non-tyrannical government than giving a single branch the first and last word.\textsuperscript{25}

The British system of government in the North American colonies understood and largely respected allocation of roles. The distribution of powers to particular officials, which judges and juries enforced through habeas and other legal remedies, had the effect of insuring that individuals were treated justly and in accordance with law.\textsuperscript{26} Indeed, because the sovereign was presumed to desire that the law be obeyed,\textsuperscript{27} subjects could judicially invoke the law against the Crown itself.\textsuperscript{28}

Plural office-holding was common in both England and early America.\textsuperscript{29} But, as shown below, the officeholders took seriously the differences among their official roles. The result from the viewpoint of prisoners was that both release and confinement could be ordered by a variety of political actors but only within a judicially-sanctioned


\textsuperscript{26} See John Phillip Reid, Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries 6 (2004).

\textsuperscript{27} See Timothy Endicott, Habeas Corpus and Guantanamo Bay: A View From Abroad, 52 AM. J. JURIS. 1, 28-29 (2009).

\textsuperscript{28} See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”).

framework. The judiciary policed the boundaries of the powers of executive officers up to and including the sovereign.

1. The Governor and Council

As illustrated by the four cases presented below, a colonial governor and his council might interact in a number of ways with the judicial system regarding a detention.

1. Early in September 1750, an Indian by the name of Nambrous was incarcerated on complaint of one Moses Winget of Dover, New Hampshire, who claimed that Nambrous had “attempted to kill him the said Winget with a knife by stabbing him in the arm and body.”

Those are the officers who are the focus of this Part of the article. Much of the important early development of habeas corpus in England took place in the context of King’s Bench establishing its role as against that of other courts, generating rules which were later expanded to restrain King and Council. See Paul D. Halliday, Habeas Corpus from England to Empire 139- 76 (2010). The American colonies lacked “the tangle of ecclesiastical courts, marshal’s courts, corporation courts, and many other courts that existed in the home country,” Freedman I, supra note 2, at 613 n.112, and thus the first aspect of the story was less salient here. Colonial prisoners indeed obtained release by challenging the jurisdiction of the committing court but the writ by which they did so was at least as likely to be denominated “supersedeas” or “certiorari” or “prohibition” as “habeas corpus.” There is a full discussion in Freedman I, supra note 2, at 597-608. See generally Kovarsky supra note 15, at 800-02 (discussing Supreme Court’s 19th century use of habeas corpus in conjunction with certiorari to review criminal convictions).

The name appears in the records under a variety of spellings. I have chosen this one to be consistent with the one that appears in 6 Provincial Papers of New Hampshire 8-9 (Nathaniel Bouton ed., 1872) (reprinting documents quoted in this section of text). See also George Wadleigh, Notable Events in the History of Dover New Hampshire: From the First Settlement in 1623 to 1865, at 144 (Tufts Coll. Press, 1913) (using this spelling in providing brief account of episode).

Relations between the colonists and the Indians have of course been the subject of extensive scholarship. For two recent historiographical summaries see Christopher Bilodeau, Indians in Southern New England: Older Paradigms and Newer Themes, 39 Revs. Am. Hist. 213 (2011) and Edward Countryman, Toward a Different Iroquois History, 69 WM. & Mary Q. 347 (2012).

Mittimus of Indian, Sept. 8, 1750, Provincial Case File No. 027045, New Hampshire State Archives. The documentation shows that Nambrous was accompanied during his captivity by a female companion who was also wounded.
When, however, the case came up later in the month the ruling was, "No evidence appearing against him the said Indian to convict him it is considered by the Court that the said Indian be acquitted and discharged." Yet, the order continued, "inasmuch as the Indian nations are making war upon his majesty's subjects in New England therefore ordered that his Excellency the Governour be informed of this Court's order to discharge the said Indian and that this Court can hold him no longer to the intent that his Excellency may take order as he shall see fit concerning him."

Later that day a copy of this order was presented to the Governor and Council, and "in as much as the tribe to which the said Indian belongs having committed hostilities against his Majesty's subjects of neighbouring governments the Council advised his Excellency to give the Sheriff orders to detain the said Indian and his squaw that is now with him till further order of the Governour and Council." They were detained accordingly until the following February.

2. In December 1752 Ebenezer Ayres was indicted for

See Benjamin Pitman's Account of Keeping Indian, Sept. 1750, Provincial Case File No.06756, New Hampshire State Archives (jailkeeper's account seeking reimbursement for boarding "the Indian man three weeks," "the Indian woman two weeks," and "rum for dressing their wounds"); Treasury Records, RG V, Box 6, Accounts 1750, New Hampshire State Archives (accounting of Drs. Sargent & Dearborn seeking payment for treating wounds of "Nimberos (an Indian)" and "Ditto for Squaws Wounds").


35 Id.

36 This may be a reference to an incident in Maine reported in Letter from Richard Waldron to [New Hampshire Governor] Jonathan Belcher (Sept. 10, 1750), M-1833-001, New Hampshire Historical Society Library ("Richmond fort was attacked by the Indians last week, who continued their fire two days and then went down the river and captured 14 people on an island. Tis reported that some are killed.").

37 Minutes of Council Meeting of Sept. 26, 1750, 6 Council Book Minutes, at 63, New Hampshire State Archives. A slightly garbled version appears in the printed papers cited supra note 32.

38 The evidence for this statement is that the jailkeeper's executor sought reimbursement from the Assembly for lodging the pair based on a memo found among the decedent's papers reading, "1750 September 3d - The Indians was bro't to his Maj'ys Gaol and they were discharged the 23d day of February following." See Petition of Joseph Mead to the New Hampshire Assembly, Petitions Index, New Hampshire State Archives. The Index entry carries a 1750 date but Mead's petition was presumably filed during the period he served as
murder, a potentially capital offense. The jury found, however, that
the shooting had been by “misadventure” and not “willful murder”
because the victim had “been in a thicket of bushes” and Ayres
“supposed he shot at a bear.” The court remanded Ayres “to his
Majesty’s gaol there to remain till he be discharged by his Majesty’s
grace and favour.”

3. Over the summer of 1749 Jotham Ordione, a substantial
citizen of Portsmouth, New Hampshire, received two alarming
letters demanding that he deposit £500 in a specified place or
else scores of men would destroy all his property down to the last
sixpence worth and “your person also when ever you can be found
in a convenient place.” On July 23, a Sunday, he complained to
the Governor and Council, which, perhaps fearing a significant
outbreak of violence, launched an investigation. The extortion
money was due on July 25, and on that date Captain John Mitchell
was arrested at the drop-off point. The Governor and Council
called him in for questioning but seemingly concluded that the
matter should be handled in ordinary course by the criminal justice
system. In any event, Mitchell was indicted in August and pleaded
not guilty. After a jury trial he was convicted, and fined £1,000 plus

the estate’s administrator, 1754-56. See 25 NEW HAMPSHIRE STATE PAPERS
11-12 (Hammond ed., 1936).

39 The documentation is to be found in Provincial Case File No. 26947 and
Judgment Book of Superior Court, Vol. B, Sept. 1750 - Mar. 1754, at 287-
88, New Hampshire State Archives. See generally Harbison v. Bell, 556 U.S.
180, 192 (2009) (noting that clemency power is a deeply-rooted feature of
Anglo-American legal tradition with particular importance in capital cases). Cf
CAROLINE ALEXANDER, THE BOUNTY: THE TRUE STORY OF THE MUTINY
counsel heard news of one mutineer’s death sentence in 1792 he immediately
and correctly concluded that pardon would be forthcoming and that client’s
life was as safe as if he had been acquitted).

40 The material in this sentence is drawn from the indictment cited infra note 44.

41 See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW
HAMPSHIRE 128-29 (1871).

42 See 3 COLLECTIONS, HISTORICAL AND MISCELLANEOUS AND MONTHLY
LITERARY JOURNAL 133-34 (1824) (giving account of episode in which
Mitchell was innocent passerby, as shown by subsequent confession of
guilty party); Judgment Book of Superior Court, Vol. B, supra note 39, at 286
(recording guilty plea and sentencing of co-defendant William Blair in 1725).

43 See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW
HAMPSHIRE, supra note 41, at 129.

44 The indictment with Mitchell’s plea endorsed is in Provincial Case File No
18130, New Hampshire State Archives.
costs of prosecution as well as being ordered to provide sureties.\textsuperscript{45} In November the Governor reported to the Council that Mitchell and a number of his supporters had been seeking clemency.\textsuperscript{46} After quoting the portion of his royal instructions dealing with his power of “remitting all fines and forfeitures &c.,” he sought and received the Council’s approval “to suspend the payment of the fine.”\textsuperscript{47} Mitchell was discharged accordingly.\textsuperscript{48}

4. In July 1725 George Walton of Portsmouth, New Hampshire was called before the Council to answer charges brought by Captain George Walker of “refusing as ferryman to transport troops and horses from Dover to Newington for his Majesty’s service,” and “expressing himself in contumacious and defamatory words in regard to the government of New Hampshire.”\textsuperscript{49} After hearing both parties the Council referred the complaint to a special session of the Justices of the Peace to take place a week later.\textsuperscript{50}

In the first three cases the prisoner’s continued incarceration rested with executive officers exercising their roles in a way complementary to that of the judges, while in the last one those officers concluded that the entire situation should be dealt with by judges.\textsuperscript{51} In each instance the officeholders (even if the same individuals) self-consciously observed their assigned role allocations.

\begin{flushright}
\footnotesize
\textsuperscript{45} See Minute Book of Superior Court, Aug. Term 1749, at 2, New Hampshire State Archives.
\textsuperscript{46} See 5 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE, supra note 41, at 130.
\textsuperscript{47} \textit{Id.} at 130-31.
\textsuperscript{48} See Minute Book of Superior Court, Aug. Term 1749, at 2, New Hampshire State Archives.
\textsuperscript{49} The summons, with the disposition thereof appearing on its reverse, is in the Executive Council Records, Box 5, Folder - Council Minutes, 1690-1769, New Hampshire State Archives.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} Another such example comes from the Maryland Court of Appeals in 1698. In Burroughs v. Copley’s Administrator, reprinted in PROCEEDINGS OF THE COURT OF APPEALS OF MARYLAND 45, 54 (Carroll T. Bond & Richard B. Morris, eds. 1933), 77 ARCHIVES OF MARYLAND ONLINE, http://aomol.msa.maryland.gov/000001/000077/html/ (last visited June 20, 2015), the Court, on which the Governor sat, was divided 3-3. Counsel for the plaintiff asked whether the Governor would exercise “a swaying vote,” but he refused and the case was put over to be decided the next term by a five-member bench. This represented a decision that the case “should be disposed of routinely by the rule of law rather than by some special political calculus or gubernatorial political judgment.” William E. Nelson, THE LAW OF COLONIAL MARYLAND: VIRGINIA WITHOUT ITS GRANDEUR, 54 AM. J. LEG. HIST. 168, 186 (2014).
\end{flushright}
2. The Sovereign

Most critically, the monarch had various roles, whose boundaries the courts would enforce.\(^{52}\) Tracing the development of this phenomenon through a wilderness of more-or-less reliable history from Magna Carta through the sixteenth century\(^{53}\) and from there through the better documented period of Edward Coke and the Petition of Right,\(^{54}\) the English Civil War and the execution of Charles I,\(^{55}\) the Glorious Revolution and the English Bill of Rights\(^{56}\) lies well beyond the scope of this article.\(^{57}\) But the power of courts to hold royal acts unlawful was an accepted part of the English constitution,\(^ {58}\) with practical consequences that were quite clear by the eighteenth century.\(^ {59}\) For example:

The Crown could not validly make a second grant impairing the rights of a prior grantholder, whether the subject of the grant

---

54 See John M. Barry, Roger Williams and the Creation of the American Soul: Church, State and the Birth of Liberty 67-70 (2012).
59 For an excellent overview see Reid, supra note 26.
was an office, corporate privileges, or land. Thus, for example, during 1749 the King created New Town, New Hampshire, from territory previously granted to South Hampton. When an action was brought to test this it resulted in a ruling "that the King has not by law a power to make a second charter with addition of persons and estates for a town which has one in full force at the time of making the second so as bind the town thereby without their consent."

