

THE CONSTITUTIONAL PUZZLE OF HABEAS CORPUS

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Abstract: The U.S. Constitution has always protected habeas corpus. Yet when we consider the Suspension Clause together with three other constitutional principles, we find a constitutional puzzle. Pursuant to the Madisonian Compromise, inferior federal courts are constitutionally optional. Under *Marbury v. Madison*, Congress cannot expand the Supreme Court's original jurisdiction beyond the bounds of Article III. Pursuant to *Tarble's Case*, state courts cannot issue writs of habeas corpus to determine the legality of federal custody. There would seem to be a violation of the Suspension Clause, however, if neither the inferior federal courts, the Supreme Court, nor the state courts could issue writs of habeas corpus. This Article suggests that the apparent conflict among these constitutional principles can be resolved by the power of individual Justices of the Supreme Court to issue writs of habeas corpus.

INTRODUCTION

Even before the U.S. Constitution was amended to add the Bill of Rights, it protected habeas corpus, insisting that 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."¹ Yet when we consider the Suspension Clause together with three other constitutional principles, we find a constitutional puzzle. Pursuant to the Madisonian Compromise, inferior federal courts are constitutionally optional. Although the Constitution requires a Supreme Court, it grants Congress the authority to decide whether there shall be inferior federal courts.² In addition, under *Marbury v. Madison*, Congress cannot expand the Supreme Court's original jurisdiction beyond the

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¹ U.S. CONST. art. I, § 9.

² See U.S. CONST. art. III, § 1 (stating that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

cases allocated to it by Article III.³ As a result, the vast majority of cases within the scope of federal jurisdiction under Article III cannot be heard by the Supreme Court unless those cases are brought originally in some other court. Apart from the rather small number of "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,"⁴ the Supreme Court cannot hear a case unless that case first has been brought in some other court. Finally, pursuant to *Tarble's Case*, state courts lack authority to issue writs of habeas corpus to determine the legality of federal custody.⁵ A person in federal custody cannot secure release by use of a writ of habeas corpus issued from a state court.⁶

Can these four principles coexist? Consider a case in which an individual is taken into custody by the federal executive and desperately wants to challenge the legality of that detention in court. And suppose that Congress exercised its power under the Madisonian Compromise not to create (or to abolish) inferior federal courts. The detainee obviously could not seek a writ of habeas corpus from non-existent courts. If the detainee were to petition the Supreme Court for a writ of habeas corpus, the Court constitutionally would be obligated under *Marbury* to dismiss the petition as outside its limited original jurisdiction.⁷ If the detainee were to seek habeas relief from a state court, *Tarble's Case* would require that court to dismiss the petition. As a result, the detainee would find that there is no court with jurisdiction in habeas corpus. That is, even though Congress, the Supreme Court, and the state court all acted in compliance with the Constitution, the detainee would have nowhere to obtain a writ of habeas corpus, and in effect, the privilege of the writ of habeas corpus would be suspended. Are these four constitutional principles in hopeless conflict?

Wrestling with this constitutional puzzle is not simply an exercise in constitutional aesthetics or intellectual tidiness. As Professor Lucas Powe recently has suggested, we may be headed for a new constitutional order:

Instead of welfare reform being the characteristic statute and whether Alabama can be sued for not accommodating its disabled employees being the characteristic constitutional ques-

³ 5 U.S. (1 Cranch) 137, 173-74 (1803).

⁴ U.S. CONST. art. III, § 2.

⁵ 80 U.S. (13 Wall.) 397, 411-12 (1872).

⁶ *Id.*

⁷ See 5 U.S. (1 Cranch) at 174.

tion, the USA Patriot Act might become the paradigmatic statute, and the availability of habeas corpus to individuals held in federal custody without being criminally charged might become the paradigmatic constitutional issue.⁸

In the October 2003 Term, the Supreme Court decided three habeas cases challenging executive detention.⁹ One of the most striking things about the three decisions, however, is how little they decided and how much they left to future decisions.¹⁰ In these circumstances, it is important to attempt to solve the constitutional puzzle of habeas corpus.

It is possible that the puzzle simply cannot be solved. Perhaps these four constitutional principles are in hopeless conflict, and one of the

⁸ L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 684–85 (2003) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)) (footnotes omitted).

⁹ See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004) (holding that the U.S. District Court for the Southern District of New York lacked jurisdiction because the immediate custodian of the petitioner was located in South Carolina); *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004) (holding that federal habeas jurisdiction extends to Guantanamo Bay, Cuba); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (holding that due process requires that the petitioner, a citizen of the United States, be given an opportunity to contest the factual basis for his detention).

¹⁰ See Erwin Chemerinsky, *Unanswered Questions*, 7 GREEN BAG 2D 323, 323–24 (2004). Indeed, Professor Erwin Chemerinsky has observed,

[W]hat seems most distinctive about October Term 2003 was how much the Court left open—how many questions it left unanswered. Sometimes this was because the Court did not reach the merits of important legal issues, such as by dismissing on jurisdictional grounds . . . Jose Padilla's claim that the Bush administration lacks authority to detain him as an enemy combatant. Sometimes the Court ruled narrowly because only a limited issue was before it, such as in the Court's holding that the Guantanamo detainees have a right to be heard in federal court, but not addressing the question of what form of hearing they must be given.

....

I cannot think of any recent Supreme Court Term where so much was left undecided. All of these issues now will be faced by the state courts and the lower federal courts. Ultimately, almost all of these questions will return to the Supreme Court in the years ahead for further clarification.

Id. (footnotes omitted); see Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 63 (predicting that "resistance will grow as it becomes clearer just how much the Court's decisions left unresolved"); Jenny S. Martinez, *Availability of U.S. Courts to Review Decisions to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror*, 98 AMER. J. INT'L L. 782, 785 (2004) (stating that "the *Hamdi* decision leaves open at least as many questions as it answers"); *id.* at 786 ("[T]he status of prisoners detained by the United States as 'enemy combatants' in the 'war on terrorism,' rather than in Afghanistan, was left ambiguous.").

four must be jettisoned. Perhaps Congress is obligated, despite the Madisonian Compromise, to create inferior federal courts. Perhaps *Marbury* is wrong, and Congress can add to the Supreme Court's original jurisdiction. Perhaps *Tarble's Case* is wrong, and state courts are not forbidden constitutionally from determining the legality of federal custody. Perhaps the Suspension Clause does not protect against the elimination of habeas corpus, but only against its temporary suspension.

All of these possibilities have been suggested by others, and this Article discusses them below.¹¹ This Article, however, suggests that it is possible for all four principles to coexist. Such coexistence is important, not because it is likely that Congress will abolish the inferior federal courts, and not simply because it acquits the Constitution (as currently interpreted by the judiciary) of internal inconsistency. More significantly, the ability of the four principles to coexist undermines any argument—or even any unarticulated sense subtly shaping interpretation—that one of the principles must be rejected because of the perceived inconsistency. In particular, it undermines the argument against the Madisonian Compromise based on *Tarble's Case* and, perhaps most importantly today, undermines any argument that seeks to rely on the Madisonian Compromise, *Marbury*, and *Tarble's Case* to contend that the Suspension Clause does not require the availability of habeas for those in federal executive custody.¹² This Article contends that resolution to this apparent conflict lies in the power of individual Supreme Court Justices to issue writs of habeas corpus—a “power granted from 1789 to the present.”¹³

I. THE PIECES OF THE PUZZLE

A. *The Madisonian Compromise*

Although the delegates to the Constitutional Convention agreed readily on the need for a federal judiciary in general, and a Supreme Court in particular, they disagreed about the need for inferior federal courts. Some proposed that the Constitution requires inferior federal courts; others argued that the Supreme Court should be the only fed-

¹¹ See *infra* notes 47–94 and accompanying text.

¹² See *infra* notes 47–94 and accompanying text.

¹³ RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 314 n.4 (5th ed. 2003) (noting that the answer to the question whether this power involves original or appellate jurisdiction “rests in obscurity”).

eral court permitted by the Constitution.¹⁴ Ultimately, our Founders agreed to what has become known as the Madisonian Compromise and authorized Congress to decide whether inferior federal courts would or would not exist.¹⁵ As a result, Article III provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹⁶ A complementary provision of Article I empowers Congress to "constitute Tribunals inferior to the supreme Court."¹⁷ Thus, in accordance with the Madisonian Compromise, the existence of inferior courts is left to the discretion of Congress.

Congress has exercised the power to create inferior federal courts "from time to time." For example, in the Judiciary Act of 1789, Congress divided the country into thirteen districts, and created a district court and a district judgeship for each district.¹⁸ At the same time, it created a circuit court for each district (other than the districts of Maine and Kentucky) consisting of two Justices of the Su-

¹⁴ Michael Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42.

¹⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104-05 (Max Farrand ed., rev. ed. 1937) (voting to create a Supreme Court and inferior courts); *id.* at 124-25 (voting to strike the reference to inferior courts); *id.* at 125 (voting to empower Congress to create inferior courts); see FALLON ET AL., *supra* note 13, at 6-9; Collins, *supra* note 14, at 42; Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1153-54 (1988).

¹⁶ U.S. CONST. art. III, § 1.

¹⁷ *Id.* at art. I, § 8. In a recent Article, Professor James Pfander notes that "most observers have assumed that the inferior tribunals to which Article I refers are precisely the same inferior courts in which Article III vests the judicial power of the United States" but argues against this general understanding. James Pfander, *Article III Courts, Article I Tribunals, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 671-72 (2004).

¹⁸ Judiciary Act of Sept. 24, 1789, ch. 20, § 2, 1 Stat. 73, 73. Nine of the districts—the districts of New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, and Georgia—were coextensive with state lines. The other four districts were created by subdividing two states into two districts each. The state of Massachusetts contained both the district of Maine and the district of Massachusetts, while the state of Virginia contained both the district of Kentucky and the district of Virginia. No district courts were created for Rhode Island or North Carolina, as neither state had yet ratified the new Constitution.

preme Court and the local district judge.¹⁹ More than a century later, in 1891, Congress created the circuit courts of appeals.²⁰

Congress also has exercised the concomitant power to abolish courts it previously had created.²¹ For example, in 1911, Congress reorganized the federal court system and abolished the circuit courts that had existed since 1789.²² Thus, under the Madisonian Compromise, there need not be any inferior federal courts.

B. *Marbury v. Madison: The Limited Original Jurisdiction of the Supreme Court*

In *Marbury v. Madison*, William Marbury asked the Supreme Court to issue a writ of mandamus to Secretary of State James Madison, directing Secretary of State Madison to provide William Marbury with his commission as a justice of the peace.²³ The Supreme Court interpreted section 13 of the Judiciary Act of 1789 to provide the Supreme Court with original jurisdiction to issue the prerogative writ of mandamus to federal officers such as Secretary of State Madison.²⁴ It refused to issue the writ, however, reasoning that the mandamus sought by William Marbury called for an exercise of original jurisdiction,²⁵ and that the Constitution bars any increase in the Supreme Court's original jurisdiction beyond the narrow band of cases allocated to its original jurisdiction by Article III.²⁶

The Court explained that the "essential criterion of appellate jurisdiction, [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."²⁷ Applying this crite-

¹⁹ Judiciary Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74-75. The eastern circuit consisted of the districts of New Hampshire, Massachusetts, Connecticut, and New York, the middle circuit consisted of the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, and the southern circuit consisted of the districts of South Carolina and Georgia. The districts of Maine and Kentucky were not allocated to any circuit. Both the district court and the circuit for each district were trial courts.

²⁰ Circuit Courts of Appeals Act of 1891, ch. 517, § 2, 26 Stat. 826, 826; see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649-57 (2000) (discussing the Act that created the circuit courts of appeals).

²¹ See Act of Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1087, 1087.

²² *Id.*

²³ 5 U.S. (1 Cranch) 137, 137 (1803).

²⁴ *Id.* at 173.

²⁵ *Id.* at 175-76 ("[T]o issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction.").

²⁶ *Id.* at 174-75.

²⁷ *Id.* at 175.

tion to the writ of habeas corpus, the Court concluded a few years later that habeas could be used as a method of exercising appellate jurisdiction, provided that the writ sought "the revision of a decision of an inferior court."²⁸ When there is no decision of an inferior court to revise, however, the Supreme Court cannot issue the writ of habeas corpus as an exercise of appellate jurisdiction.²⁹ Moreover, under *Marbury*, unless the case falls within the narrow category of cases allocated to the Supreme Court's original jurisdiction by Article III, it cannot issue the writ of habeas corpus as an exercise of original jurisdiction.³⁰

The terminology frequently used in this area is rather confusing: the appellate use of the writ of habeas corpus by the Supreme Court is often labeled "original," with the word placed in quotation marks to indicate that it "is not 'original' in the sense that it issues in the exercise of the Court's original jurisdiction,"³¹ but rather in the sense that the habeas petition is "filed in the first instance" in the Supreme Court.³² Although this terminology seems rather ingrained at this point, it is also rather unfortunate. A petition for a writ of certiorari is "filed in the first instance" in the Supreme Court, but no one calls it an "original" writ of certiorari for that reason. A writ of certiorari, a writ of habeas corpus, a writ of mandamus, a writ of error: all are simply mechanisms by which appellate jurisdiction can be implemented. The mere fact that some of them—including certiorari, habeas, and mandamus—also are used by some courts in the exercise of original jurisdiction does not justify dubbing some of them "original" when used to implement appellate jurisdiction.

Despite this unfortunate terminology, *Marbury* stands for the proposition that the Supreme Court cannot exercise genuinely original jurisdiction except in the rather limited set of cases allocated to its original jurisdiction by Article III. Taken together, the Madisonian Compromise and *Marbury* mean that there might be no federal court with original jurisdiction to issue a writ of habeas corpus to a federal

²⁸ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807).

²⁹ See Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Cr. Rev. 153, 155 ("Any legislation purporting to enlarge the Supreme Court's original jurisdiction to issue a writ of habeas corpus beyond those cases specified in Article III, § 2 would, of course, be unconstitutional.").

³⁰ *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883) (denying a petition for habeas and noting that "except in cases affecting ambassadors, other public ministers, or consuls, and those in which a State is a party," the Supreme Court only can issue habeas "for a review of the judicial decision of some inferior officer or court").

³¹ Oaks, *supra* note 29, at 155.

³² *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring).

executive official. The inferior federal courts might not exist, and the Supreme Court would constitutionally be barred from exercising jurisdiction over an application for habeas that did not seek the revision of a decision of an inferior court.

C. Tarble's Case: *The Inability of State Courts and Judges to Issue Habeas for Those in Federal Custody*

If neither the Supreme Court nor inferior federal courts were available to issue writs of habeas corpus, one might expect that the state courts would be. Indeed, the conclusion of Henry Hart's famous dialogue was that state courts "are the primary guarantors of constitutional rights, and in many cases may be the ultimate ones."³³

In *Ableman v. Booth*, however, the Supreme Court held that state judges and state courts could not use habeas corpus to review the legality of detention ordered by federal judges and courts.³⁴ The Court insisted that "it was not in the power of the State" to confer such judicial authority, because "no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government."³⁵ The Court held that a state could no more authorize its judges and courts to issue habeas for someone in federal custody than it could do so for someone held in another state by that other state.³⁶

Ableman was an antebellum case involving state resistance to the Fugitive Slave Act.³⁷ Moreover, the Wisconsin Supreme Court, having freed Sherman Booth from federal custody after he had been convicted and sentenced by the federal district court, had gone so far as to direct its clerk to make no return to the writ of error issued by the U.S. Supreme Court.³⁸ The rule established in *Ableman*, however, was

³³ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

³⁴ 62 U.S. (21 How.) 506, 515-16 (1858).

³⁵ *Id.* The Court explained that if the application for habeas itself does not make clear that the person imprisoned is in custody under the authority of the United States, the state court or judge may issue the writ and the custodian should file a return making known his authority. Once the state court or judge learns that the custody is under the authority of the United States, it can proceed no further. Moreover, the custodian must not actually produce the prisoner, and must refuse obedience to any state process concerning the prisoner. *Id.* at 523.

³⁶ *Id.* at 516.

³⁷ *Id.* at 507.

³⁸ *Id.* at 511-12.

not limited to the situation where the habeas petitioner had been placed in custody by a federal judicial order.

Instead, in *Tarble's Case*, which involved the issuance of a writ of habeas corpus by a Wisconsin court commissioner seeking discharge from the U.S. military, the Supreme Court broadly posed the question before it as follows:

Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government.³⁹

The Court concluded that the decision in *Ableman* "disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal."⁴⁰ Quoting *Ableman* extensively, the Court reiterated that state courts and judges could not be authorized to review the legality of federal detention.⁴¹ The opinion was expansive:

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other.⁴²

When *Tarble's Case* is added to the Madisonian Compromise and *Marbury*, there might be no court, state or federal, with original jurisdiction to issue a writ of habeas corpus to a federal executive official. The inferior federal courts might not exist, the Supreme Court would be constitutionally barred from exercising jurisdiction over an application for habeas that did not seek the revision of a decision of an inferior court, and the state courts would be constitutionally barred from issuing habeas to test the legality of the federal custody. With neither the inferior federal courts nor state courts available, the Supreme

³⁹ 80 U.S. (13 Wall.) 397, 402 (1872).

⁴⁰ *Id.* at 403-04.

⁴¹ *Id.* at 407-08.

⁴² *Id.* at 407.

Court's appellate jurisdiction likewise would be unavailable because there would be no inferior court judgment to subject to revision.

D. The Suspension Clause: The Requirement That Habeas Be Available Unless Validly Suspended

Article I, section 9, clause 2 of the Constitution provides that "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."⁴³ There is considerable dispute concerning the breadth of the Suspension Clause, including whether it protects habeas for those in state custody or for those detained pursuant to a judgment by a court of competent jurisdiction.⁴⁴ The Supreme Court has stated, however, that at "the absolute minimum," it protects the writ as it existed in 1789,⁴⁵ and at "its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention."⁴⁶

If a person in the custody of a federal executive could not seek habeas relief from any court, state or federal, it certainly would appear to be a violation of the Suspension Clause. Thus, if the inferior federal courts do not exist, the Supreme Court cannot exercise original jurisdiction outside the cases allocated to its original jurisdiction by Article III, and the state courts cannot issue writs of habeas corpus

⁴³ U.S. CONST. art. I, § 9.

⁴⁴ See, e.g., FALLON ET AL., *supra* note 13, at 1291 ("[The] Suspension Clause appears to have been directed only to detention under federal authority, as was the grant of habeas jurisdiction in the Judiciary Act of 1789. Only in 1867 did Congress extend access to the writ to all prisoners held under state authority."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963) (noting the "black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction"); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 345 (1952) (contending that "nothing in the historical background provides any indication that a prisoner convicted according to the course of the common law by a court of general criminal jurisdiction was ever entitled to the writ"); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 924 (1994) (arguing that, taken together, the Suspension Clause and the Fourteenth Amendment require federal habeas review for convicted state prisoners).

⁴⁵ INS v. St. Cyr, 533 U.S. 289, 301 (2001); cf. *Felker*, 518 U.S. at 663–64 (stating that "we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789").

⁴⁶ INS, 533 U.S. at 301; see Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002) (noting that, as improved by the Habeas Corpus Act of 1679, "the writ afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds").

for those in federal custody, so it would seem that the Suspension Clause is violated. Is the U.S. Constitution simply self-contradictory?

II. AVOIDING THE CONFLICT BY DENYING ONE OF ITS ELEMENTS

It is possible, of course, to avoid the conflict among these four constitutional principles by denial. That is, if one denies any of the elements creating the conflict, the conflict evaporates. Indeed, sometimes the conflict itself is used as a lever in order to deny one of the elements.

A. *Rejecting the Madisonian Compromise*

Some scholars claim that, despite the Madisonian Compromise, Congress is constitutionally obligated to create inferior federal courts.⁴⁷ On one variant of this argument, the Madisonian Compromise simply has outlived its usefulness and should be discarded.⁴⁸

Another variant builds on a passage in *Martin v. Hunter's Lessee*, in which Justice Joseph Story suggested that because the Supreme Court's original jurisdiction is limited, and because there are cases over which the state courts cannot exercise jurisdiction (thereby precluding resort to the Supreme Court's appellate jurisdiction), Congress is "bound to create some inferior courts."⁴⁹ Advocates of this po-

⁴⁷ See FALLON ET AL., *supra* note 13, at 331–37. Most broadly, it has been argued that the "ordain and establish" language of Article III requires Congress to create inferior federal courts. See 1 JULIUS GOEBEL, JR., *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 246–47 (1971); cf. Collins, *supra* note 14, at 126 (noting that Julius Goebel is persuasive that this language prohibits Congress from appointing state courts as federal courts, but that simply because federal courts "had to be separate, if created, does not suggest also that they had to be created").

⁴⁸ See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 533 (1974) (stating that the "[a]bolition of the lower federal courts is no longer constitutionally permissible"). But see Fallon, *supra* note 15, at 1217 n.350 (describing Theodore Eisenberg's view as implausible and noting that it "generally has not been accepted [even] by other scholars in the Nationalist tradition").

⁴⁹ See 14 U.S. (1 Wheat.) 304, 331 (1816). Both variants of the position that Congress must create inferior federal courts are quite different from the position that the power of Congress to create inferior courts and to make exceptions to the Supreme Court's appellate jurisdiction must work in tandem, so that all cases and controversies (or just all cases) within the federal judicial power must be allocated to either the Supreme Court or some inferior court. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 260–61 (1985) (arguing that federal jurisdiction, in either original or appellate form, must be available for all "cases" but not for all "controversies" listed in Article III, so that if (but only if) Congress excepts certain "cases" from the Supreme Court's jurisdiction, it must create inferior federal courts to hear those "cases"); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction and Its Implementa-*

sition rely heavily on *Tarble's Case* to demonstrate that there are cases over which state courts cannot exercise jurisdiction.⁵⁰ On this view, the Madisonian Compromise was premised on the availability of state courts to hear federal claims. Once that premise is undermined, and there are federal claims that cannot be heard by state courts, inferior federal courts are required.⁵¹ In other words, the principle of *Tarble's Case* requires the rejection, in part, of the Madisonian Compromise.