The judges could and did rule that certain offices or prerogatives were beyond royal power to grant at all. Thus, for example, when in 1558 Queen Mary selected one Robert Coleshill to be a judicial clerk to Anthony Browne, the Chief Justice of Common Pleas, the position was contested by Alexander Scroggs who had been appointed by Browne. The judges of Queens Bench ruled "that the title of Colsehill was null, and that the gift of the said office by no means and at no time belongs or can belong to our lady the queen." Similarly, in 1604 all the judges of England published formal advice to James I that the monarch lacked power to transfer (for a fee) to a private individual the royal prerogative of granting dispensations from the obligation of complying with statutes.

See Rex v. Savage (KB 1519), reprinted in 2 J.H. Baker, Reports of Cases by John Caryll 699, 704 (2000) (quoting statement of court "that where the king, by his letters patent dated the first of May, grants me an office and something else, and then by other letters patent dated the second of May he grants the same thing to a stranger, these second letters patent are absolutely void.").

See Hamburger, supra note 31, at 194 & n.41. Compare Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 560 (1819) (argument of Daniel Webster that "the king cannot abolish a corporation, or new model it, or alter its powers, without its assent") with id. at 643 (statement of Chief Justice Marshall in opinion that Parliament would have had power to annul the charter but "the perfidy of the transaction would have been universally acknowledged.").

The documentation is in Provincial Case File 23510, New Hampshire State Archives.


Skrogges v. Coleshill (1559), 2 Dyer Rep. 175a, at 175b (Q.B.). To make the ruling stick the judges had to release Scroggs by habeas corpus from the Fleet prison, to which he had been committed by a commission appointed by the Queen to resolve the dispute after she was dissatisfied with the first ruling. See id.; J.H. Baker, Personal Liberty Under the Common Law, 1200-1600, in The Origins of Modern Freedom in the West 178, 199 (R.W. Davis ed., 1995) (describing case).

See Penal Statutes (1605), 7 Coke Rep. 36b.
The judges would restrain the monarch from encroaching on subjects' ancient liberties. For example, although the Crown could requisition provisions on condition of paying reasonable prices,\textsuperscript{66} the Magna Carta barred the taking of standing timber without the owner's consent.\textsuperscript{67} When the judges pointedly noted this in 1604, "James I eventually had to publicize that he would comply."\textsuperscript{68}

The monarch could neither adjudicate individual cases extra-judicially\textsuperscript{69} nor legislate by unilateral proclamation as opposed to Act of Parliament,\textsuperscript{70} nor grant franchises that were contrary to statute or included penal provisions unauthorized by Parliament.\textsuperscript{71}

In all of these instances the sovereign could not cause a person to suffer a legal hardship unless it was one affirmatively permitted by law.\textsuperscript{72} The same principle was at work when the judges granted relief against unlawful imprisonments, whether by granting the great writ of habeas corpus,\textsuperscript{73} issuing a prerogative writ\textsuperscript{74} or imposing

\textsuperscript{66} Cf. U.S. Const. amend. V (forbidding taking of private property for public use without just compensation).

\textsuperscript{67} See 2 Edward Coke, Institutes of the Laws of England 34 (quoting Magna Carta ch. 21).

\textsuperscript{68} Hamburger, supra note 31, at 196 n.46.

\textsuperscript{69} See Prohibitions del Roy, (1607) 77 Eng. Rep. 1342, 1342-43 (C.P.) (providing Coke's account of his reliance on Bracton to inform an enraged James I to his face that he must rule under God and the Law); Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 Emory L.J. 585, 601-02 (2009); see also Hamburger supra note 31, at 71-73. As correctly observed by Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 5, 25 (2003), the principle was not that the King could not adjudicate but rather that he could not do so unilaterally, being required to act judicially through the House of Lords. See generally Donald E. Wilkes, Jr., Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603-1625, 54 Am. J. Legal Hist. 200, 211-15 (2014) (describing judicial character of Parliament).

\textsuperscript{70} See Hamburger, supra note 31, at 200-02 (describing the point as settled by the middle of the seventeenth century).

\textsuperscript{71} See Attorney General v. Donatt (Ex. 1561), reprinted in 1 J.H. Baker, Reports from the Lost Notebooks of Sir James Dyer 49-50 (1994) (holding void as "utterly against the law" a royal patent to the town of Southampton making it sole port of entry for certain wines and authorizing collection of treble customs duty for any landed elsewhere).

\textsuperscript{72} See Freedman I, supra note 2, at 596.

\textsuperscript{73} See Reid, supra note 26, at 5.

\textsuperscript{74} See Freedman I, supra note 2, at 593 (noting that "demands for release from unlawful imprisonment could be made during the colonial and early national period by seeking a variety of writs, including certiorari, supersedeas,
money damages. In considering the powers of a committing court or a subordinate officer, “the central question the judges sought to decide was what right the jailer had to impose the restraint rather than what right the prisoner had to be free of it.”

III. Courts in the New Nation: A Tempestuous Beginning

A. Populist Storms Batter Legal Structures

In the first half century after Independence the legal systems of the states and the national government developed in ways particular to their own local political, intellectual, and economic environments. Events in each jurisdiction moved in ways that were prohibition, trespass, and replevin — or even by pleadings that asked for no particular writ at all.”; see also Wilkes, supra note 69, at 231. See generally Kevin Costello, The Writ of Certiorari and Review of Summary Criminal Convictions, 1660-1848, 128 L.Q. REV. 443 (2012). As Professor Halliday has shown, unifying the judges’ use of the various prerogative writs was a sweeping conception that it was their role to insure that justice was being done to the prisoners. See Halliday, supra note 30, at 77-83.

See Baker, supra note 64, at 192-94 (describing how civil damages actions were routine remedy for unlawful imprisonments well before rise of habeas corpus); Freedman II, supra note 3, Part II.B.1. See also William E. Nelson, The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760-1775, 18 AM. J. LEG. HIST. 1, 8-9 (1974) (listing numerous cases in Massachusetts seeking damages for official misconduct).


See Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 7 (1971). See generally Kathryn Preyer, Penal Measures in the American Colonies, 26 AM. J. LEGAL HIST. 326, 326-27 (1982) (emphasizing that because of geographical and temporal variations, “The character of each colony at its earlier and later stages needs to be considered in order to assess the process of change through time”).
“complex, halting, and at times irrational”78 rather than linear,79 and there remains ample room for future scholarship to illuminate the details of the timing and contents of specific struggles to create legal structures that could gain general acceptance.

For present purposes, though, it is sufficient to note that widespread gales were sweeping the landscape of public opinion in large parts of the country:

1. Judges were in bad odor. From Royal apparatchiks80 they became State officials lacking a popular mandate. Moreover, they were not thought to add any valuable expertise to government. Whether or not they were lawyers (and many were not),81 the general view was that they knew no more about law — and certainly less about justice — than a cross-section of the local community: “The authority of juries to determine the law in civil and criminal cases rested on the widespread understanding that ordinary citizens had as great an ability as judges to discern what the law was.”82 This view, in turn, rested critically on the belief that legal constraints on individuals’ behavior should be ones “arising out of and reflecting the community” rather than ones “elaborated by legally trained professionals.”83 In this vision, “Justice would be personal and pragmatic,” reflecting the

78  Ellis, supra note 77, at viii.
79  See Shugerman, supra note 9, at 31-34 (noting that the “story of early American courts was not a steady march toward judicial supremacy” but was characterized by bursts of judicial assertiveness in particular places followed by political pushback with “judges often... taking two steps forward and one step back”).
80  See Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789-1815, at 400-01 (2009); Gordon S. Wood, The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less, 56 Wash. & Lee L. Rev. 787, 789-90 (1999) (observing that at Independence judges were considered dangerous, being regarded “essentially as appendages or extensions of royal authority”); see also Hamburger, supra note 31, at 341-42. Even when imposing constraints on the Crown, the judges were, by a fiction more or less strained, deemed to be implementing the royal will. See Brendan McConville, The King’s Three Faces: The Rise and Fall of Royal America, 1688-1776, at 8 (2006).
83  Id.
idea “that laws were made by people and should reflect the value system of their creators.”

2. In consequence,

The mass of the people in rural or frontier regions cherished around 1800 an ingrained hostility to the law as a profession . . . . It was not that the American people were positively resolved on becoming lawless, in the manner of cinema badmen, but they did profoundly believe that the mystery of the law was a gigantic conspiracy of the learned against their helpless integrity.

3. “Almost as soon as the lawyers of the young Republic began to mobilize the forces of the Head against the anarchic impulses of the American heart they found themselves further embarrassed by a hostility . . . to any and every use of the English Common Law.” To the “patriotic hatred of everything British” were added the attacks that common law doctrines (a) lacked any sort of American democratic legitimacy, and (b) were retrogressive in substance — or at best “a haphazard accumulation of precedents, quirks [and] obscurities.” Moreover, because the rules emerged from multifarious judicial pronouncements rather than an easily accessible statute they were liable to infinite manipulation.

The confluence of the foregoing views, sometimes labelled “popular legalism” or “popular constitutionalism” led to powerful forces favoring legal systems that minimized the role of lawyers,

85 Perry Miller, The Life of the Mind in America From the Revolution to the Civil War 102 (1965); see also Golumbic, supra note 84, at 65 (observing that from farmers’ viewpoint, “[l]awyers were selling the law, just as farmers sold their hogs and corn,” with the purpose of ensuring “backcountry dependence on the bar”).
86 Miller, supra note 85, at 105.
87 Id.
88 See Kunal M. Parker, Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism 76-77 (2011).
89 Miller, supra note 85, at 121.
90 See Wood, supra note 80, at 403-04.
promoted informal and case-specific dispute resolution,\textsuperscript{91} and made the sources of legal obligation as accessible as possible to ordinary people.\textsuperscript{92} In the words of Thomas Paine:

The courts of law . . . hobble along by the stilts and crutches of English and antiquated precedents. Their pleadings are made up of cases and reports from English law books; many of which are tyrannical, and all of them now foreign to us . . . . The terms used in courts of law, in sheriffs' sales, and on several other occasions, in writs, and other legal proceedings, require reform. Many of those terms are Latin, and others French . . . . [T]hey serve to mystify, by not being generally understood, and therefore they serve the purpose of what is called law, whose business is to perplex; and . . . from thence to create the false belief that law is a learned science, and lawyers are learned men . . . .