B. *Rejecting Marbury v. Madison*

Another way to avoid the conflict among the four principles is to deny the correctness of *Marbury v. Madison's* holding that Congress lacks the authority to expand the Supreme Court's original jurisdiction. Article III allocates some cases to the Supreme Court's original jurisdiction and some to its appellate jurisdiction, and then empowers Congress to make exceptions to the Supreme Court's appellate jurisdiction.⁵² Might not this mean that Congress can transfer cases from the Supreme Court's appellate jurisdiction to its original jurisdiction?⁵³

As Professor William W. Van Alstyne put it, *Marbury* could have held that "the Article III grant of Supreme Court original jurisdiction is an irreducible minimum; and . . . [that] Congress may supplement that jurisdiction by excepting cases otherwise within the appellate ju-

tion of and Departures from the Constitutional Plan, 86 COLUM. L. REV. 1515, 1518 (1986) (noting that the Madisonian Compromise "authorized Congress to create inferior federal courts, but did not mandate their creation," but arguing that the exceptions power works "hand in hand with the power to create inferior federal courts"); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 750-53, 793 (1984) [hereinafter Clinton, *Guided Quest*] (distinguishing the positions and making clear acceptance of the power of Congress to choose not to create inferior federal courts); cf. Collins, *supra* note 14, at 131 (noting that it was Justice Joseph Story's theory of mandatory vesting, "coupled with the pervasive understanding that the states were incapable of handling some Article III trial business, that pushed him to speculate on the requirement of lower federal courts").

⁵⁰ Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 63 (1975) (criticizing Professor Henry Hart for ignoring *Tarble's Case*); *id.* at 75 (criticizing Professor Theodore Eisenberg for ignoring *Tarble's Case*).

⁵¹ See *id.* at 104-05. Martin H. Redish and Curtis E. Woods do not limit their argument to the habeas context, but argue more broadly that state courts lack the authority (whether by mandamus, habeas, or injunction) "to control directly the acts of federal officers," and that due process requires an independent judicial resolution of a constitutional claim. *Id.* at 76, 93.

⁵² U.S. CONST. art. III, § 2, cl. 2.

⁵³ See FALLON ET AL., *supra* note 13, at 272-73.

risdiction."⁵⁴ Similarly, Professor Robert Clinton suggests that *Marbury* may have been wrong, in that the Exceptions Clause "may also have been intended to include congressional power to reallocate the constitutionally structured appellate jurisdiction by authoring the Supreme Court to exercise that jurisdiction in original form."⁵⁵

Occasionally, authors imply that, despite the distinction between original and appellate jurisdiction drawn by *Marbury* and *Ex parte Bollman*, the Supreme Court's so-called "original" habeas jurisdiction is available in cases that do not involve the revision of another court's decision.⁵⁶ Of course, the Supreme Court's appellate jurisdiction is not limited to revising the decisions of other Article III courts.⁵⁷ Although the precise limits of what counts as a "court" subject to the Supreme Court's appellate jurisdiction is subject to some dispute,⁵⁸ and even a

⁵⁴ William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 33. Professor Van Alstyne adds that the Court could have added that the "only way in which Congress may create exceptions to the Court's appellate jurisdiction is by means of adding such cases to its original jurisdiction." *Id.*

⁵⁵ Clinton, *Guided Quest*, *supra* note 49, at 778; see Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1297, 1380 (2003) (arguing against the constitutionality of adding to the Supreme Court's original jurisdiction and raising concerns about Congress using "jurisdiction-packing" to overwhelm the Court); cf. FALLON ET AL., *supra* note 13, at 345 n.26 (noting that a broad usage of the term "courts" is "necessarily fuzzy at the borders, due to the practical and conceptual difficulty of distinguishing non-Article III courts from administrative agencies or other bodies charged with applying fact to law"); Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 465 (1989) (noting that modern day critics of *Marbury* have never "attempted to develop this point beyond merely posing the question" and arguing that if they had "they would have been disappointed").

⁵⁶ See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2226 n.130 (2003) (stating that if Congress had not created any lower federal courts, "it presumably could have vested this 'original' jurisdiction in the Supreme Court alone" without discussing, or even mentioning, *Marbury v. Madison* or *Ex parte Bollman*); cf. Pfander, *supra* note 17, at 723-24 (noting the "lingering confusion" over the extent to which *Marbury* limits the Supreme Court's power "to review the work of an Article I tribunal" and suggesting that it "poses a threat . . . most pointedly in cases where the court below is (like a court martial) not a court of record and the process of review contemplates active judicial factfinding and the entry of judgment").

⁵⁷ See, e.g., *United States v. Jones*, 119 U.S. 477, 480 (1886) (upholding appellate jurisdiction to review decision of the Court of Claims); *Martin*, 14 U.S. (1 Wheat.) at 304 (upholding appellate jurisdiction to review decision of the state court).

⁵⁸ See, e.g., *Everett v. Truman*, 334 U.S. 824, 824 (1948) (denying leave to file a petition for writ of habeas corpus for "relief from sentences upon the verdicts of a General Military Government Court at Dachau, Germany," with four Justices finding a lack of jurisdiction, four Justices urging that leave to file be granted and the case set for argument, and one Justice (Justice Robert Jackson) not participating); see also 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4005, at 101 (2d ed. 1996) ("[i]f a case is a major

certain kind of military tribunal may count as a "court,"⁵⁹ to treat any official who decides to restrain someone as a "court" would be inconsistent with *Marbury*: if an official who makes a decision to restrain a person is thereby a "court," so too is a person who makes a decision to withhold a document from a person. Although Charles Lee, arguing in William Marbury's behalf, advocated a conception of appellate jurisdiction sufficiently broad to reach that case,⁶⁰ the Court rejected that argument, concluding that "the essential criterion of appellate jurisdiction, [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause" and that to issue mandamus "to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper."⁶¹

In *Ex parte Quirin*, counsel for Nazi saboteurs sought leave to file a petition for a writ of habeas corpus directly with the Supreme Court.⁶² The Supreme Court called a special term and scheduled the matter for oral argument.⁶³ Before oral argument, however, counsel also filed a habeas petition in the district court.⁶⁴ While oral argument in the Supreme Court was proceeding, counsel perfected an appeal to the court of appeals from the district court's denial of relief.⁶⁵ The Supreme Court denied leave to file the habeas petition, but granted certiorari before judgment in the court of appeals to review the decision of the district court.⁶⁶ It appears that counsel for the saboteurs originally thought that they could seek habeas directly in the Supreme Court without first seeking relief in an inferior court until Justice Owens Roberts reminded them of *Marbury*.⁶⁷

theoretical uncertainty as to the nature of the tribunals whose action is so far judicial that initial revisory jurisdiction qualifies as 'appellate.'").

⁵⁹ See FALLON ET AL., *supra* note 13, at 316-18 (discussing *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam); *Everett*, 334 U.S. at 824). Compare *Solorio v. United States*, 483 U.S. 435, 436 (1987) (exercising jurisdiction to review a decision of the U.S. Court of Military Appeals without discussing this jurisdictional issue), with *In re Yamashita*, 327 U.S. 1, 8 (1946) (stating that "the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court").

⁶⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147-48 (1803).

⁶¹ *Id.* at 175.

⁶² 317 U.S. 1, 5 (1942).

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 19-20.

⁶⁵ *Id.*

⁶⁶ See *id.* at 19-20, 48. As Professor Robert E. Cushman quipped, the Supreme Court's "jurisdiction caught up with the Court just at the finish line." Robert E. Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case*, 28 CORNELL L.Q. 54, 58 (1942).

⁶⁷ Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENT. 431,

C. Rejecting or Downgrading *Tarble's Case*

There is no shortage of scholars who reject *Tarble's Case* or who seek to cabin it. Moreover, just as *Tarble's Case* is deployed by some to deny the principle of the Madisonian Compromise, others deploy the Madisonian Compromise or the Suspension Clause to deny the principle of *Tarble's Case*.

Professor Daniel J. Meltzer, for example, "happily" treats *Tarble's Case* "as unsound insofar as it suggests that the *Constitution* precludes state court habeas jurisdiction against federal officials," because the Madisonian Compromise "is a basic structural feature of the *Constitution*."⁶⁸ Instead, he suggests that *Tarble's Case* be viewed "as a sub-constitutional one, resting on the existence (and implied exclusivity) of federal court habeas jurisdiction."⁶⁹ Former Solicitor General Seth

441 n.21 (1997); see Cushman, *supra* note 66, at 57 (stating that "[r]eview by the Supreme Court of what the Military Commission was doing was rather clearly not an exercise of the Court's appellate jurisdiction"); cf. *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576-77 (1930) (explaining that although "[e]arly and long continued usage" treats certification of a distinct question of law as an exercise of appellate jurisdiction, the Supreme Court has "uniformly ruled" that it would not entertain certifications of the whole case "for otherwise it would be assuming original jurisdiction withheld from it by the *Constitution*"); *Ex parte Barry*, 43 U.S. (1 How.) 65, 65-66 (1844) (dismissing a petition for a writ of habeas corpus claiming that the petitioner's infant daughter was being detained unlawfully by the child's grandmother, and holding that it involved the exercise of original jurisdiction); *White v. Turk*, 37 U.S. (12 Pet.) 238, 239 (1838) (finding no jurisdiction because the certificate "brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction").

⁶⁸ Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2567 (1998). Professor Meltzer concedes "that there is much language in the decision to support the view that the *Constitution* itself precludes state courts from exercising habeas jurisdiction to challenge the legality of detention at the behest of federal officials." *Id.* at 2567 n.160; see Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1406 (1964) (noting that he would "cheerfully accept" a conclusion that state courts can issue habeas corpus); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 n.4 (1998) (describing himself as "one of many *Tarble* skeptics" and stating that "Congress's power to exclude cases from state court comes only from its power to put them exclusively in federal court, and that the *Constitution* of its own force does not keep any case out of state court that could be brought in the federal system"); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 84 (1981) (noting that if Congress were to abolish the lower federal courts, *Tarble's* rule would be critical, but "then the implications of the article III compromise make it wrong").

⁶⁹ Meltzer, *supra* note 68, at 2567 n.160. Indeed, even Martin H. Redish and Curtis E. Woods may retreat to viewing *Tarble's Case* as sub-constitutional. See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157-61 (1982) (suggesting that *Tarble's Case* be read as depending on an inference of congressional intent); Redish & Woods, *supra* note 50, at

P. Waxman and Professor Trevor W. Morrison similarly contend that because of the Madisonian Compromise, *Tarble's Case* should not be read as a constitutional decision.⁷⁰ Instead, they contend, "a better reading of *Tarble's Case* is that it reflects the Court's conclusion that Congress had invested only the federal courts with habeas jurisdiction to review the legality of federal detention" and that "to permit a state court to exercise jurisdiction would conflict with the federal statutory scheme established by Congress."⁷¹ For those who seek to downgrade *Tarble's Case* from a constitutional decision to a subconstitutional one, the case can be conceptualized as involving either statutory interpretation or a federal common law of state-federal relations.⁷²

Professor George Rutherglen agrees with these critics that the "square holding" of *Tarble's Case* "must be qualified" in that the "door to the state courts could be closed only if the door to the federal courts remained open."⁷³ He points to the Suspension Clause, arguing that without this qualification, the result could be a "suspension of the writ of habeas corpus."⁷⁴

D. *Eviscerating the Suspension Clause*

The principle that the Suspension Clause guarantees habeas corpus for those in federal executive detention (unless validly suspended in accordance with the Suspension Clause itself) has not escaped criticism. To the contrary, Justice Antonin Scalia has argued that the Suspension Clause does not "guarantee any content to (or even existence of) the writ of habeas corpus."⁷⁵ On this view, although the Suspension Clause limits the power of Congress to "temporarily withh[o]ld operation of the writ," it in no way restricts congressional power to alter permanently its content, just as the Equal Protection Clause guards "against unequal application of the laws, without guaranteeing any par-

101 n.244 (suggesting that if Congress were to speak sufficiently clearly, it could authorize state courts to issue habeas to federal officials).

⁷⁰ Waxman & Morrison, *supra* note 56, at 2226.

⁷¹ *Id.* at 2227.

⁷² See FALLON ET AL., *supra* note 13, at 439-40; Fallon, *supra* note 15, at 1206.

⁷³ George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2D 397, 400 (2002).

⁷⁴ *Id.*; cf. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1033 (1998) (noting that "[i]n a world without lower federal courts, the Supreme Court would presumably reevaluate the propriety of state court relief from federal detention").

⁷⁵ *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).

ticular law which enjoys *that* protection.”⁷⁶ That is, the Suspension Clause does not bar the “permanent repeal of habeas jurisdiction.”⁷⁷

Although Justice Scalia does not himself explicitly do so, one might bolster his argument by contending that the Suspension Clause cannot be understood to require the availability of any habeas remedy, given the Madisonian Compromise, the limitation on the Supreme Court’s original jurisdiction recognized in *Marbury*, and *Tarble’s Case*. That is, just as the Madisonian Compromise and the Suspension Clause are used against *Tarble’s Case*, and vice versa, the Madisonian Compromise, *Marbury*, and *Tarble’s Case* could be used together to support a narrow view of the Suspension Clause.⁷⁸

Although all of these methods succeed in eliminating the conflict among the four principles, they “solve” the constitutional puzzle in the same way that one “solves” a jigsaw puzzle with scissors. To clip off the Madisonian Compromise and to insist that inferior federal courts are constitutionally required would be to discard a central element of our constitutional architecture that is reflected in the debates of the Constitutional Convention, and the text of the Constitution, and that is fixed by more than two centuries of practice.⁷⁹ To slice the holding of *Marbury* out of our constitutional jurisprudence would not only reject what “has ever since [*Marbury*] been accepted as fixing the construction of this part of the Constitution,” but also deface, if not destroy, a constitutional icon.⁸⁰

⁷⁶ *Id.* at 338 (Scalia, J., dissenting).

⁷⁷ *See id.* at 341 n.5 (Scalia, J., dissenting). Although Justice Antonin Scalia in this footnote states that such permanent repeal is not “unthinkable,” the context demonstrates that he does not believe it would be unconstitutional. *See id.* (Scalia, J., dissenting).

⁷⁸ *See FALLON ET AL., supra* note 13, at 1291 (“A claimed right to habeas review in *federal court* bumps up against the constitutional understanding (already accepted by the Constitutional Convention when the Suspension Clause was adopted) that it was for Congress to decide whether to create lower federal courts at all.”); *cf.* Neuman, *supra* note 74, at 1033 (noting that if Congress abolished the lower federal courts “the remedial question would become more difficult but that is not the world in which we live”).

⁷⁹ *See* Charles L. Black, Jr., *The Presidency and Congress*, 32 *WASH. & LEE L. REV.* 841, 846 (1975) (describing congressional control of federal jurisdiction as “the rock on which rests the legitimacy of the judicial work in a democracy”). For a discussion of the founding generation’s view of “fixing” meaning, see generally Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519 (2003).

⁸⁰ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97 (1868) (noting that if “the question were a new one, it would, perhaps, deserve inquiry” whether Congress could add to the Supreme Court’s original jurisdiction, particularly in habeas corpus, but that *Marbury* had fixed the contrary construction); *see* Amar, *supra* note 55, at 467–78 (explaining the correctness of *Marbury*’s conclusion regarding the Supreme Court’s original jurisdiction).

Trimming the traditional view of the Suspension Clause so as to authorize Congress simply to eliminate the privilege of the writ of habeas corpus would come close to lopping that clause from the Constitution. Professor Gerald L. Neuman finds Justice Scalia's interpretation so surprising that he wonders if it "may be an error to take [it] seriously."⁸¹ Justice Scalia's interpretation of the Suspension Clause, for example, would leave the people in the Northwest Territory with less protection from such restriction on their liberty than before the ratification of the Constitution. The Northwest Ordinance guaranteed that the "inhabitants of the said territory shall always be entitled to the benefits of the writ[] of habeas corpus," and promised that this guarantee would inure to "the people and States in the said territory, and forever remain unalterable, unless by common consent."⁸² Indeed, it would leave the people of the United States less protected from lawless executive detention than British subjects in 1679.⁸³

It is true, as Justice Scalia emphasized in *INS v. St. Cyr*,⁸⁴ that federal courts lack inherent authority to issue writs of habeas corpus and only can exercise such authority when authorized by Congress.⁸⁵ But to conclude from this premise that there is no constitutional obligation to make habeas available for those in federal custody depends on

⁸¹ Neuman, *supra* note 46, at 562. Professor Neuman nevertheless proceeds to provide ample reason to reject Justice Scalia's interpretation. *Id.* at 570–87. It bears emphasis, however, that when armed with habeas jurisdiction, Justice Scalia insists that an American citizen detained within the territorial jurisdiction of a federal court either must be prosecuted criminally or released. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660, 2671, 2673 (2004) (Scalia, J., dissenting). Indeed, in such circumstances, Justice Scalia has a robust conception of the Suspension Clause:

If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

Id. at 2672 (Scalia, J., dissenting).

⁸² Northwest Ordinance of 1787, art. 2, 1 Stat. 52, 52 (1789).

⁸³ See Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.), reprinted in NEIL H. COGAN, CONTEXTS OF THE CONSTITUTION 679, 679–86 (1999); see also *Yerger*, 75 U.S. (8 Wall.) at 96 (noting the "remarkable anomaly" that would result if the Supreme Court "had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares [British courts] to possess").

⁸⁴ 533 U.S. at 340 (Scalia, J., dissenting).

⁸⁵ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807). See generally Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283 (2003) (noting that the Supreme Court cannot issue any prerogative writ, including habeas corpus, without congressional authorization).

an equation (unfortunately one all too frequently made by the Supreme Court) of the Constitution with what the Supreme Court says and does in the name of the Constitution.⁸⁶ Simply because the judiciary lacks authority to enforce a constitutional obligation does not mean that there is no constitutional obligation at all.

If our judge-focused contemporary legal culture makes it difficult to see this point, consider the constitutional obligation of Congress to provide for the establishment of the Supreme Court itself.⁸⁷ There is little doubt of this constitutional requirement, but if Congress failed to do so, no group of "judges" could declare themselves the Supreme Court of the United States and start exercising that court's jurisdiction.

The obligation to provide for the privilege of the writ of habeas corpus is parallel to the obligation to provide for the establishment of the Supreme Court. Consider in this light Chief Justice John Marshall's famous statement about the obligation imposed by the Suspension Clause on the first Congress:

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.⁸⁸

Chief Justice Marshall's reasoning applies equally to the constitutional obligation of Congress to provide for the establishment of the Su-

⁸⁶ See generally Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4 (2001); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 292-342 (1994).

⁸⁷ See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . ."); see also Neuman, *supra* note 46, at 581 (noting other examples where "constitutional guarantees are dependent on legislative action for their implementation").

⁸⁸ *Bollman*, 8 U.S. (4 Cranch) at 95; see, e.g., WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 172 n.126 (1980) (describing Chief Justice John Marshall's thesis as "the habeas clause imposed an obligation on Congress to emp[ower] the courts with habeas jurisdiction").

preme Court. Congress had—and must have felt—that obligation, albeit an obligation that could not be enforced by the judiciary.⁸⁹

Concededly, cutting *Tarble's Case* down to size would not be quite so dramatic.⁹⁰ Yet even *Tarble's Case* is hardly an isolated relic. It shares connections with the rejection of state court power to issue writs of mandamus to federal officials⁹¹ and the longstanding doubts regarding state court power to issue injunctions to federal officials.⁹² It has considerable support in the original understanding and early practice.⁹³ Finally, it is consonant with—although certainly not logically entailed by—the recent resurgence of judicially enforced federalism.⁹⁴

⁸⁹ See Neuman, *supra* note 46, at 581 (stating that *Bollman* “at most . . . supports the proposition that some constitutional violations cannot be judicially remedied”).

⁹⁰ Indeed, a rejection of *Tarble's Case* as a constitutional holding would temper considerably the problems of the narrow reading of the Suspension Clause. So coupled, if Congress eliminated federal habeas for those in federal custody, state courts could issue habeas for those in federal custody, unless habeas had been validly suspended by the federal government.

⁹¹ *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821).

⁹² See FALLON ET AL., *supra* note 13, at 442 (noting the “uncertainty about the capacity of state courts to issue injunctions against federal officials”); Arnold, *supra* note 68, at 1393–97 (discussing the cases addressing whether state courts have the power to issue injunctions to federal officials); Redish & Woods, *supra* note 50, at 105. This Article does not address the extent (if any) to which the Constitution requires remedies other than habeas corpus, which is the only remedy explicitly mentioned in the text. Compare Harrison, *supra* note 68, at 2516–27 (suggesting that the only constitutionally required remedy is nullity), with Meltzer, *supra* note 68, at 2559 (rejecting John Harrison's claim and arguing that the Constitution firmly requires remedies that are adequate to keep government generally within the bounds of law). There is reason to doubt that mandamus relief is constitutionally required; *Marbury* itself gives reason to doubt, given the denial of mandamus relief by the Supreme Court and the unlikelihood that it would have been available in any other court at the time. See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329–30 (1938) (finding withdrawal of power of federal courts to issue injunctions in labor disputes unexceptional). Compare Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 617 (2001) (claiming that there is “good reason to believe Marbury and his colleagues would have prevailed in the Circuit Court”), with Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 52 n.271 (2003) (claiming that “it seems highly doubtful that the Court, in the politically charged atmosphere of 1803, would have upheld the authority of the D.C. courts to order mandamus relief for William Marbury against James Madison”). If there are other constitutionally required remedies that are unavailable in state court, in the inferior federal courts, and in the Supreme Court, then some solution other than the power of individual Justices to issue habeas would have to be found to solve the resulting conundrum.

⁹³ See Collins, *supra* note 14, at 58–105.

⁹⁴ See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that state executive officials cannot be compelled to enforce federal law). See generally Daniel A. Farber, *The Trouble with Tarble's: An Excerpt from an Alternative Casebook*, 16 CONST. COMMENT. 517 (1999) (suggesting, through the use of a fictional 1997 decision, the considerable problems that might have resulted if *Tarble's Case* had been decided the other way).

Nevertheless, my point here is not so much to defend each of the four principles, but rather to determine whether they all can coexist. Thus far, we have seen only how various critics have chosen among the conflicting principles, not reconciled them. The next step is to seek a reconciliation.