\textsuperscript{91} See John Phillip Reid, Legitimating the Law: The Struggle for Judicial Competency in Early National New Hampshire 31 (2012) (describing "commonsense jurisprudence": "Spur-of-the-moment judgments, decreeing neighborly, commonsense solutions to a dispute . . . were not only preferred, they were expected to be superior to the conclusions of a lawyer needing hours to find an answer in some musty precedent or inscrutable treatise"); John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 Colum. L. Rev. 547, 566 (1993) (describing people holding these views as “hostile to lawyers and legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways.”). See also Thomas Paine, To the Citizens of Pennsylvania on the Proposal for Calling a Convention (Aug. 1805), reprinted in 4 The Writings of Thomas Paine, App. G, at 457, 459 (Moncure Daniel Conway ed., 1894), http://oll.libertyfund.org/titles/paine-the-writings-of-thomas-paine-vol-iv-1791-1804:

Every case ought to be determined on its own merits, without the farce of what are called precedents, or reports of cases; because, in the first place, it often happens that the decision upon the case brought as a precedent is bad, and ought to be shunned instead of imitated; and, in the second place, because there are no two cases perfectly alike in all their circumstances, and therefore the one cannot become a rule of decision for the other.

Two farmers or two merchants will settle cases by arbitration which lawyers cannot settle by law. Where then is the learning of the law, or what is it good for? It is here necessary to distinguish between lawyer's law, and legislative law. Legislative law is the law of the land, enacted by our own legislators, chosen by the people for that purpose. Lawyer's law is a mass of opinions and decisions, many of them contradictory to each other, which courts and lawyers have instituted themselves, and is chiefly made up of law-reports of cases taken from English law books. The case of every man ought to be tried by the laws of his own country, which he knows, and not by opinions and authorities from other countries, of which he may know nothing. A lawyer, in pleading, will talk several hours about law, but it is lawyer's law, and not legislative law, that he means.  

Views like these prevailed in many places, setting their judicial systems down paths very different from the ones that were eventually followed. On the national level, these views were frequently associated with Thomas Jefferson and his Republicans as they attacked their Federalist rivals.

B. The Storm Surge: Legislative Limitations on Judicial Autonomy

---


94 See infra Parts III.B, IV.

95 See Miller, supra note 85, at 105-06. For a lengthy attack by Jefferson on the view that the federal courts had inherent common law powers see Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), http://founders.archives.gov/documents/Washington/05-17-02-0417 (“Of all the doctrines which have ever been broached by the federal government, the novel one of the common law being in force & cognisable as an existing law in their courts, is to me the most formidable. all their other assumptions of un-given powers have been in the details . . . in comparison of the audacious, barefaced and sweeping pretension to a system of law for the US. without the adoption of their legislature and so infinitely beyond their power to adopt.”). See also Wood, supra note 80, at 416-18; infra text accompanying notes 183-86.
1. Architectural Arrangements

Working within the framework of the ideas described in the previous section, legislatures in the early nation period often sought to create judicial systems that would maximize the power of lay people by (a) staffing the bench with judges who were not lawyers,\(^9^6\) (b) allocating as much power as possible to juries rather than judges,\(^9^7\) and (c) organizing the judiciary in such a way as to avoid

\(^{96}\) See Reid supra note 91, at 20-37.

\(^{97}\) See John Reid, From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire, N.H. B.J., Apr. 1959, at 27, 28-30. In the immediate aftermath of the Revolution the legislatures of North Carolina and Virginia were only willing to grant equity jurisdiction to the courts on condition that issues of fact be tried by a jury. See Daniel D. Blinka, Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic, 47 AM. J. LEGAL HIST. 35, 82-84 (2005); Columbic, supra note 84, at 68-69. New Hampshire was even more grudging. See Reid, supra note 91, at 68-69.


This is not surprising. During the colonial period the absence of juries in admiralty had often led litigants to take steps—including obtaining writs of habeas corpus—to avoid it. See 2 William E. Nelson, The Common Law in Colonial America: The Middle Colonies and the Carolinas, 1660-1730, at 94-96 (2013); Freedman I, supra note 2, at 606 n.77; William E. Nelson, The Persistence of Puritan Law: Massachusetts, 1160-1760, 49 WILLAMETTE L. REV. 307, 350-53 (2013). As the Revolutionary crisis intensified the Sugar Act of 1764 and the Stamp Act of 1765 expanded admiralty jurisdiction in ways designed to assist royal revenue collection, and “the admiralty grievance” emerged as a major issue. See John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 177-83 (1986); Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution 207-11 (1960).
creating superior appellate courts with law-pronouncing powers. They also imposed legislative prohibitions on the citation and official publication of judicial decisions in order to prevent their becoming an authoritative source of law.

2. Wiping Out Courts Wholesale

Once the Revolution broke out, Congress resolved that prize disputes should be adjudicated in the first instance by state courts, using juries, and then appealed to a Congressional committee. See Henry J. Bourguignon, The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787, at 45-47 (1977); see also infra note 229 (describing later history). As Professor Bourguignon notes, trial by jury was “an unheard of innovation for prize courts, obviously inspired by the decade of complaints against the lack of jury trials in vice-admiralty courts,” id. at 46. The state courts’ practices varied with time and place, and there is still a good deal of historical work remaining to be done. See id. at 192-96.


As indicated supra text accompanying note 90, the official publication of judicial opinions (as distinct from statutes) could be an extremely controversial political issue in the early Republic because it implicated the lawmaking authority not just of judges, as opposed to juries, but also of judges as opposed to legislatures.

The New Hampshire history of this issue has been extensively documented by John Phillip Reid. See John Phillip Reid, Legislating the Courts: Judicial Dependence in Early National New Hampshire 8 (2009) (“One of the most direct and frequently implemented ways that legislatures supervised judges in the era of the early republic was to control what they could read in court and what they could cite or quote as authority.”).

When judicial decisions displeased legislatures, they might react by abolishing entire courts, thereby terminating the functioning of judges who otherwise held office during good behavior.\textsuperscript{101} This happened in New Hampshire repeatedly,\textsuperscript{102} and also in Maryland,\textsuperscript{103}

\textsuperscript{101} Judges in the colonies, unlike those in England following the Glorious Revolution, had served at the pleasure of the monarch, not during good behavior. See John Phillip Reid, The Ancient Constitution and the Origins of Anglo-American Liberty 76 (2005). This was a longstanding colonial grievance in America, see, e.g., A.G. Roebber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810, at 63 (discussing Virginia complaint on the subject in 1700), which assumed greater importance as the Revolution neared, see Reid, supra note 97, at 176,192-93, and was articulated in the Declaration of Independence ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."). Post-Independence constitutions rectified the situation. See U.S. Const., art. III, §1 ("The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); The Federalist No. 78, at 465 (James Madison) (Clinton Rossiter ed., 1961) (Noting general public approval of good behavior tenure throughout the States as embodied in their constitutions and praising it as "certainly one of the most valuable ... improvements in the practice of government," an excellent barrier to despotism in monarchies and "in a republic ... a no less excellent barrier to the encroachments and oppressions of the representative body," as well as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws"); see also James E. Pfander, Judicial Compensation and the Definition of Judicial Power in the Early Republic, 107 Mich. L. Rev. 1 (2008) (noting importance of compensation, as well as tenure, provision).

\textsuperscript{102} See Reid, supra note 91, at 6 ("New Hampshire's executive and legislature employed the tactic of legislating judges out of office at least five times to clear the high court of every member."); see also Freedman II, supra note 3, at 19 n.58 (collecting sources on one of these episodes); Chuck Douglas, Put a Republican on the Court, Governor Lynch, Concord Monitor, Dec. 7, 2008, at D1 (summarizing history through 1876).

\textsuperscript{103} See 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, 71-72 (2002). One of the displaced judges, William Whittington (represented by Robert Goodloe Harper, a prominent federalist lawyer who would later represent Erick Bollman, see infra note 151) brought suit to reclaim his office. In an opinion that Professor Shugerman rightly sees as closely connected to Marbury, see Shugerman, supra note 9, at 36, the Maryland General Court denounced the repeal legislation in harsh language but went on to hold against the plaintiff, see Whittington v. Polk, 1 H. & J. 236 (Md. 1802).
Kentucky\textsuperscript{104} and South Carolina.\textsuperscript{105} Very significantly for present purposes the method was also used on the federal level when the Judiciary Act of 1802\textsuperscript{106} repealed the Judiciary Act of 1801,\textsuperscript{107} and the Supreme Court effectively upheld the action\textsuperscript{108} six days after deciding \textit{Marbury v. Madison}.\textsuperscript{109}


\textsuperscript{107} Act of Feb. 13, 1801, 2 Stat. 89.

\textsuperscript{108} See Stuart v. Laird, 5 U.S (1 Cranch) 137 (1803); see also Gerhardt & Stein, supra note 106, at 573-74 (noting political weakness of efforts by ousted judges to challenge repeal prior to Supreme Court ruling). In terms of the power of the judiciary vis. a vis. the legislative branch, Stuart, not Marbury, was "the main event." Shugerman, supra note 9, at 46. See William E. Nelson, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 69 (2000) (observing that fundamental distinction between cases was that if Court had invalidated the Judiciary Act of 1802 in Stuart it "would have embroiled itself in a political contest with Congress and the president that it might not have survived").

3. Pressuring Individual Judges

A legislature might also put pressure on individual judges by impeachment — as happened dramatically to Justice Chase and others by calling them before it to explain their conduct, or, in some states, by voting an “address,” i.e., removing judges by simple legislative vote without any imputation of misconduct. Indeed, a frustrated President Jefferson, lamenting that it would take two years to try the Chase impeachment, commented to Senator Plumer of New Hampshire, “The Constitution ought to be altered, so that the President should be authorized to remove a Judge from office, on
the address of the two Houses of Congress."\textsuperscript{114}

Furthermore, in a number of states the legislatures elected the judges for a prescribed period, sometimes as short as a year, which meant that if the legislature did not like their decisions it could simply replace them with more pleasing incumbents.\textsuperscript{115}

4. Re-deciding Cases

Legislatures might also interfere with judicial decision-making on a retail rather than wholesale basis by reviewing the factual and legal determinations of courts and, if so disposed, reversing them.\textsuperscript{116} Indeed, John Marshall wrote to Samuel Chase just before the latter’s impeachment trial that a more appropriate mechanism for dealing with "legal opinions deemed unsound by the legislature" than impeachment was the vesting of "appellate jurisdiction in the legislature."\textsuperscript{117}

It has long been known that legislatures exercised such power in Connecticut\textsuperscript{118} and Rhode Island\textsuperscript{119} but the practice was not limited to those states.\textsuperscript{120} The New Hampshire legislature engaged in it

\textsuperscript{114} See Letter from William Plumer to T.W. Thompson (Feb. 18 1803), reprinted in William Plumer, Jr., Life of William Plumer 253 (1857); see also Ellis, \textit{supra} note 77, at 104 (attributing Chase’s acquittal in part to fact that Jefferson did not want to see him removed from office by impeachment); Wood, \textit{supra} note 80, at 422-25.

\textsuperscript{115} See Wood, \textit{supra} note 80, at 401-02 (identifying Rhode Island, Connecticut, and Vermont as states with annual legislative election of judges).