III. SOLVING THE CONFLICT: THE HABEAS POWER OF INDIVIDUAL JUSTICES OF THE SUPREME COURT

From 1789 until today, individual Justices of the Supreme Court have been authorized to issue writs of habeas corpus.⁹⁵ The Judiciary Act of 1789 provided "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."⁹⁶ Significantly, the Judiciary Act of 1789 did not unambiguously give the Supreme Court itself the power to issue writs of habeas corpus (except as ancillary to a case otherwise before the court).⁹⁷ Instead, it

Critics of *Tarble's Case* also should consider the possibility of state courts issuing *other* prerogative writs to federal officials, such as prohibition from a state court to a federal district judge, or certiorari from a state court to a federal court of appeals, or quo warranto in a state court to determine who is the legal President of the United States. See generally Hartnett, *supra* note 85 (discussing the need for statutory authorization for the U.S. Supreme Court to issue prerogative writs).

To be sure, denial of state court power to issue habeas to federal officials is not precisely parallel to judicially enforced limitations on the scope of federal power. Nevertheless, one who interprets the Constitution to bar Congress from requiring state legislatures to enact particular laws, as in *New York v. United States*, or from requiring state executives to enforce federal law, as in *Printz*, might readily conclude that it similarly bars state courts from issuing habeas to federal officials. See *Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. 144, 188 (1992). Moreover, one who adheres to *Hans v. Louisiana*, and refuses to treat it as less than a constitutional decision, might readily adhere to *Tarble's Case* and refuse to treat it as less than a constitutional decision. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 64 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15-16 (1890).

⁹⁵ See FALLON ET AL., *supra* note 13, at 314 n.4 (noting that the power of a single Justice to issue a writ of habeas corpus is "a power granted from 1789 to the present"); see also Eric 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, 575-85 (2000) (emphasizing the importance of the power of individual judges to issue writs of habeas corpus, while criticizing the decision in *Ex parte Bollman*); Neuman, *supra* note 74, at 970 (noting that the difficulty of determining the meaning of the privilege of the writ of habeas corpus based on eighteenth-century practice is "enhanced by the fact that writs were often issued by individual judges acting in chambers, rather than as courts").

⁹⁶ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

⁹⁷ *Id.* (providing that "all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective functions, and

was the freestanding grant of habeas power to the individual Justices that led the Court to conclude that the Court itself had this power.⁹⁸

Chief Justice Marshall, writing for the Court in *Ex parte Bollman*, found "much force" in the argument that "[C]ongress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled."⁹⁹ He added,

It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the *supreme* court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from *every* court in the United States: and as it is granted to *all* in the *same sentence* and by the *same words*, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as

agreeable to the principles and usages of law"). The ambiguity is whether the restrictive clause ("which may be necessary for the exercise of their respective jurisdictions") modifies the entire list of writs ("*scire facias*, *habeas corpus*, and all other writs") or only the last item on the list ("all other writs"). See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (noting that the "only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions"); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1479-83 (2000) (arguing that the test of necessity applies only to "all other writs" and not to the named writs, but noting that Chief Justice Marshall "largely based his conclusion in favor of the Court's power to grant the 'great writ' of habeas corpus on an additional collection of structural considerations"). The current version of this All Writs Act is 28 U.S.C. § 1651 (2000). See *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (confirming that the All Writs Act "does not confer jurisdiction").

⁹⁸ See *Bollman*, 8 U.S. (4 Cranch) at 96-97. The opinion noted that Justice Samuel Chase doubted the authority of the Court to issue habeas, but agreed that either of the Justices could and that Justice William Johnson "intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not." *Id.* at 75 n.1.

⁹⁹ *Id.* at 96.

those courts are not always in session, the second sentence vests it in every justice or judge of the United States.¹⁰⁰

Indeed, even Justice William Johnson, dissenting in *Bollman*, emphasized that he was "not disputing the power of the individual judges who compose this court to issue the writ of *habeas corpus*. This application is not made to us as at chambers, but to us as holding the supreme court of the United States" ¹⁰¹

This vesting of power in individual Justices and judges to grant writs of habeas corpus is not some fluke of the Judiciary Act of 1789. When Congress expanded the reach of federal habeas corpus in 1833 and in 1842, it again vested the power in individual Justices and judges, rather than explicitly in the courts.¹⁰² When Congress extended federal habeas still further in 1867, it explicitly conferred habeas power on the federal courts, but continued to confer that power on individual Justices and judges as well.¹⁰³

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 107 (Johnson, J., dissenting). Justice Johnson explained,

We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion.

Id. (Johnson, J., dissenting).

¹⁰² See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539; Force Act of 1833, ch. 57, § 7, 4 Stat. 632, 634–35; *DUKER*, *supra* note 88, at 137–38; *FALLON ET AL.*, *supra* note 13, at 1287–88.

¹⁰³ See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86; *FALLON ET AL.*, *supra* note 13, at 1288; see also *DUKER*, *supra* note 88, at 191–92 (suggesting that perhaps one purpose of the 1867 Act may have been to overcome the "lingering doubt about the power of the courts under the 1789 statute, and the enactment of 1833 and 1842 [which] clearly pertained only to individual judges"). In a provision that confirms the distinction between the Supreme Court and an individual Justice, the 1867 Act provided for an appeal in a habeas case from "the final decision of any . . . justice . . . to the circuit court of the United States for the district in which said cause is heard." Act of Feb. 5, 1867, § 1, 14 Stat. at 386; see *REV. STAT.* §§ 763, 765 (1875) (providing for appeal from "the final decision of any . . . justice . . . upon an application for a writ of habeas corpus" to "the circuit court for the district in which the cause is heard"); George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 411–12 (1953) (noting that under the Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, circuit courts were given appellate jurisdiction over habeas decisions by individual Justices). The appellate jurisdiction of circuit courts over the habeas decisions of individual Justices appears to have been eliminated, along with all other appellate jurisdiction of the circuit courts, upon the creation of the circuit courts of appeals in 1891. See Act of Mar. 3, 1891, ch. 517, § 4, 26 Stat. 826, 827 (providing that "no appeal . . . shall hereafter be taken or allowed for any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts").

This basic framework, empowering both federal courts and federal judges individually to issue writs of habeas corpus, remains in force. Today, the basic federal habeas statute provides that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."¹⁰⁴

Moreover, the power of individual judges to issue writs of habeas corpus has historical roots still deeper than the Judiciary Act of 1789. In reaction to the refusal of British judges to issue a writ of habeas corpus on behalf of Francis Jenkes because the writ could not be issued out of term,¹⁰⁵ the Habeas Corpus Act of 1679 specifically empowered individual judges to issue habeas.¹⁰⁶ William Blackstone ex-

¹⁰⁴ 28 U.S.C. § 2241 (a) (2000). Although statutes frequently are interpreted to refer to "court" and "judge" interchangeably, that interpretation of a given statute is not inevitable. See *In re United States*, 194 U.S. 194, 196-97, 198-200 (1904) (noting the conflicting decisions and stating that "the proper construction of [a statutory reference to a 'district judge'] is not free from difficulty"); *Foot v. Silsby*, 9 F. Cas. 383, 384 (N.D.N.Y. 1850) (No. 4917) (Nelson, J., in chambers) (noting that "there may be some doubt in the matter"). Such an interpretation clearly would be incorrect in a statutory scheme that explicitly distinguishes between a court and the judges or justices thereof. See 28 U.S.C. § 2254(a). The statute states,

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.; see *In re Mackin*, 668 F.2d 122, 137 (2d Cir. 1981) (dismissing a petition for habeas corpus made to the court of appeals and noting that a "court of appeals is conspicuously absent from this list").

The current statute requires an application addressed to an individual Justice to "state the reasons for not making application to the district court of the district in which the applicant is held." 28 U.S.C. § 2242. It also permits an individual Justice to whom an application for habeas is made to "transfer the application for hearing and determination to the district court having jurisdiction to entertain it." *Id.* § 2241(b). Cynthia J. Rapp, a staff attorney in the Clerk's Office at the Supreme Court, states flatly that "[i]ndividual Justices no longer entertain writs of habeas corpus." Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2d 181, 183 (2002); see Frank Felleman & John C. Wright, Jr., Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 1017-18 (1964) (describing the power of an individual Justice to issue habeas as of "no practical importance" and asserting that a single Justice is not "an appropriate forum for original habeas proceedings"); cf. *Bowen v. Johnston*, 55 F. Supp. 340, 343 (N.D. Cal. 1944) (Denman, Circuit Judge, in chambers) (noting that "[i]f a district judge is not available," a habeas petitioner may seek one of the circuit judges, and if "by an extraordinary circumstance none of these is then there, he may seek any of the justices of the Supreme Court and the Chief Justice").

¹⁰⁵ See DUKER, *supra* note 88, at 56-57.

¹⁰⁶ See Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.), reprinted in NEIL H. COGAN, *CONTEXTS OF THE CONSTITUTION* 679, 680 (1999); 3 WILLIAM BLACKSTONE, *COMMENTARIES*

plained, "This is a high prerogative writ, and therefore by the common law issuing out of the court of kings's bench not only in term-time, but also during the vacation. . . . If it issues in vacation, it is usually returnable before the judge himself who awarded it."¹⁰⁷

As the remainder of this Part demonstrates, this power of individual Justices to issue writs of habeas corpus solves the conflict among the Madisonian Compromise, *Marbury v. Madison*, *Tarble's Case*, and the Suspension Clause.

IES *135-36 (explaining that the "famous habeas corpus act . . . which is frequently considered as another *magna carta* of the kingdom" was in response to the refusal to issue habeas for Francis Jenkes in vacation); DUKER, *supra* note 88, at 185 (noting that the "Habeas Corpus Act of 1679 solved problems such as those of Jenkes by empowering" individual judges and Justices to issue habeas in vacation and that the Judiciary Act of 1789 did likewise "by empowering the justices of the Supreme Court and judges of the district courts to issue the writ in chambers, as well as when assembled as a court"); *cf.* Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29, 31-51 (H. L. 1758), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 313, 317 (Philip B. Kurland & Ralph Lerner eds., 1987) (concluding that the Habeas Corpus Act's provision for action by a judge in vacation was "not meant to give a power which they did not exercise before, but to reduce an unsettled, informal, vague practice, into a formal regular system, as to the bailing for bailable offenses, and to correct the abuse of any power which they had in fact exercised"), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s3.html (last visited Mar. 15, 2005); 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 175-78 (Garland Publ'g 1978) (1846) (referring to Francis Jenkes and stating that the Habeas Corpus Act made clear that a single judge could issue the writ during the vacation, but questioning how much the matter of Francis Jenkes contributed to the passage of the Act).

¹⁰⁷ 3 BLACKSTONE, *supra* note 106, at *131; *see, e.g.*, Wyeth v. Richardson, 76 Mass. (10 Gray) 240, 241-42 (1857) (Shaw, C.J.) (noting that the power to issue habeas in vacation "is a special power, conferred by statute, to be used by a judge as judge, not as a court; though if the court is in session when the writ is returned, the judge may adjourn the case into court"); 2 DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS ON THE ADOPTING OF THE FEDERAL CONSTITUTION, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 108-09 (Jonathan Eliot ed., 2d ed. 1996), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 328 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of Judge Sumner) (noting, in discussing the Suspension Clause, that when a person is imprisoned, "he applies to a judge of the Supreme Court; the judge issues his writ to the jailer, calling upon him to have the body of the person imprisoned before him"), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s10.html (last visited Mar. 15, 2005); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 290-92 (reprint 1969) (1803), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 329 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that judges in Virginia may issue the writ in vacation), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s12.html (last visited Mar. 15, 2005).