\textsuperscript{119} See Taylor v. Place, 4 R.I. 324 (1856) (invalidating practice).

\textsuperscript{120} But cf. Nathan S. Chapman & Michael W. McConnell, \textit{Due Process as Separation of Powers}, 121 \textit{Yale L.J.} 1672, 1730 (2012) (asserting that "[o]utside Connecticut and Rhode Island, which . . . preserved the power of legislative adjudication until . . . 1818 and 1848, respectively, the only major adjudicatory powers that state and federal legislatures continued to enjoy" after Independence were “the power to impeach government officials and the power to satisfy private claims on public debt”).
frequently, and similar evidence is emerging from Massachusetts. Thomas Jefferson complained in 1788 that since Independence the Virginia legislature had “in many instances, decided rights which should have been left to judiciary [sic] controversy.”

There is, moreover, every reason to believe that examples from other states remain to be unearthed by historians. For instance, in 1824, the Kentucky legislature passed “An Act for the Benefit of Benjamin Craig and Others.” This first recited that “it is represented to the present General Assembly, that there is a prosecution now depending in ... Boone County against Ben. Craig for stabbing, and because the person with whom the said Craig had the conflict, possesses numerous and influential relations in said county... the said Craig believes... that a fair trial cannot be had in said country,” and then enacted that “a change of venue be granted and allowed the said Craig, to the county of Scott.”

121 Numerous examples are documented in Reid, supra note 99, at 62-70 and Freedman II, supra note 3, at 68-70.
124 See, e.g., 1821 N.C. Sess. Laws 66 (“An Act for the Relief of Charlotte McDonald”) (terminating proceedings against McDonald, who was then under indictment for bigamy).
125 1824 Ky. Acts 56.
126 Id. Subsequent sections of the statute similarly granted James K. Laird and Gilbert Christian, indicted for murder in Henderson County a change of venue to Hopkins County, id. at 58, and William Frogg, indicted in Cumberland County “for maliciously stabbing a man by the name of Rupe,” a change of venue to Wayne County, id. at 59. When Kentucky adopted a new constitution in 1850, it added art. II, § 38: “The General Assembly shall not change the venue in any criminal or penal prosecution, but shall provide for the same by general laws.” The provision currently in force, Section 11 of the Kentucky Constitution of 1891, provides that “the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.”
C. Ex Parte Bollman and the Precatory Suspension Clause

Ex Parte Bollman\textsuperscript{127} was delivered when judicial independence was at its nadir\textsuperscript{129} and Chief Justice Marshall was quite understandably deeply concerned for its future.\textsuperscript{130} But his legal reasoning was wrong then;\textsuperscript{131} the surrounding context changed subsequently;\textsuperscript{132} and the policy implications of Bollman were disturbing.\textsuperscript{133} The case is an artifact of a time that has passed and, as described in Part V below, has now been properly repudiated by the Supreme Court.

1. The Political and Legal Background

As relevant here, the historic victory of Thomas Jefferson and his Republicans in the Presidential election of 1800 resulted in:
- The elevation of Secretary of State John Marshall to the Chief Justiceship, and to the titular leadership of the judicial branch, now the Federalists’ last, and beleaguered, bastion;\textsuperscript{134} and
- Connectedly, the ruling in Marbury v. Madison,\textsuperscript{135} in which Marshall read Section 13 of the Judiciary Act of 1789 as conferring authority on the Supreme Court to exercise original mandamus powers, and then held the section unconstitutional because it

\textsuperscript{127} The narrative below is substantially drawn from Chapter 3 of FREEDMAN, supra note 11. An earlier version containing additional documentation appeared as Eric M. Freedman, Just Because John Marshall Said it, Doesn’t Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789, 51 ALA. L. REV. 531 (2000). For a more recent scholarly account that focuses on the issues of relevance to this article, see Halliday & White, supra note 7, at 683-98.

\textsuperscript{128} 8 U.S. (4 Cranch) 75, 93-94 (1807).

\textsuperscript{129} See supra Part III.B & infra text accompanying notes 183-86.

\textsuperscript{130} Indeed, even the watered-down opinion he wrote drew political backlash. See NEWMYER, supra note 12, at 65 (“Loyal [Jefferson] supporters in Congress, with Jefferson’s encouragement . . . renewed their effort to limit the Court’s habeas corpus jurisdiction. Talk of Marshall’s impeachment, already rampant after Marbury, now intensified.”).

\textsuperscript{131} See infra text accompanying notes 187-96.

\textsuperscript{132} See infra Part IV.A.

\textsuperscript{133} See Freedman, supra note 18, at 19 (describing doctrinal situation as “potentially dangerous to constitutional liberty”).


\textsuperscript{135} 5 U.S. (1 Cranch) 137 (1803).
expanded the original jurisdiction of the Supreme Court beyond the limits laid down in Article III of the Constitution. In his famous opinion Marshall lambasted his successor, James Madison, for not delivering to the Federalist William Marbury the commission for the office of Justice of the Peace to which the Adams Administration had appointed him in its last hours (and that Secretary of State Marshall had probably lost himself in the confusion), while not issuing an order that the Jefferson Administration would surely have ignored.

As matters eventually turned out the *Bollman* opinion is the mirror image of the *Marbury* opinion. In *Marbury*, Marshall wrote a decision spiked with harsh dictum, but did not order the Jefferson administration to deliver Marbury’s commission. In *Bollman*, Marshall ordered the Jefferson administration to release the prisoners, but wrote a decision softened with placatory dictum.

### 2. The Factual Background

When the Jefferson Administration completed its first term in office, Vice President Aaron Burr (whose poisoned relationship with Jefferson had led to his being brusquely removed from the second-term ticket, and who was facing charges in New York and New Jersey for murder as a result of having killed Alexander Hamilton in a duel), found it prudent to travel west. There, he allegedly conspired with others to separate some of this country’s newly acquired western territories from their allegiance to the United States. Among his alleged co-conspirators were Samuel Swartwout and Dr. Erick Bollman. In December 1806, they were seized by General James Wilkinson, the American Army commander in New Orleans (who had himself been involved in Burr’s plans), and summarily transported by warship.

---


139 See 2 Henry Adams, *History of the United States During the Administration of Thomas Jefferson* 241-42 (1891); Hoffer, supra
to Baltimore via Charleston — in defiance of writs of habeas corpus granted by federal judges in New Orleans\textsuperscript{140} and Charleston.\textsuperscript{141}

The day the prisoners arrived in Washington, President Jefferson met with Bollman to discuss a plea bargain,\textsuperscript{142} and one of the President's leading Senate allies — seeking to insure that Bollman and Swartwout would not obtain any further pesky writs of habeas corpus — introduced legislation to suspend the writ for three months and to keep the two imprisoned.\textsuperscript{143} Convening in closed session, the Senate passed the measure with only a single dissenting vote, but over a weekend, the atmosphere cooled and the House, by a vote of 113-19, bluntly rejected the proposal as unworthy of consideration.\textsuperscript{144}

On the following day, the United States attorney moved the Circuit Court for the District of Columbia for an arrest warrant in order to have the pair committed to stand trial on a charge of treason.\textsuperscript{145} A politically divided bench granted the motion.\textsuperscript{146}

\begin{footnotes}
\item [138] See 1 Political Correspondence and Public Papers of Aaron Burr 982-83 (Mary-Jo Kline & Joanne W. Ryan eds., 1983). Several detailed accounts appear in the N.Y. Eve. Post, Feb. 18, 1807, at 1, which also reports Henry Clay's much-publicized comment in the Senate on February 11 "that the late seizure of men at New Orleans, by military force, and the transportation of them to the Atlantic coast, was one of the most arbitrary and outrageous acts ever committed."

\item [140] See 1 Charles Warren, The Supreme Court in United States History 302 (1922).

\item [142] See Hoffer, supra note 138, at 95; Milton Lomask, Aaron Burr: The Conspiracy and the Years of Exile, 1805-1835, at 202 (1982).


\item [144] See Hoffer, supra note 138, at 88; Newmyer, supra note 12, at 50-51; Am. Mercury, Feb. 12, 1807 (Congress), at 1 (reporting House debate).

\item [145] See United States v. Bollman, 24 F. Cas. 1189 (C.D.C. 1807) (No. 14,622). In support of the application, the United States attorney proffered an affidavit from General Wilkinson "and a printed copy of the president's message to congress of the 22d of January, 1807." Id. In this communication, Jefferson denounced the conspiracy and said that General Wilkinson’s information placed Burr's guilt "beyond question." See 16 Annals of Cong. 39, 40 (1807); see also id. at 1008-18 (reprinting supporting documents accompanying message).

\item [146] See Bollman, 24 F. Cas. at 1189. The Chief Judge, William Cranch, a Federalist, opined that there was insufficient probable cause, but was outvoted by his two Republican colleagues. See Hoffer, supra note 138, at 95; Newmyer, supra note 12, at 50-56. Extended accounts of the proceedings appear in the National
The prisoners then applied to the United States Supreme Court for writs of habeas corpus. As Justices Johnson and Chase expressed doubts as to the Court’s jurisdiction, Chief Justice Marshall set that preliminary question down for a full argument. In a reflection of the political context, interest in the argument “was at fever pitch, almost the whole of Congress being in attendance.”

3. Arguments of Counsel

The Attorney General, who apparently did not doubt the Court’s power to grant the writ, “declined arguing the point on behalf of the United States.” In fact, he told the bench that if it should determine “to issue a writ of Habeas Corpus he should cheerfully submit to it.” Thus, the Justices heard argument only from petitioners’ counsel, principally from the prominent Federalists Robert Goodloe Harper and Charles Lee.

In the portion of his argument of present relevance, Harper addressed whether “this court has the power generally of issuing the writ.” In support of an affirmative response Harper urged that (1) the Court had inherent power to issue writs of habeas corpus

Intelligencer of Feb. 2, 1807 and Feb. 4, 1807. See also Warren, supra note 141, at 303-04 (reprinting letter from Cranch to his father describing surrounding atmosphere).

147 See Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 76 n.(a) (1807).
149 Bollman, 8 U.S. at 79.
151 The four lawyers who appeared for the petitioners had constituted Justice Chase’s defense team in his impeachment trial. See Hoffer, supra note 138, at 98-99. Lee, a former Attorney General of the United States, had been William Marbury’s lawyer in his unsuccessful effort to obtain his commission. As indicated supra note 103, Harper had represented another of the displaced judges in connected litigation.
152 Bollman, 8 U.S. at 79.
generally, and (2) was authorized to do so in this case by a statute\textsuperscript{153} that was (a) applicable and (b) constitutionally valid.\textsuperscript{154}

(1) Harper’s initial proposition was:

The general power of issuing this great remedial writ [of habeas corpus] is incident to this court as a supreme court of record. It is a power given to such a court by the common law . . . . [A court that] possessed no powers but those given by statute . . . could not protect itself from insult and outrage . . . . It could not imprison for contempts in its presence. It could not compel the attendance of a witness . . . . 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.\textsuperscript{155}

\textsuperscript{153} The statute in question was Section 14 of the First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81 (1789). With clause numbering inserted for ease of reference, the section provided:

\begin{quote}
[1] That all the . . . courts of the United States shall have the power to issue writs of scire facias, habeas corpus, [2] and all other writs not specially provided for by statute, [3] which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. [4] And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. [5] Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.
\end{quote}

\textsuperscript{154} For convenience, I have numbered counsel’s arguments, and in the next section of text used the same numbering to designate Marshall’s responses and my own analysis. Also for convenience, I have relied on the version of the argument reprinted in the United States Reports. Another version, which is very similar but perhaps preserves Harper’s oratory slightly better, was published in two parts in the National Intelligencer of Feb. 18, 1807 and Feb. 20, 1807. The surrounding atmosphere is well captured by HOFFER, supra note 138, at 97-111.

\textsuperscript{155} Bollman, 8 U.S. at 79-80.
Harper supported this argument by showing “that all the superior courts of record in England,” whether or not they had any criminal jurisdiction or statutorily-granted habeas jurisdiction, “are invested by the common law with this beneficial power, as incident to their existence.” As an example providing “a conclusive authority in favour of the doctrine for which we contend,” he cited a case that would have been very familiar to his audience as a monument to English liberty, *Bushel’s Case,* in which the court of common pleas (which had no statutory habeas corpus jurisdiction) employed its common law habeas corpus powers to release a juror who had been imprisoned because — contrary to evidence that the trial judge considered convincing — he had dared to vote to acquit William Penn on a charge of breaching the peace by preaching on a London street. Harper then asked whether the American people had not “as good a right as those of England to the aid of a high and responsible court for the protection of their persons?”

(2) (a). Turning to his argument that the Court had jurisdiction under Section 14 of the Judiciary Act, Harper first argued that the first sentence contained “two distinct provisions,” viz., clause [1] and the remainder of the sentence. The authority to issue writs of habeas corpus, he argued “is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers which such courts usually possess.”

In other words, the federal courts had the authority to issue writs of habeas corpus when appropriate whether or not there was an underlying action over which they had subject matter jurisdiction — a point of some importance to the prisoners, since,

156 Id. at 82. Harper’s account was correct. See Freedman I, supra note 2, at 610 & n.93; Freedman II, supra note 3, at 4 n.5; and Freedman, supra note 11.
159 Bollman, 8 U.S. at 80-81. See Halliday & White, supra note 7, at 690-92 (discussing this passage).
160 For the text of Section 14 with interpolated clause numbers see supra note 153.
161 Bollman, 8 U.S. at 83.
other than the habeas corpus application itself, there was no action pending in the Supreme Court.

(2) (b). Harper next addressed the problem posed by Marbury, namely, that the Section 13 of the Judiciary Act\(^\text{162}\) — which bore an uncomfortable resemblance to Section 14 — had been held unconstitutional as an attempt to confer upon the Court original jurisdiction in violation of the limitations on that jurisdiction contained in Article III of the Constitution.\(^\text{163}\) Harper asserted that "the object of the habeas corpus now applied for, is to revise and correct the proceedings of the court below."\(^\text{164}\) Hence, the proceedings were appellate, and fell within the class of cases in which Congress was authorized to confer jurisdiction on the Court.\(^\text{165}\) Therefore, the statute authorizing the Court to issue a writ of habeas corpus was constitutional.

Indeed, Harper argued, the Court had in fact granted relief on similar facts twice before. In United States v. Hamilton\(^\text{166}\) which arose out of the Whiskey Rebellion, Hamilton, who "had been committed upon the warrant of the District Judge of Pennsylvania, charging him with High Treason," brought a habeas corpus petition to the Supreme Court challenging the sufficiency of the evidence against him. Rejecting the government's defense that the decision of the District Judge could be revised only on the "occurrence of new matter" or a "charge of misconduct," the Court had ordered that Hamilton

\(^{162}\) "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." First Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80 (1789).

\(^{163}\) U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned [in U.S. CONST. art. III, § 2, cl. 1], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). The ruling in Marbury was that Section 13 authorized the Court to assume original jurisdiction over controversies, like the one involved there, that did not fall within the first sentence just quoted, and was therefore unconstitutional. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-76 (1803).

\(^{164}\) Bollman, 8 U.S. at 86.

\(^{165}\) That is, this case fell within the second sentence quoted from Article III supra note 163.

\(^{166}\) 3 U.S. (3 Dall.) 17 (1795).
be admitted to bail. \(^{167}\) And just the previous year, the Court had decided *Ex Parte Burford*. \(^{168}\) There, Burford, confined in the District of Columbia under a commitment charging that he was “an evil doer and disturber of the peace,” had petitioned the Supreme Court for a writ of habeas corpus. Since the Court was “unanimously of opinion, that the warrant of commitment was illegal, for want of stating *some good cause certain, supported by oath,*” (original emphasis) it had ordered the prisoner discharged. \(^{169}\)

4. Marshall’s Opinion

(1). In the section of greatest significance for present purposes, Marshall’s opinion began by rejecting Harper’s argument that all courts of record have inherent habeas corpus powers and disclaiming “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 the common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench,

\(^{167}\) *Id.* at 17-18. See 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 514-21 (Maeva Marcus et al. eds., 1998). Dissenting in *Bollman*, Justice William Johnson agreed that the “case of Hamilton was strikingly similar to the present,” but argued “that the authority of it was annihilated by the very able decision in *Marbury v. Madison,*” since the *Hamilton* Court had been exercising original jurisdiction. *Bollman*, 8 U.S. at 103-04 (Johnson, J., dissenting).

\(^{168}\) 7 U.S. (3 Cranch) 448 (1806).

\(^{169}\) *Id.* at 450-51, 453. Dissenting in *Bollman*, Justice Johnson reported that he had objected to the Court’s disposition of *Burford*, but had “submitted in silent deference to the decision of my brethren.” *Bollman*, 8 U.S. at 107 (Johnson, J., dissenting). He also reported that his *Bollman* dissent had the support of an absent Justice. *Id.* Scholars have long been hopelessly divided as to whether this was Chase or Cushing. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 81 n.131 (1985); see also NEWMYER, *supra* note 12, at 57 (picking Chase as most likely).
has even for an instant, been dissatisfied . . . . The inquiry therefore on this motion will be, 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 as that of Erick Bollman and Samuel Swartwout, has been given to this court.\(^\text{170}\)

(2)(a). Marshall accepted Harper's assertion that clause [1] of Section 14 is independent of the remainder of the first sentence, but did so in a way from which the field has only recovered in the past decade.\(^\text{171}\)

(i) He began by quoting the Suspension Clause\(^\text{172}\) and suggesting that, "[a]cting under the immediate influence of this injunction," the First Congress "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."\(^\text{173}\) Thus, the statute should receive a robust reading.

(ii) Marshall next observed that, since the restriction in clause [3] (i.e. "which may be necessary for the exercise of their respective jurisdictions") plainly did not apply to the second sentence of Section 14, if it were to be applied to clause [1], the result would be that individual judges would have more power than courts, which "would be strange."\(^\text{174}\)

---

\(^\text{170}\) Bollman, 8 U.S. at 93-94. The elided portion of the passage contains two further responses to Harper's arguments on the role of the common law. First, Marshall asserted, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." Second, responding to Harper's discussion of the contempt power, Marshall wrote, "This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals."

\(^\text{171}\) See infra Part V. To assist the reader of this page of text, Section 14 with interpolated clause numbers has been set forth supra note 153.

\(^\text{172}\) U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

\(^\text{173}\) Bollman, 8 U.S. at 95.

\(^\text{174}\) Id. at 96.
Moreover, Marshall continued, in a lengthy passage, to apply the limitation in clause [3] to clause [1] would render it largely meaningless, since, in light of the restrictions on the jurisdiction of the federal courts, there would never be any occasion to issue the writ if it could only be done in cases in which it is "being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally," with one exception.

That exception, he wrote — the only power "which on this limited construction would be granted by the section under consideration" — would be the power "of issuing writs of habeas corpus ad testificandum," that is, ones designed to bring witnesses before the court. But the "section itself proves that this was not the intention of the legislature," because that variety of the writ was the subject of its own special provision, namely the proviso in clause [5].

He continued, "This proviso extends to the whole section. It limits the powers previously granted to the courts. . . . That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted."

Therefore, Marshall concluded, Section 14 allowed a federal court to make "an inquiry into the cause of commitment" by federal authorities regardless of whether or not there was an underlying litigation pending before it — meaning that the statute covered the present circumstances.

(2) (b). Having decided that the Court had statutory authority to issue the writ, Marshall turned to the constitutional issue framed by Marbury and, accepting Harper's argument, ruled in a few terse sentences that the jurisdiction "which the court is now asked to

175 Id. at 96-97.
176 Id. at 99.
177 Id.
178 Id. at 100. The prisoners in Bollman were federal, not state. Nonetheless, Marshall, in additional dictum not relevant to this article took the opportunity to construe the statutory provision respecting the issuance of the writ to state prisoners (clause [5] of Section 14 as reproduced supra note 153) in a way that, as I have argued in detail elsewhere, was indefensibly restrictive see Freedman, supra note 11, at 30-35, and that in any event would not lead to the conclusions he sought to draw, see id. at 36-46. Aspects of my argument have been criticized in Lee Kovarsky, Prisoners and Habeas Privileges Under the Fourteenth Amendment, 67 VAND. L. REV. 609, 622-25 (2014) and in a book review by Steven Semeraro, Reconfirming Habeas History, 27 T. JEFFERSON L. REV. 317 (2005). I hope to address these matters in future work.
exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol [sic]."\(^\text{179}\) Thus the statute granting the Court the power to issue the writ on the facts before it was constitutional as well as applicable.

Accordingly, in proceedings stretching over five days, the Supreme Court proceeded to examine the merits. The "clear opinion of the court," Marshall said, is "that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done."\(^\text{180}\) With the prisoners present,\(^\text{181}\) the Court "fully examined and attentively considered," on an item-by-item basis, "the testimony on which they were committed," held it insufficient, and ordered their discharge.\(^\text{182}\)

## 5. *Bollman’s Sea Mine*

Because the actual (and correct) holding of *Bollman* was that a valid statute gave the Court jurisdiction to issue a writ of habeas corpus in the case at hand, its disclaimer of common law powers was pure dictum. Marshall’s insertion of these pronouncements is, of course, easy to explain. Ruling in a highly politicized case so soon after the 1805 attempt to impeach Justice Chase,\(^\text{183}\) strong considerations of political prudence suggested that Marshall take every possible measure to minimize the risk of attacks on the independence of the federal judiciary. As so often, he "was doing what was politically smart and institutionally essential,"\(^\text{184}\) engaging in a "mixture of

\(^{179}\) *Bollman*, 8 U.S. at 101.

\(^{180}\) *Id.* at 114.

\(^{181}\) *See* Supreme Court Minute Book (entries of Feb. 16-20, 1807); Letter from Buckner Thurston to Harry Innes (Feb. 18, 1807), Innes Papers, Manuscript Reading Room, Library of Congress.

\(^{182}\) *Bollman*, 8 U.S. at 125, 128-36. Although this portion of the opinion is not the focus of the present article, it was of considerable political significance because it served as a dress rehearsal for Burr’s eventual trial, *see* HOFFER, *supra* note 138, at 112, and presaged a successful defense there, *see* NEWMYER, *supra* note 12, at 5.

\(^{183}\) *See* WOOD, *supra* note 80, at 421-25; *supra* text accompanying note 110.