A. Consistency with the Madisonian Compromise

Under the Madisonian Compromise, although the existence of the inferior courts is subject to Congress's discretion, the establishment of the U.S. Supreme Court is not. The Supreme Court is constitutionally obligatory; Congress must provide for its establishment.¹⁰⁸ As the Supreme Court once put it, "[s]o long, therefore, as this Constitution shall endure, this tribunal must exist with it."¹⁰⁹

The Constitution does not set the size of the Supreme Court, and Congress has varied its size over the years.¹¹⁰ Nevertheless, because there must be a Supreme Court, it must have judges or Justices, even if Congress does not create any lower federal courts. The power of Supreme Court Justices to issue writs of habeas corpus, as they have from 1789 until today, presents no conflict with the Madisonian Compromise.

B. Consistency with Tarble's Case

Tarble's Case, like *Ableman v. Booth* before it, concluded that "no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government."¹¹¹ *Tarble's Case*, however, stands as no impediment to individual Justices of the Supreme Court issuing writs of habeas corpus to determine the legality of federal custody.

Moreover, both *Ableman* and *Tarble's Case* themselves illustrate that individual judges long have been given the power to issue writs of habeas corpus. The state involvement in *Ableman* began with an individual justice of the Wisconsin Supreme Court issuing a writ of habeas corpus returnable before himself.¹¹² The *Ableman* Court spoke of the

¹⁰⁸ U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . .").

¹⁰⁹ *Ableman v. Booth*, 62 U.S. (21 How.) 506, 521 (1858).

¹¹⁰ See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (setting the number of Justices at six); Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89 (setting the number at five upon the next vacancy); Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (repealing the Judiciary Act of 1801 before any vacancy occurred); Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794 (setting the number at ten); Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209 (setting the number at seven); Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44 (setting the number at nine). However small Congress makes the Supreme Court, it must, at the very least, create one federal judgeship, both because at least one judge is necessary for there to be a Supreme Court, and because the Constitution specifically requires that there be a Chief Justice. See U.S. CONST. art. I, § 3 (providing that when the President is impeached, the Chief Justice shall preside at the Senate trial).

¹¹¹ *Tarble's Case*, 80 U.S. (13 Wall.) 397, 405 (1872) (quoting *Ableman*, 62 U.S. (21 How.) at 515-16).

¹¹² 62 U.S. (21 How.) at 508, 513.

limitation on *both* state judges and courts, referring to the two as a couplet more than half a dozen times.¹¹³ Similarly, state involvement in *Tarble's Case* began with a court commissioner issuing a writ of habeas corpus returnable before himself at his office.¹¹⁴ *Tarble's Case* also repeatedly spoke of *both* state judges and courts.¹¹⁵

C. Consistency with the Suspension Clause

If the individual Justices of the Supreme Court have the power to issue writs of habeas corpus to determine the legality of those in federal custody, the privilege of the writ has not been suspended. Seeking the writ from an individual Justice may be less convenient—for both the petitioner and the Justice—than seeking it from a local federal district judge or, for that matter, from a local state judge. Nonetheless, so long as there is a set of judicial officers with the power to issue the writ, it is difficult to claim that habeas corpus has been suspended.¹¹⁶

D. Consistency with Marbury

The key question, then, is whether the exercise of habeas jurisdiction by individual Justices of the Supreme Court is consistent with *Marbury's* limitation on the Supreme Court's jurisdiction. Although it may seem odd, at first blush, to conclude that the individual Justices

¹¹³ *Id.* at 515 ("judges and courts"); *id.* at 515–16 ("judges or courts"); *id.* at 523 ("court, or judge"); *id.* ("court or judge"); *id.* ("judge or court"); *id.* ("judge or court"); *id.* at 524 ("judge or court"); *id.* ("judge or court").

¹¹⁴ See 80 U.S. (13 Wall.) at 398.

¹¹⁵ *Id.* at 404 ("State court, or by a State judge"); *id.* at 409 ("State judges and State courts"); *id.* ("judge or court"); see *id.* at 402 ("any judicial officer of a State"); see also *id.* at 411 (stating that "it is for the courts or judicial officers of the United States" to release a party who is illegally imprisoned under the authority of the United States); *id.* (declaring that federal "courts and judicial officers are clothed with the power to issue the writ of habeas corpus"); cf. *Robb v. Connolly*, 111 U.S. 624, 637–38 (1884) (recognizing "the authority of a state court, or one of its judges, upon writ of habeas corpus," to test the legality under federal law of state custody).

¹¹⁶ See Neuman, *supra* note 74, at 975–76 (observing that it is conceivable that the Suspension Clause be read as "self-enforcing once the federal courts had been brought into existence," but that "it might not have been self-evident which federal courts or judges should have jurisdiction to issue the writ, given the likelihood that the Suspension Clause does not require that they *all* must").

Perhaps if the number of judicial officers empowered to issue habeas were so small compared to the number of detainees seeking habeas that relief effectively was denied, one might conclude that habeas effectively had been suspended. Because neither the number of such detainees nor the number of Justices is fixed by the Constitution, however, this possibility does not mean that the Suspension Clause necessarily requires that state courts and judges or inferior federal courts and judges also have the power to issue habeas corpus.

may exercise original jurisdiction when the Supreme Court itself cannot,¹¹⁷ this is the correct conclusion. As Professor William Duker once put it, the "Constitution specifically limits the original jurisdiction of the Court, though the individual justice in chambers or on circuit is subject to no such limit."¹¹⁸

As discussed above, the law has long distinguished between the acts of an individual judge and the acts of a court, particularly with regard to the issuance of habeas corpus.¹¹⁹ A major contribution of the Habeas Corpus Act of 1679 was its clarification that an individual judge had the power and obligation to issue habeas even when the court was not in session.¹²⁰ Moreover, both state and federal law in this country have long empowered individual judges, including individual Justices of the Supreme Court, to issue habeas.¹²¹

In addition, under the Judiciary Act of 1789, Justices of the Supreme Court spent most of their time exercising original jurisdiction that would have been forbidden to the Supreme Court itself. This is what circuit riding involved, which is why both Chief Justice John Jay and Justice Samuel Chase questioned its constitutionality.¹²² Yet as

¹¹⁷ See Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), reprinted in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (noting that "it would appear very singular, if the constitution was capable of being so construed, as to exclude the court, but yet admit the judges of the court"); see also Amar, *supra* note 55, at 469 n.124 (noting that this letter may never have been sent).

¹¹⁸ DUKER, *supra* note 88, at 165 n.89; see ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 759 (8th ed. 2002) (noting that although the Court's original jurisdiction is limited, the "individual Justices are not so limited").

¹¹⁹ See *supra* notes 95–107 and accompanying text.

¹²⁰ See Habeas Corpus Act of 1679, 31 Car. 2, c. 3 (Eng.), reprinted in NEIL H. COGAN, CONTEXTS OF THE CONSTITUTION 679, 680 (1999).

¹²¹ Individual Justices also are empowered to set bail as an original matter. See 18 U.S.C. §§ 3041, 3141 (2000); Felleman & Wright, *supra* note 104, at 989 & n.50 (describing this as "a rare instance in which the power of the individual Justice exceeds that of the Court as a whole" and noting that *Marbury's* limitation of the Supreme Court's original jurisdiction "apparently does not extend to individual Justices, who traditionally rode circuit and sat in original cases").

¹²² See Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), reprinted in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (presuming that the constitutional limit on the Supreme Court's original jurisdiction applies to its judges as well and therefore that Supreme Court Justices constitutionally could not be judges of the circuit courts). Justice Chase wrote the following to Chief Justice Marshall:

It appears to me, that Congress cannot, by Law, give the Judges of the Supreme Court, *original* Jurisdiction of the *same* Cases of which it *expressly* gives them *appellate* Jurisdiction. . . . The Constitution intended that the Judges of

early as 1803, the Supreme Court considered the constitutionality of circuit riding too well settled to be reconsidered.¹²³

In the particular context of habeas corpus, although the Justices of the Supreme Court in *Bollman* disagreed on whether the Court itself could issue the writ, there was no dispute that the individual Justices could do so.¹²⁴ Justice Johnson implored that it be "remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of habeas corpus. This application is not made to us as at chambers, but to us as holding the supreme court of the United States . . ."¹²⁵

Indeed, perhaps the most famous and controversial writ of habeas corpus ever issued in the United States—the one defied by President Abraham Lincoln—was issued by Chief Justice Roger Taney in

the Supreme Court should not have *original* Jurisdiction, but only in the few Cases enumerated.

Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *reprinted* in 6 THE PAPERS OF JOHN MARSHALL 109, 115 (Charles F. Hobson et al. eds., 1990).

¹²³ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (stating that "the question is at rest, and ought not now to be disturbed"). For the same reason, the constitutionality of permitting the judges of courts, not simply the courts themselves, to issue writs of habeas corpus and thereby to exercise the "judicial power of the United States" vested in courts by Article III, should be treated as settled. Indeed, as we have seen, the ability of individual judges to issue habeas not only has been part of our law since the Judiciary Act of 1789, but also is rooted in British practice and the Habeas Corpus Act of 1679. *See supra* notes 95–107 and accompanying text; *see also, e.g.*, *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000) (treating historical practice in both Great Britain and the United States as "well nigh conclusive" in deciding that *qui tam* actions are "'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (internal quotation marks omitted)). Justice Felix Frankfurter famously explained,

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

¹²⁴ *See Bollman*, 8 U.S. (4 Cranch) at 96; *id.* at 107 (Johnson, J., dissenting).