\(^{184}\) R. Kent Newmyer, *Chief Justice Marshall in the Context of His Times*, 57 WASH. & LEE L. REV. 841, 844-45 (1999). *See also* WOOD, *supra* note 80, at 438-40 (describing Marshall’s “strategy of retrenchment and conciliation and his genius for compromise while at the same time asserting the authority of the
political calculation and legal maneuvering,"\textsuperscript{185} in this case "in order to maintain at least some level of judicial independence to issue the writ in the future."\textsuperscript{186}

As background to the argument presented at the end of this article that the Court has now reclaimed that independence,\textsuperscript{187} it is important to recognize how weak \textit{Bollman} was on the day it was decided.\textsuperscript{188}

Marshall’s claim that the Court had “repeatedly” explained the reasoning behind the proposition that courts created by written law could only exercise the powers explicitly granted by such laws was false.\textsuperscript{189} “Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect.”\textsuperscript{190}

But this claim is the foundation of Marshall’s suggestion that Congress could suspend the writ by doing nothing at all — the mine floating underneath the surface of the case. According to the \textit{Bollman} dicta, the Constitution as it emerged from Philadelphia did not preserve a pre-existing writ from suspension, but only whatever writ


\textsuperscript{186} Wertz, supra note 185, at 39. See also Keith E. Whittington, \textit{Judicial Review of Congress Before the Civil War}, 97 Geo. L.J. 1257, 1286-87 (2009) (observing that effect of Marshall’s legal reasoning was that Court could continue to adjudicate habeas cases).

\textsuperscript{187} See infra Part V.

\textsuperscript{188} I have made this argument at some length in Freedman, supra note 11, at 29-46. I note here only those points of present relevance.


Congress might choose to vouchsafe in the future. The Suspension Clause under this reading is merely precatory: a request to Congress to enact a statute giving the federal courts habeas corpus powers. But if Congress failed to do so, “the privilege itself would be lost, although no law for its suspension should be enacted.”

This idea would certainly have come as a shock to all of the participants in the ratification debates over the Suspension Clause, who had vied with each other in lauding the importance of the writ. Those debaters knew (as did Marshall, of course) that suspension of the writ in England or its colonies had required an affirmative Act of Parliament, and that the contours of Parliamentary suspension authority had been the source of bitter controversy in the context of the American Revolution.

If any substantial body of opinion had shared Marshall’s precatory view of the meaning of the Suspension Clause, the ratifiers would surely have insisted on preserving the entitlement to the writ by an amendment in the Bill of Rights. But the ratifiers saw no need to do this because, since “the writ was not constitutionally granted in positive terms in many state constitutions, and [was] only recognized indirectly by a limitation placed upon the authority to suspend its operations,” they naturally assumed “that the non-suspension clause in the federal document also functioned in oblique fashion, implicitly

191 Bollman, 8 U.S at 95. See Freedman, supra note 18, at 19-20 (describing modern terrorism scenarios that might trigger this hypothetical). Only by interpreting Marshall’s observation to mean the opposite of what it says, as Justice Stevens did in INS v. St. Cyr, 533 U.S. 289, 304 n.24 (2001), is it possible to assert that Bollman’s dicta did not represent a lurking threat to civil liberties, see, e.g., Isaac J. Colunga, Ex Parte Bollman: Revisiting a Federalist’s Commitment to Civil Liberty, 23 T.M. COOLEY L. REV. 429, 434 (2006). See generally supra note 17 (collecting sources on St. Cyr).

192 See Daniel J. Meltzer, Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision, 2008 S. CT. REV. 1, 11-12 (“[I]t would have astonished the Framers to think that they had protected the writ against suspension (presumably by Congress)—but that Congress could achieve the same result, not by suspending a writ it had otherwise made available, but instead by simply precluding the federal courts from making it available in the first place.”).

193 See FREEDMAN, supra note 11, at 12-19.


195 For extended discussions see Halliday & White, supra note 7, at 644-51 and Amanda L. Tyler, Habeas Corpus and the America Revolution, 103 CAL. L. REV. 635 (2015).
conferring the right of the privilege” until such time as a valid legislative suspension occurred.

IV. Hands to the Pumps

Over the course of time, and again with substantial local variations, the hydraulic pressure of the ideas outlined in Part III.A was weakened by a sustained counter-attack whose forces included legal, intellectual, political, and economic elements. None of these forces, however, could make room in their ranks for jury autonomy, which began a steep decline.

A. Rebuilding Judicial Autonomy

1. The Resuscitation of Common Law Pronounced by Legally-Trained Judges

The common law as applied by a professional judiciary had always retained some support and important supporters, and

196 Cantor, supra note 189, at 75. See Tyler, supra note 143, at 958-59 (noting that pattern of states during Revolution was to assume existence of habeas privilege and suspend it legislatively as seemed warranted).

197 For sketches of the struggles in a few key states, see Wood, supra note 80, at 425-32.

198 See generally McClanahan, supra note 82, at 827; Rowe, supra note 13, at 555-56.

199 See Langbein, Lerner & Smith, supra note 158, at 484-88; infra Part IV.B.


201 One of these was Chief Justice Jeremiah Smith of New Hampshire who, regardless of the state of public opinion (which was volatile, see Reid, supra note 100, at 33-55) believed it his duty to write reasoned opinions in the “quixotic” but ultimately correct belief that they would eventually be published, whether publicly or privately. See id. at 66. One example of such an opinion is Kidder v. Smith (N.H. 1807), reprinted in Decisions of the Superior and Supreme Courts of New Hampshire... Selected from the Manuscript Reports of the Late Jeremiah Smith... 155 (Boston, Little, Brown, and Company 1879). In this ruling he first (a) determined that a tax statute might be construed in accordance with “the usage of the State from the earliest times of which we have any knowledge, i.e. by the common
during the first half of the nineteenth century a series of factors strengthened their influence.

On the intellectual level, the period saw a number of responses to the criticisms canvassed above. Some authors, building on Blackstone, pointed out that statutes would inevitably require interpretation. Not only were jurors unskilled in performing this function, but even judges would be left to improvisation unless they had published judicial opinions to rely upon. Made available to the public, these opinions would enable it to evaluate the work of the judges. Legally-educated
judges were thus much-needed and valuable public servants for the dutiful implementation of the legislative will.\textsuperscript{208}

\textit{The Calling of the Special Superior Court . . . for the Trial of Peter Lung, . . . With Observations on the Constitutional Power of the Legislature to Interfere With the Judiciary in the Administration of Justice} 40-41 (Windham [, Ct.], J. Byrne 1816) (authored by sitting Chief Judge of Connecticut Superior Court) (arguing that judges of highest court “should assign the reasons of their decisions, which ought to be published for the information of the public. In this way we have a security for the faithful discharge of their duty and the correctness of their decisions . . . in their responsibility to public opinion.”); Jessica K. Lowe, \textit{Guarding Republican Liberty: St. George Tucker and Judging in Federal Virginia, in Signposts: New Directions in Southern Legal History} 111, 126-27 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (describing Tucker’s corresponding view).

These arguments were well summarized in an anonymous encyclopedia article published by Justice Joseph Story in 1844:

As all trials, both civil and criminal, are public; and reports are printed, from time to time, of those which are most interesting either as to law, or facts; as the opinion of the court is always publicly given, and, generally, the reasons of that opinion, it is not easy for any court to trespass upon the known principles of law or the rights of the parties. In the U. States . . . the citizens at large watch with jealousy the proceedings of the courts of justice. The very great number of lawyers engaged in profession also furnishes an additional security.


\textsuperscript{208} See \textit{Miller, supra} note 85, at 125. When, beginning in 1794, the Supreme Court of the United States began to evaluate the constitutionality of federal statutes, it took a similar approach, treating its task as implementing the will of the People who framed the Constitution. See Whittington, \textit{supra} note 186, at 1270-84. \textit{See also 2 David Ramsay, The History of South Carolina, From its First Settlement in 1670, to the Year 1808, at 129 (1809)} (stating that South Carolina judicial system was modeled on England “but with this difference, the state considered her courts as the courts of the people in their sovereign capacity, enforcing justice between separate units of one common mass of sovereignty); \textit{The Federalist} No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that because judges are empowered by the people judicial review does not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.”); Lowe, \textit{supra} note 207, at 119-21 (describing same argument being made in Virginia state cases); \textit{see generally Wood, supra} note 80, at 449 (“[T]reating the Constitution as mere law that had to be . . . applied to particular cases like a statute suggested that American judges had a special authority to interpret constitutions that other branches of the government did not possess.”).
As to the common law, a long list of legal scholars, judges and eminent practitioners worked to re-frame it by “adding elements of consent and choice.”\textsuperscript{209} The common law was not an anachronistic bundle of outmoded rules bequeathed by ancient foreigners, but rather the crowd-sourced and evolving expression of the current consensus of American society and therefore quite as democratically legitimate as any statute.\textsuperscript{210} In lecture notes prepared in 1836, Jeremiah Smith described the common law of New England this way:

It is made just as the English common law was made; a collection of the general customs and usages of the community; maxims, principles, rules of action, founded in reason, and found suitable to that first condition of society; if not created by the wisest and most favored, sanctioned and approved by them.\textsuperscript{211} Here, every member of society is a legislator; every maxim, which by long usage acquires the force of law, must have been stated, opposed, defended, adopted by rulers and judges, slowly and at first timidly, but so acceptable that all approve. If the custom be of a more doubtful class, again debated, criticised, denied, but finally confirmed and established. These principles, after all, may not be wise and salutary maxims; but they have all the wisdom that the people of all classes (every man having precisely the weight and influence he deserves,) can give them. Farther advances in knowledge and experience may demonstrate their unfitness and inutility; then they will be modified, and silently changed.\textsuperscript{212}

\textsuperscript{210} Id. at 24-26. See also Miller, supra note 85, at 126-28.
\textsuperscript{211} It is worth pausing to note here that, following a path pioneered by Alexander Hamilton and others, Smith’s definition of “the common law” embraces much more than judicial decisions, thereby giving a good deal of flexibility to its advocates. See Kate Elizabeth Brown, Rethinking People v. Croswell: Alexander Hamilton and the Nature and Scope of “Common Law” in the Early Republic, 32 Law & Hist. Rev. 611, 643-45 (2014). Justice Joseph Story took the same approach in 1844, see The Common Law, in Story supra note 207, at 3, 4.
\textsuperscript{212} See Morison, supra note 205, at 428-29; Reid, supra note 100, at 55. This passage is quoted in Langbein, Lerner & Smith, supra note 199, at 497-98, where the authors situate Smith as one of a large group of influential writers
On the practical level, advocates undertook a sustained campaign to promote their views. They created and taught in law schools. They wrote legal treatises. They published their views in speeches and essays directed to the public. And they aggressively promoted publication of judicial opinions (including ones they themselves had written) in an ultimately successful effort to overcome of similar views, including Chancellor James Kent of New York; Joseph Story, Isaac Parker, Theodore Sedgwick, and Theophilus Parsons of Massachusetts; Jesse Root and Zepaniah Swift of Virginia; William Gaston and Thomas Ruffin of North Carolina; George Nicholas and John Breckinridge of Kentucky; Thomas McKean and Alexander Dallas of Pennsylvania; and Henry William Desaussure in South Carolina. Smith preceded the passage of the lecture quoted in the text with words of praise for Parsons. See Morison, supra note 205, at 427-28. As indicated in the next paragraph of text, these advocates advanced their views in multiple fora.