¹²⁵ *Id.* at 107 (Johnson, J., dissenting); *cf.* Letter from Chief Justice John Jay to President George Washington (Apr. 3, 1790), *reprinted* in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1573, at 437, 440 n.1 (Fred B. Rothman & Co. 1999) (1833) (finding "the distinction between a court and its judges from . . . illegal or unconstitutional," but nevertheless rejecting the idea that "the of the Supreme Court may also be judges of inferior and subordinate courts").

his capacity as an individual Justice to determine the legality of a detention by military authorities during the Civil War.¹²⁶ Chief Justice Taney explained that "[t]he petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there."¹²⁷ Chief Justice Taney did not make the writ returnable in Washington, however, but instead "resolved to hear it in [Baltimore] as obedience to the writ . . . would not withdraw General Cadwalader . . . from the limits of his military command."¹²⁸ Although he directed the clerk of the Circuit Court for the District of Maryland to issue the writ, he also directed that the writ be returnable

¹²⁶ *Ex parte Merryman*, 17 F. Cas. 144, 144-45 (C.C.D. Md. 1861) (No. 9487). Although the report of the decision in Federal Cases—a compilation not published until 1894—includes a caption denominating the case as one decided by the Circuit Court for the District of Maryland in its April 1861 term, the reproduction of the original opinion is captioned, "Before the Chief Justice of the Supreme Court of the United States, at Chambers." SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY* app. at 646 (1872). This is the caption used by Chief Justice Roger Taney himself. See CARL B. SWISHER, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64*, at 848 & n.25 (1974) (referring to a draft in Chief Justice Taney's longhand and noting that Chief Justice Taney labeled his opinion "Before the Chief Justice of the Supreme Court of the United States at Chambers"); see also Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993) (noting that some scholars have erroneously treated *Merryman* as a circuit court case, but concluding that it actually involved Chief Justice Taney as an individual Justice). Two contemporary reports denominate the case as decided in chambers, not in the April 1861 term of the Circuit Court for the District of Maryland, although they also denominate it as decided in the Circuit Court. See *Ex parte Merryman*, AM. L. REG. & U. PA. L. REV., 1861, at 524 (providing caption "In the United States Circuit Court, Chambers, Baltimore, Maryland. Before Taney, Chief Justice"); 3 W. L. MONTHLY 461, 461 (1861) (providing caption "U.S. Circuit Court—At Chambers. Baltimore, Md. . . . Before Hon. Roger B. Taney, Chief Justice of the United States."). At the conclusion of the proceedings before him, Chief Justice Taney ordered "all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the District of Maryland," an order that scarcely would have been necessary if the proceedings actually had been conducted in that Circuit Court, but which may help to explain why the case frequently has been thought of as one before that Circuit Court. *Merryman*, 17 F. Cas. at 153; see STERN ET AL., *supra* note 118, at 755 (noting that in-chambers opinions of Supreme Court Justices "have been printed at the end of the volumes of the United States Reports since Vol. 396 in 1969"); SWISHER, *supra*, at 847 (noting that "at that time and for many years thereafter opinions written at chambers were not usually printed in official reports"); *id.* at 849 n.26 (noting that although the Federal Cases citation to *Merryman* refers to the Circuit Court for the District of Maryland, this "is not to be taken as an admission on the part of the Chief Justice that the case was disposed of in that court" and that "[h]e continued to treat it as a decision by the Chief Justice at chambers").

¹²⁷ *Merryman*, 17 F. Cas. at 147; see TYLER, *supra* note 126, at app. at 640-41 (reproducing the petition addressed "To the HON. ROGER B. TANEY, Chief Justice of the Supreme Court of the United States" and praying that the writ of habeas corpus issue, commanding General George Cadwalader "to produce your petitioner before you, Judge as aforesaid").

¹²⁸ *Merryman*, 17 F. Cas. at 147.

"before me, Chief Justice of the Supreme Court of the United States," not before the Circuit Court, and this is how the writ issued.¹²⁹ The return was similarly addressed "[t]o the HON. ROGER B. TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BALTIMORE, MD.," not to the U.S. Circuit Court for the District of Maryland, and the attachment that Chief Justice Taney ordered to issue against General George Cadwalader for contempt in refusing to produce John Merryman was likewise made returnable "before me."¹³⁰ When the U.S. Marshal for the District of Maryland, who attempted to serve the writ of attachment, certified that he was refused admission to Fort McHenry, he certified this fact "to the HONORABLE ROGER B. TANEY, Chief Justice of the Supreme Court of the United States," not to the Circuit Court for the District of Maryland.¹³¹ Indeed, Chief Justice Taney himself explained that District Judge William F. Giles was not sitting with him because it was not a session of the Circuit Court but rather a proceeding before the Chief Justice at chambers.¹³²

If there was any doubt about the constitutional power of an individual Justice to exercise original jurisdiction in cases outside the Supreme Court's own original jurisdiction, surely President Lincoln and his Attorney General would have raised the argument, particularly given the far-reaching arguments they did make.

President Lincoln himself asserted that the President had the power, without congressional authorization, to suspend habeas and intimated that, even if this constitutional interpretation were wrong, he was nonetheless right to violate the Constitution, asking, "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"¹³³ Attorney General Edward Bates

¹²⁹ See TYLER, *supra* note 126, at app. at 642 (reproducing order that the writ be issued "by Thomas Spicer, clerk of the Circuit Court of the United States in and for the District of Maryland," returnable "before me, Chief Justice of the Supreme Court of the United States"); *id.* (reproducing the writ itself, commanding General Cadwalader "to be and appear before the Honorable ROGER B. TANEY, Chief Justice of the Supreme Court of the United States," and "receive whatsoever the said Chief Justice shall determine upon concerning you on this behalf").

¹³⁰ *Id.* at 642, 643 (reproducing the return); *id.* at 644 (reproducing the order for attachment).

¹³¹ *Id.* at 644-45 (reproducing the certification).

¹³² SWISHER, *supra* note 126, at 846-47; CARL BRENT SWISHER, ROGER B. TANEY 551 (1935). Judge William Giles, however, had sat with Chief Justice Taney during the proceeding of the previous day. SWISHER, *supra* note 126, at 846.

¹³³ President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430-31 (P. Basler ed.,

issued a nineteen page opinion supporting the President's power to arrest suspected insurgents and to refuse to obey a writ of habeas corpus issued by a court or a judge.¹³⁴ He contended that the President was "above all other officers, the guardian of the Constitution—its *preserver, protector, and defender*,"¹³⁵ answerable to "no other human tribunal" than the "high court of impeachment."¹³⁶ Neither objected to Chief Justice Taney's action on the ground that he could not issue an original writ of habeas corpus because of the limitations on the Supreme Court's original jurisdiction.¹³⁷

The authors of the leading federal courts text ask, "[d]oes the power of a single Justice of the Supreme Court to issue a writ of habeas corpus . . . involve original or appellate jurisdiction?"¹³⁸ The an-

1953); see DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157–63 (2003) (discussing President Lincoln's suspension of habeas corpus and Chief Justice Taney's response); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 11–58 (1998) (discussing *Merryman*); see also Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 246–49 (1981) (describing General Andrew Jackson's arguments defending his refusal to obey a writ of habeas corpus, as well as his subsequent payment of a \$1000 fine for contempt of court); *id.* at 242–43 (explaining that General Jackson not only had refused to obey the writ, but had jailed both the federal judge who issued it and the federal prosecutor who sought state habeas on the federal judge's behalf). See generally Paulsen, *supra* note 126 (discussing *Merryman* and executive power).

¹³⁴ Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 74–92 (1861).

¹³⁵ *Id.* at 82.

¹³⁶ *Id.* at 91. In addition to declaring that a court could not issue an order to the President to submit to the court's judgment, Attorney General Edward Bates also claimed that an order could not issue against the President's subordinates. *Id.* at 85–86. If this is correct, it is difficult to see how habeas for federal prisoners would ever be available. See REHNQUIST, *supra* note 133, at 44 (noting that Attorney General Bates's opinion "would persuade only those who were already true believers"); cf. Paulsen, *supra* note 86, at 290 (stating that unless habeas has been suspended, presidents must obey writs of habeas corpus).

¹³⁷ To the contrary, Attorney General Bates relied on *Bollman* for the proposition that habeas is always "in the nature of an appeal," and asserted that "it will hardly be seriously affirmed, that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States—and especially in a case purely political." 10 Op. Att'y Gen. at 86–87. Although *Bollman* states that "[t]he decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature," in context, the statement is referring to *judicial* decisions that an individual shall be imprisoned, not all decisions to imprison. See 8 U.S. (4 Cranch) at 101. Although an executive official must interpret and apply the law in particular situations, to treat all judicial examination of the legality of executive conduct as appellate would constitute a rejection of *Marbury*, for it would mean that the mandamus sought in that case should have been characterized as appellate because it sought review of Secretary of State James Madison's decision to withhold William Marbury's commission. See 5 U.S. (1 Cranch) 137, 147–48 (1803) (presenting argument of Charles Lee).

¹³⁸ FALLON ET AL., *supra* note 13, at 314 n.4.

swer to this question "rests in obscurity" because the question itself is flawed.¹³⁹ It contains an implicit assumption that the answer must be the same for all exercises of habeas power by an individual Justice.

But this assumption is simply wrong. Just as *Marbury* makes clear that the writ of mandamus can be used as a means of exercising *either* original *or* appellate jurisdiction, *Bollman* makes clear that the writ of habeas corpus can be used as a means of exercising *either* original *or* appellate jurisdiction. For both prerogative writs, the essential criterion is whether the particular case involves revision of another court's judgment—if so, appellate jurisdiction is involved, and if not, original jurisdiction is involved.¹⁴⁰

¹³⁹ See *id.* But see *Fay v. Noia*, 372 U.S. 391, 407 (1963) (stating that "the habeas jurisdiction of the other federal courts and judges, including the individual Justices of the Supreme Court, has generally been deemed original").

¹⁴⁰ *Bollman*, 8 U.S. (4 Cranch) at 100–01; *Marbury*, 5 U.S. (1 Cranch) at 175. In one rather confusing opinion, the Supreme Court held that it lacked jurisdiction to review an extradition decision by a district judge in chambers, writing broadly that the Supreme Court could "exercise no power, in an appellate form, over decisions made at his chambers by a justice of this court, or a judge of the District Court." *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847). See generally John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93 (2002) (discussing *Metzger*, its possible interpretations, and its progeny, in detail).

Metzger might be read as limited to the extradition context, where a district judge can be understood to be exercising a non-judicial "special authority." See 46 U.S. (5 How.) at 191; see also 18 U.S.C. § 3184 (providing that "any justice or judge of the United States" as well as certain magistrates and state judges, but not any courts, may conduct extradition proceedings); *LoDuca v. United States*, 93 F.3d 1100, 1105 (2d Cir. 1996) (reasoning that "[p]resumably, the Court was describing the role of the district judge rather than the place of his decision-making, since the Court later noted that the judge was exercising 'a special authority' for which no provision existed regarding the appealability of his decision"); *In re Mackin*, 668 F.2d at 125, 129 (Friendly, J.) (tracing the inability to appeal extradition orders to *Metzger*'s conclusion that an extradition judge exercises a special authority and holding that such an order is not a final decision of a "district court" subject to appeal under 28 U.S.C. § 1291 (2000)). But see Parry, *supra*, at 160–64 (criticizing Judge Friendly's approach).

Metzger also might be read to reflect a view that the Supreme Court lacked statutory authorization to review in-chamber decisions. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313–14 (1810) (construing Acts of Congress granting the Supreme Court appellate jurisdiction as impliedly excepting all other cases). Read this way, however, *Metzger* is difficult to reconcile with the proposition that the Supreme Court's "appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress." *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 99 (1868); see Oaks, *supra* note 29, at 165 (discussing *Metzger* and *Yerger*); cf. STERN ET AL., *supra* note 118, at 787 (noting that the Court "has jurisdiction, on motion, to review and reverse the action of an individual Justice with respect to a stay application").

Metzger also might stand for the proposition that because appellate jurisdiction involves the revision of another court's judgment and an individual judge in chambers is not holding court, an in-chambers decision itself cannot be, as a constitutional matter, subject to appellate review.

When the Supreme Court's own jurisdiction is at issue, it is important to decide whether the particular case involves original or appellate jurisdiction because the Court's constitutionally permissible original jurisdiction is limited. For that reason, whether an individual Justice may refer a petition for habeas corpus to the full court depends on whether the jurisdiction at issue is original or appellate. It was in this context that the Supreme Court addressed the proper characterization of the habeas jurisdiction of individual Justices.