See, e.g., Swift, supra note 207. Jeremiah Smith reviewed anonymously the first volume of the Massachusetts Reports for the Monthly Anthology and Boston Review, a general interest literary magazine, devoting considerable effort to the task. See Morison, supra note 205, at 215-24; Reid, supra note 100, at 157-69. The following year Daniel Webster reviewed the first volume of the New York Reports for the same publication. See 1 The Papers of Daniel Webster: Legal Papers 167-68, 172-74 (Alfred S. Konefsky & Andrew J. King eds., 1982). Thereafter, he and other like-minded lawyers, including Caleb Cushing, Joseph Story, and Henry Wheaton, reviewed volumes of published law reports for the North American Review, a national literary magazine, see Reid, supra note 100, at 170. See generally Rowe, supra note 13, at 455-56 & n.185 (establishing the authority of judiciary in the early Republic involved “petitioning, parading, toasting, arguing to juries, printing newspaper invective, and other uses of the public sphere,” including the anonymous publication of newspaper articles by Supreme Court Justices in defense of their judicial opinions).

See Wilf, supra note 92, at 1686.
the scarcity of printed law reports\textsuperscript{217} and demonstrate that case law could be made as accessible and transparent as statutory law.\textsuperscript{218}

The more law became understood as a science and its devotees as scholars, the more judges were entitled to be respected as neutral authorities rather than treated as just another group of political actors,\textsuperscript{219} a powerful reason that increasingly “courts generally could expect compliance with their mandates.”\textsuperscript{220}

\section*{2. The Dangers of Democracy}

Over time the orthodox Federalist view of the late 1780’s that the legislature on account of its very political responsiveness could pose “a major threat to minority rights and individual liberties”\textsuperscript{221} that required a judicial counterweight\textsuperscript{222} gained support as “large numbers of influential people [became] increasingly disillusioned

\begin{footnotesize}
\begin{enumerate}
\item See generally M.H. Hoeflisch, Legal Publishing in Antebellum America 11-27 (2010); Miller, supra note 85, at 109; Freedman I, supra note 2, at 609 n.89 (collecting sources); John D. Gordan III, Publishing Robinson’s Reports of Cases Argued and Determined in the High Court of Admiralty, 32 Law & Hist. Rev. 525, 528-29 (2014).
\item See Nelson, supra note 218, at 354-55 (explaining that establishment of judges’ power “rested upon their superior ability to research traditional professional sources and thereby find pre-existing law” while acknowledging ultimate democratic political control of the substance of the law, with the result that “elite leaders and the common people felt comfortable that they were in control.”); Wood, supra note 80, at 804 (describing withdrawal of judges from political activity). Reflecting the change, one study of journalistic accounts of trials finds that as the century progressed lawyers’ courtroom performances were praised more for their legal analyses than for their ability to sway the emotions of the jurors. See Simon Stern, Forensic Oratory and the Jury Trial in Nineteenth-Century America, 3 Comp. Legal Hist. 293 (2015).
\item Nelson, supra note 108, at 95.
\item Wood, supra note 80, at 791.
\end{enumerate}
\end{footnotesize}
with the kind of democratic legislative politics that was emerging in the early Republic."  

3. The Decline of Legislative Adjudication

When the practice of legislative adjudication was challenged, the courts sometimes prevailed in whole or in part. For example, judicial opinions in Connecticut, New Hampshire and Massachusetts denied the validity of the practice, and seem to have reduced if not entirely eliminated it.

Perhaps more significantly, legislatures found that holding quasi-judicial proceedings — and, to their credit, they commonly would hear from the parties when reviewing judicial rulings — was a

224 For a survey see Treanor, supra note 105, at 508.
225 See Sysmbury Case, 1 Kirby 444 (Conn. Super. Ct. 1785).
226 See Merrill v. Sherburne, 1 N.H. 199 (1818). For a full discussion of this case and its judicial precursors see Lawrie, supra note 223. See also Freedman II, supra note 3, at 17 n.51 (providing background on author of opinion).
227 The 1789 manuscript decision of the Supreme Judicial Court in Goddard v. Goddard is documented in HAMBERGER, supra note 31, at 529.
228 See id. at 533; Reid, supra note 99, at 167.
229 See, e.g., SWIFT, supra note 207, at 14-19; Freedman II, supra note 3, at 69 n.281. Cf. Reid, supra note 99, at 65 (noting that one of the rare instances of a gubernatorial veto of an act overturning a New Hampshire judicial ruling occurred when representatives had determined facts without being in a position to do so).

For a description of the elaborate quasi-judicial procedures followed by the New York provincial legislature of the early 1700's in adjudicating creditors' claims against the government, see Christine A. Desan, The Constitutional Commitment to Legislative Adjudication in the Early American Tradition, 111 HARV. L. REV. 1381, 1472-74 (1998). The legislatures of North and South Carolina during the colonial period seem to have delegated to the conduct of similar proceedings to their committees. See id. at 1497-98 nn.568-69. During the Articles of Confederation period, Congress found even this too burdensome and created administrative agencies for the purpose. See Eric M. Freedman, Note, The United States and the Articles of Confederation: Drifting Toward Anarchy or inching Toward Commonwealth?, 88 YALE L.J. 142, 157-58 (1978). So too, the first federal court came into existence because the Continental Congress found that giving admiralty litigants adequate process, even where the proceedings were only appellate and delegated to a committee, see supra note 97, was an untoward call on its resources. See Deirdre Mask & Paul MacMahon, The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction, 63 BUFF. L. REV. 477, 490-95 (2015).
significant resource drain.\textsuperscript{230} By 1832 the New Hampshire legislature had “vest[ed] the courts with full authority to grant equitable relief.”\textsuperscript{231}

4. The Commercial Need for Predictability

As commercial transactions grew in size, complexity and geographical scope, so too did the pressures for a legal regime in which the participants could predict legal outcomes with a reasonable degree of certainty.\textsuperscript{232} “Businesses could not prosper in a legal environment marked by the uncertainty of a legal system in which decisions were based on . . . ‘fairness.’”\textsuperscript{233} They needed a legal system in which legally-knowledgeable decisionmakers ruled in accordance with known principles.\textsuperscript{234} Moreover, the constituency in favor of the stability of property rights broadened as the diversification of the economy led to increasing numbers of people being “caught up in buying and selling and creating new modern sorts of property.”\textsuperscript{235}

5. The Election of Judges

In addition, recent scholarship has emphasized that the ongoing trend towards an elective judiciary helped reconcile “judicial accountability to the people and judicial independence from the

\textsuperscript{230} See Reid, supra note 99, at 66-69. The ruling in Merrill, 1 N.H. at 199, originated with a request by the legislature to the Superior Court of Judicature for an advisory opinion, and Professor Reid speculates that the request may have been made because the lawmakers, “had reached the limits of their tolerance for the time-consuming procedures they followed” in reviewing judicial rulings and were hoping for a decision that gave them political cover to cease entertaining such matters. See Reid, supra note 91, at 19.


\textsuperscript{233} Heflich, supra note 217, at 24.

\textsuperscript{234} See id.

\textsuperscript{235} Wood, supra note 80, at 459; see id. at 462-66 (discussing proliferation of incorporated businesses).
other branches."  

B. Jetsam: The Jury as Law-Pronouncer

The very factors just canvassed in Part IVA as strengthening the judicial branch as against the others converged to weaken the autonomy of the jury inside the court system.

Juries remained ignorant of the formal law even as judges were becoming more knowledgeable about it. Juries were prone to share transitory community passions and thus a source of instability to minority and property rights alike. And with the rise of an elective judiciary, jurors no longer had inside the judicial branch the comparative advantage of democratic legitimacy.

The result in general terms was that by around 1830 or so, “in civil cases ... trial judges had successfully wrested control over the law for themselves and confined jurors to finding the facts in a particular case.”

---

236 Shugerman, supra note 9, at 57; see Shugerman, supra note 100, at 1142. See also Wood, supra note 80, at 794. For a discussion of the older scholarship see Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 Am. J. Legal Hist. 190 (1993).

237 See Kramer, supra note 69, at 101.

238 See Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 904-06 (1994); Tarr, supra note 81, at 657. See also Wood, supra note 80, at 453-55.

239 See Alshuler & Deiss, supra note 238, at 916-17; Lerner, supra note 232, at 828-31. “The Schizophrenic Jury” of Professor Dubber’s essay cited supra note 5 is one that is seen at some times and places as the idealistic representative of community norms and a check on arbitrary government and at others as an inefficient, arbitrary, prejudiced, and irrational decisionmaker. See Dubber, supra note 5, at 3, 10, 13, 15-16. See generally Jeffrey Abramson, Four Models of Jury Democracy, 90 Chi. Kent L. Rev. 861 (2015); Jenny Carroll, The Jury as Democracy, 66 Ala. L. Rev. 825 (2015).

240 Specialists continue to debate the nuances of the timing and content of the change – a debate that is likely to become more not less complex as more historical studies covering additional jurisdictions and regions are completed – but the overall narrative arc has been reliably established. See Larry D. Kramer, The Pace and Cause of Change, 37 J. Marshall L. Rev. 357, 371-78 (2004).

241 Elizabeth Dale, Criminal Justice in the United States, 1789-1939, at 30 (2011). The demise of the jury as the final word on the law in criminal cases took longer, and is generally traced to Sparf v. United States, 156 U.S. 51 (1895). For an overview of developments during the period see Dennis Hale, The Jury in America: Triumph and Decline 117-46 (2016). The independent role of the jury in criminal cases has spawned an enormous,
V. Boumediene Defuses Bollman’s Sea Mine

Boumediene v. Bush242 is a case of monumental importance in many dimensions, most of which are not relevant to the present historically-focused survey.243

For purposes of understanding its relationship to Bollman, the case may be summarized quite simply.244 After the Supreme Court ruled in 2004 that the modern habeas corpus statute embodying Section 14 of the Judiciary Act of 1789245 applied to prisoners detained at Guantanamo Bay in pursuit of the “war on terror,”246 Congress sought to overrule the decision by statute; that effort failed when


243 In addition to raising a host of questions as to the validity of legal tactics the federal government is deploying in its global struggle against terrorism, see, e.g., Mark D. Falkoff & Robert Knowles, Bagram, Boumediene, and Limited Government, 59 DEPAU L. REV. 851 (2010); Tim J. Davis, Comment, Extraterritorial Application of the Writ of Habeas Corpus After Boumediene: With Separation of Powers Comes Individual Rights, 57 KAN. L. REV. 1199, 1231-33 (2009) (arguing that, notwithstanding test grounded in individual rights employed by case itself, focus on its checks-and-balances rationale supports conclusion that writ extends to any detainee of executive branch “at any time and in any place”), the opinion has significant implications for a variety of domestic questions. See Gerald L. Neuman, The Habeas Suspension Clause After Boumediene v. Bush, 110 COLUM. L. REV. 537, 556-77 (2010). These include statutory restrictions on the federal courts' habeas corpus examination of state criminal convictions, see, e.g., Samuel R. Wiseman, Habeas After Pinholster, 53 B.C. L. REV. 953, 994-96 (2012), and of immigration cases, see, e.g., Brandon L. Garrett, Habeas Corpus and Due Process, 98 CORNELL L. REV. 47, 111-17 (2012).

244 The history set forth in the remainder of this paragraph of text has been well summarized in Linda Greenhouse, The Mystery of Guantanamo Bay, 27 BERKELEY J. INT’L L. 1, 8-20 (2009).


the Court ruled that the statute applied only prospectively, and thus would not affect the hundreds of detainees who had habeas petitions pending. Congress responded by passing yet another statute, the Military Commissions Act (MCA) of 2006, to make its intentions unmistakable. The MCA amended the basic habeas corpus statute to provide:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Such prisoners were to be relegated to a non-adversarial internal review procedure conducted administratively by the Defense Department with limited judicial review. Boumediene invalidated the amendment under the Suspension Clause, leaving the petitioners free to pursue habeas corpus under the historic writ.

248 See Boumediene, 553 U.S. at 738 (“[W]e cannot ignore that the MCA was a direct response to Hamdan’s holding that the [prior statute]’s jurisdiction-stripping provision had no application to pending cases.”).
251 In seeking to actually do so, they encountered from all three branches of government lawless stonewalling analogous to the “massive resistance” that followed Brown v. Bd. of Educ., 347 U.S. 483 (1954). See Muneeer I. Ahmad, Resisting Guantanamo, 103 Nw. L. Rev. 1683 (2009); JONATHAN HAFETZ, Introduction to Obama’s Guantanamo: Stories From an Enduring Prison (Jonathan Hafetz ed., forthcoming 2016); Freedman, Past and Present, supra note 15; see also Paola Bettelli, The Contours of Habeas Corpus after Boumediene v. Bush in the Context of International Law, 28 N.Y. Int’l L. Rev. 1, 22-23 (2015) (concluding that post-Boumediene developments have put the United States in violation of international law). Although the underlying Constitutional principles do not command the unanimity among the Justices that existed in Cooper v. Aaron, 358 U.S. 1, 17-19 (1958), there are both practical and institutional reasons for the Court to respond. See generally Boumediene, 553 U.S. at 765 (insisting on importance of principle that “the political branches [not] have the power to switch the Constitution on or off at will ... leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’ Marbury v. Madison”) (citation omitted).
So stated, Boumediene is not inconsistent with the precatory Suspension Clause theory of Bollman. Congress had not done nothing. It had passed a statute in 1789 that extended to these prisoners. It repealed that statute by another in 2006. The Court invalidated the repealing statute. The original statute resumed its force. Nothing in the situation required the Court to exercise any inherent habeas-granting authority.

Indeed, any statements Boumediene might make on that question could be categorized as dicta. But Bollman’s statements on the subject were dicta too. Yet they remained a sea mine threatening the writ’s function “of judicially ferrying persons whom the government, through restraints, has separated from their rights under the Fundamental Law of the Land to the safe harbor afforded by that Law.”

So the Court in Boumediene decided to defuse the sea mine. In a “momentous” opinion resolving a question “that had not received an authoritative answer for more than two centuries into our nation’s history,” the Court clearly announced that the Constitution “affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention.”

After presenting a historical account of habeas steeped in the “duty and authority of the Judiciary to call the jailer to account,”

252 See supra text accompanying note 191.
253 See Meltzer, supra note 192, at 20 (observing that there was no “need to consider the more difficult situation in which the Suspension Clause applies but there is no background congressional grant of federal court jurisdiction on which to rely”).
254 See supra text accompanying notes 183-86.
256 See Meltzer, supra note 192, at 1, 58.
257 Id. at 17.
258 Id. at 1. This quote is set forth more fully infra note 267.
259 Boumediene, 553 U.S. at 745. See id. at 742-46. The Court relied heavily on the well-documented historical presentation in Halliday & White, supra note 7. Indeed, the historical data unearthed by Professor Halliday and subsequently presented in Halliday, supra note 30, “drove Boumediene’s result.” Kovarsky, supra note 15, at 759. This is of some significance because Halliday and White quite explicitly questioned the soundness of a Bollman-based understanding “that the source of the habeas privilege is exclusively statutory,” and suggested that it “should be re-considered.” Halliday & White, supra note 7, at 683; see also id. at 701.
Boumediene determined that “the judicial authority to consider petitions for habeas corpus relief” derives from principles “of separation of powers.” (Of course, as the context makes clear, the Court is here using the phrase “separation of powers” in the sense that I assigned above to “checks and balances.”) 261

The judiciary has the habeas power of inquiry and remedy (including ordering release) needed to effectively play its role in policing the other branches. 263 As Boumediene thankfully makes clear,

260 Boumediene, 553 U.S. at 797 (“Chief among [freedom’s first principles] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”). See Greenhouse, supra note 244, at 18 (describing opinion as “among the Court’s most important modern statements on the separation of powers”).

Scholars have uniformly emphasized the central importance of this aspect of the opinion. See, e.g., Baher Azmy, Executive Detention, Boumediene, and the New Common Law of Habeas, 95 IOWA L. REV. 445, 466 (2010) (describing Boumediene as “rooted in separation of powers and a concern about executive manipulation of legal rules”); Katz, supra note 20, at 399-400 (arguing that checks and balances basis of opinion supports broad rule “that Congress cannot strip jurisdiction where doing so serves to shield Congress or the President from judicial review in constitutional cases, giving the political branches the last word on the constitutionality of their own actions”); Neuman, supra note 243, at 548-49; Stephen I. Vladeck, Boumediene’s Quiet Theory: Access to The Courts and Separation of Powers, 84 NOTRE DAME L. REV. 2107, 2109-11 (2009) (observing that case supports a view of habeas corpus that is “as much about preserving the role of the courts as it is about protecting individual litigants”).

261 See supra text accompanying notes 22-25.

262 See Kovarsky, supra note 15, at 795 (“Boumediene specifically identifies two core features of habeas power: the power to consider whether custody is lawful, and the power to order discharge.”).

263 See Boumediene, 553 U.S. at 787 (“We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”); id. at 779 (stating that power to order release is one of the “easily identified attributes of any constitutionally adequate habeas corpus proceeding”). See also Freedman, Past and Present, supra note 15, at 40-41 (criticizing D.C. Circuit for subsequently defying this holding in Kiyemba v. Obama, 553 F.3d 1022 (D.C. Cir. 2009)).

264 It follows that in adjudicating habeas cases courts must employ procedural mechanisms, e.g., discovery, that are sufficient for this purpose, regardless of whether those procedures existed at common law, are made available by statute, or conform to the wishes of the jailers. See generally Azmy, supra note 260, at 524-37; Marc D. Falkoff, Back to Basics: Habeas Corpus Procedures and Long-
this is true regardless of whether Congress has (1) passed a statute restricting the power (the actual situation in Boumediene) or (2) failed to pass one granting the power (the hypothetical posed by Bollman).  

(1). The issue actually before the Court arose under the Suspension Clause, which is a limit on the power of Congress to pass a statute like the MCA. That is why the Court explicitly grounded its holding invalidating the Act in the Suspension Clause.

(2). But the broader proposition — the modern dicta supporting an inherent judicial habeas power which destroyed the older dicta rejecting it — does not originate in the Suspension Clause. That proposition rests on Article III. The Court in 2008 unmistakably if silently accepted the argument that Harper had made unsuccessfully on behalf of Bollman in 1807: "[T]he power of issuing writs of habeas corpus, for the purpose of relieving from illegal

---

265 See Stephen I. Vladeck, Common-Law Habeas and the Separation of Powers, 95 IOWA L. REV. BULL. 39, 52-54 (2010) (explaining why Constitutional rule of Boumediene is that Suspension Clause protects common law habeas corpus "whether Congress has provided for it or not").

266 See Boumediene, 553 U.S. at 739, 746, 771.

267 But cf. Meltzer, supra note 192, at 1 ("[T]he Supreme Court . . . clearly held . . . that the Constitution's Suspension Clause, despite its indirect wording, affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention.") (footnote omitted); id. at 17 ("[T]he Court's holding that the Suspension Clause confers an affirmative right to habeas relief has not received the attention it deserves."); id. at 30 ("Also correct, and of more fundamental importance, is the holding that the Suspension Clause affirmatively guarantees the right to habeas corpus review"); Neuman, supra note 243, at 541 (stating holding in Boumediene, which "should make us all breathe easier": "The Suspension Clause . . . permanently requires a right to habeas corpus, with certain minimum content, when the writ has not been suspended.").

268 This argument has been made fully and rigorously in the wake of Boumediene by Kovarsky, supra note 15, at 754-86, 810. It was sketched out prior to Boumediene by Stephen I. Vladeck, The Suspension Clause as a Structural Right, 62 U. MIAMI L. REV. 275, 277-78, 283-84, 302-05 (2008).

269 Boumediene makes only one entirely glancing reference to Bollman. See Boumediene, 553 U.S. at 779.

270 Perhaps Harper would have appreciated the thought of Oliver Wendell Holmes that the law offers to its practitioners "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought — the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that
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.”

The inherent authority to grant writs of habeas corpus in the
absence of a valid suspension is one of the attributes of the “judicial
power” that Article III grants. By embracing that proposition
Boumediene defused the two-century-old Bollman dicta, effacing them
from the U.S. Reports before they could do any harm. But the Court
did more. It re-defined the basis of its own habeas corpus authority in
a way that recognized the writ as an instrument for the enforcement
of checks and balances. Those two aspects of Boumediene make it “an
occasion for dancing in the streets.”

They represent critical lessons about habeas corpus that the
present has learned from the past and should bequeath to the future:
“[T]he practice of arbitrary imprisonment[] [has] been, in all
ages, the favorite and most formidable instruments of tyranny.”

It oppresses the individual of course. But it also undermines the
cathedral of government under law that the legal system of the United
States is continuously seeking to construct. And that is true whether
the fault lies with the legislature, the executive or both, and

which commands an army.” Oliver Wendell Holmes, The Profession of the
Law, in Collected Legal Papers 29, 32 (1920).

See supra text accompanying note 155. For a recent consideration of inherent
judicial powers, see Alexander Volokh, The Inherent Powers Corollary: Judicial
paper, Emory University School of Law) (on file at http://ssrn.com/
abstract=2638490).

See Kovarsky, supra note 15, at 804.

of the First Amendment,” 1964 S. Ct. Rev. 191, 208, 221 n.125 (agreeing with
assessment of Alexander Meiklehohn that, quite part from its doctrinal
contributions to libel law, the decision in New York Times Co. v. Sullivan,
376 U.S. 24 (1964) was “an occasion for dancing in the streets” both because
it definitively determined the unconstitutionality of the Sedition Act of 1798,
1 Stat. 586, and because it put that insight at the heart of the meaning of the
First Amendment).

The judicial branch, too, may be responsible for wrongful imprisonments, but
Boumediene did not present that problem and this article has put it to one side.
See supra notes 30, 178.
whether their misuse of power consists of action or inaction. The independent power of the judicial branch to grant habeas corpus in the absence of a valid suspension both restores liberty to the person who was arbitrarily deprived of it and strengthens the government structures that ought to have prevented the deprivation in the first place.


See Freedman I, supra note 2, at 618.