In *In re Kaine*, an alleged fugitive from Great Britain was brought before a U.S. Commissioner pursuant to an extradition treaty and was ordered committed.¹⁴¹ The U.S. Circuit Court, District Judge Samuel R. Betts presiding, refused a writ of habeas corpus, and Thomas Kaine presented a petition for a writ of habeas corpus to Justice Samuel Nelson at chambers. Justice Nelson granted the writ, but rather than making a final disposition, ordered that the case be heard "before all the Justices of the Supreme Court in bank, at the commencement of the next term" keeping Thomas Kaine in the custody of a marshal until then.¹⁴² Upon argument before the Supreme Court, the Court assumed that Justice Nelson's action involved original jurisdiction, and therefore concluded that his attempted transfer to the full court was invalid.¹⁴³

the exercise of the Supreme Court's appellate jurisdiction. See 46 U.S. at 191 (stating that the question of jurisdiction arises because the district judge acted "at his chambers, and not in court"); *id.* at 189 (stating that "it is said" that *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795), involved "an original exercise of jurisdiction by the [Supreme] court, as it does not appear that the district judge was holding a court at the time of the commitment" on a charge of treason, but noting that the issue of jurisdiction was not considered); *id.* at 180 (noting the argument of Coxe, counsel for petitioner, that "this court has held, that, in awarding this writ, it does so in the exercise of appellate and not original jurisdiction, and that a doubt has been expressed whether, this being a proceeding before the district judge at chambers, this court can exercise any revisory power over it").

However *Metzger* is interpreted, it does nothing to call into question the power of individual Justices of the Supreme Court to exercise original jurisdiction by issuing writs of habeas corpus.

¹⁴¹ See 55 U.S. (14 How.) 103, 103-04 (1852).

¹⁴² *Id.* at 104. For the decision of the Circuit Court, see *In re Kaine*, 14 F. Cas. 84 (C.C.S.D.N.Y. 1852) (No. 7598). For the decision of Justice Samuel Nelson in chambers adjourning the case to the full Supreme Court, see *In re Kaine*, 14 F. Cas. 82 (C.C.S.D.N.Y. 1852) (No. 7597a).

¹⁴³ *Kaine*, 55 U.S. (14 How.) at 116-17 (Catron, J.); *id.* at 131 (Nelson, J., dissenting). Four of the eight participating Justices concluded that the Supreme Court could issue habeas in the exercise of its appellate jurisdiction to revise the judgment of the Circuit Court and denied relief on the merits. *Id.* at 116-17 (Catron, J., joined by McLean, Wayne, and Grier, JJ.). Three other Justices agreed that the Court itself could use habeas in the exercise of its appellate jurisdiction to revise the decision of the Circuit Court, but concluded on the merits that the Circuit Court should have ordered the petitioner discharged from custody. *Id.* at 134, 148 (Nelson, J., dissenting, joined by Taney, C.J., and Daniel, J.).

Even Justice Nelson stated that he was "inclined to concur with [his] brethren, that [they] cannot entertain jurisdiction . . . upon [his] allowance of the writ and adjournment of the proceedings to be heard in this court," based on his view that because the Court's appellate power cannot be exercised by individual Justices at chambers, the "proceedings before [him], at chambers . . . must undoubtedly be regarded as an original proceeding, and not in the exercise of an appellate power."¹⁴⁴

In *Ex parte Clarke*, however, the Court upheld the power of an individual Justice to refer a habeas matter to the full Court.¹⁴⁵ Augustus Clarke, a member of the city council of Cincinnati, was convicted in a U.S. Circuit Court for failing to perform certain duties involving a federal election and presented a petition for a writ of habeas corpus to Justice William Strong.¹⁴⁶ Justice Strong granted the writ, "returnable forthwith before himself, at the Catskill Mountain House."¹⁴⁷ Upon the return, Justice Strong postponed the hearing of the case into the full Court until its next term.¹⁴⁸

The government objected that this procedure was invalid under *Kaine*, a point that the Court "considered . . . with some care."¹⁴⁹ The Court explained that the "ground taken" in *Kaine* was that "the writ had been issued by [Justice Nelson] in virtue of his original jurisdiction."¹⁵⁰

But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the justice who issued it, or by this court, would in fact require a revision of the action of the Circuit Court by which the petitioner was com-

Justice Benjamin Curtis, speaking for himself, emphasized the difference between the individual Justice and the Court, stating that an individual Justice "in vacation, at his chambers, has no power to grant a writ of *habeas corpus* out of this court" because only the full Court could do so, and that an individual Justice similarly lacks power "to make such a writ returnable before himself, and then adjourn it into term." *Id.* at 118. He therefore agreed with every other Justice that the Court could not act under Justice Nelson's writ. *Id.* Nonetheless, he rejected the conclusion, accepted by every other Justice, that the Court could issue habeas in the exercise of its appellate jurisdiction, concluding that the cause of Thomas Kaine's commitment was not the act of the Circuit Court, but instead the act of the Commissioner, and therefore the petition called for an exercise of original jurisdiction. *See id.* at 126. The Court entered an order denying the writ and dismissing the petition. *Id.* at 148; *see* Neuman, *supra* note 74, at 998-1001 (discussing *Kaine*).

¹⁴⁴ *Kaine*, 55 U.S. (14 How.) at 130-31 (Nelson, J., dissenting).

¹⁴⁵ 100 U.S. 399, 400-02 (1879).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 402.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Clarke*, 100 U.S. at 402.

mitted, and such revision would necessarily be appellate in character. This appellate character of the proceeding attaches to a large portion of cases on *habeas corpus*, whether issued by a single judge or by a court.¹⁵¹

Significantly, the Court added that the appellate feature is "no objection to the issue of the writ by the associate justice, and is essential to the jurisdiction of this court."¹⁵² That is, although the power of the Court itself to issue habeas, whether directly or on referral from an individual Justice, depends on whether the particular case involves original or appellate jurisdiction, an individual Justice has the power to grant habeas whether the particular case involves original or appellate jurisdiction. Put slightly differently, the power of an individual Justice to issue a writ of habeas corpus is *both* original and appellate: appellate if the particular case involves the revision of another court's judgment, and original if the particular case does not.

In *Kaine*, the Court assumed that individual Justices could not exercise the appellate power of the Court itself, and did not discuss whether the individual power vested in Justices might, in some cases, properly be characterized as appellate. In *Clarke*, by contrast, the Court was untroubled by the prospect of individual Justices exercising appellate power via habeas, noting that an individual Justice can issue habeas "in any part of the United States where he happens to be," and can "undoubtedly . . . dispose[] of the case himself," although if "the case is one of which this court also has jurisdiction," and is "of great moment and difficulty," the Justice may postpone the case to the whole Court.¹⁵³

¹⁵¹ *Id.* at 402-03. Between *Kaine* and *Clarke*, the Court decided *Yerger* and clarified the following:

[I]n all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

Yerger, 75 U.S. (8 Wall.) at 103. In doing so, the Court explicitly rejected the contrary position taken by Justice Curtis in *Kaine*. *Id.* at 100.

¹⁵² *Clarke*, 100 U.S. at 403.

¹⁵³ *Id.* Justice Joseph Bradley, the author of the *Clarke* opinion, denied a writ of habeas corpus sought by the assassin of President James Garfield and explained,

In a case of grave doubt and difficulty, and appellate in its character (as this case is) I have a right, undoubtedly, to refer the matter to the Supreme Court

Although both cases wrestled with the interaction between the power of an individual Justice to grant habeas and the limitation on the Supreme Court's original jurisdiction, neither case suggested the least doubt that an individual Justice could exercise original habeas jurisdiction, notwithstanding the constitutional limitations on the Supreme Court's own original jurisdiction. This is dramatically illustrated by the aftermath of the *Kaine* case: even though at least seven Justices, including Justice Nelson himself, already had stated that his power as an individual Justice in that case involved the exercise of original jurisdiction, he nevertheless subsequently exercised that jurisdiction to discharge Thomas Kaine from custody.¹⁵⁴

Later developments have called into doubt *Clarke's* robust view of an individual Justice's power to take action that effectively decides an appeal unilaterally.¹⁵⁵ For example, although individual Justices are empowered by statute to grant stays pending certiorari,¹⁵⁶ they are quite reluctant to do so when it effectively would decide the case on the merits.¹⁵⁷ Similarly, although individual Justices are empowered by

of the United States [citing *Clarke*]; but such is not the usual course, and is not to be followed if it can well be avoided. . . . The law gives jurisdiction to, and places the responsibility upon, a single judge to grant or refuse the wish; and it is his duty to decide an application therefore if he can do so with reasonable confidence in his own conclusion; and it is his right to do so in every case.

In re Guiteau (1882) (Bradley, J., in chambers), reprinted in 1 A COLLECTION OF IN CHAMBERS OPINIONS, at xiv, xv (Cynthia Rapp ed., 2004); see *Sacco v. Massachusetts* (1927) (Holmes, J., in chambers), reprinted in 1 A COLLECTION OF IN CHAMBERS OPINIONS 16, 16 (Cynthia Rapp ed., 2004) (noting that if the proceedings leading to the conviction "were void in a legal sense . . . no doubt I might issue a habeas corpus . . . simply as anyone having authority to issue the writ might do so").

¹⁵⁴ See *Ex parte Kaine*, 14 F. Cas. 78, 82 (C.C.S.D.N.Y. 1853) (No. 7597) (Nelson, J., in chambers). Judge Nelson observed that, given the Court's jurisdictional determination, the "case before me . . . necessarily remained for a final hearing at chambers." *Id.* at 79–80. Note, too, that four Justices in *Kaine* had refused habeas relief on the merits and Justice Nelson's views on the merits had attracted only two other votes, yet Justice Nelson, as an individual Justice, ordered Thomas Kaine discharged. *Id.* at 82.

¹⁵⁵ See Rapp, *supra* note 104, at 183 n.5 (referring to a 1944 letter from the Clerk's Office as indicating "that although a Justice might have the power to grant a petition of habeas corpus, it was a well-established practice that such applications would be considered by the full Court"). It would appear that Cynthia J. Rapp is referring only to habeas petitions calling for the exercise of appellate jurisdiction, for she makes no attempt to explain how the Court could entertain an application for habeas that called for the exercise of original jurisdiction beyond the cases allocated to the Supreme Court's original jurisdiction by Article III.

¹⁵⁶ 28 U.S.C. § 2101(f) (2000).

¹⁵⁷ See *Cousins v. Wigoda*, 409 U.S. 1201, 1206 (1972) (Rehnquist, J., in chambers); STERN ET AL., *supra* note 118, at 798 (citing *Cousins*, 409 U.S. at 1206 and noting that one factor considered in stay applications is a "concern that to grant a stay would effectively be to determine the case on the merits, a power not otherwise vested in the individual Justices").

statute to grant bail,¹⁵⁸ that power has been questioned in situations where a certiorari petition to review a lower court's decision regarding bail is pending.¹⁵⁹

When confronted with a case seeking "habeas corpus relief by way of injunction," Justice William Douglas once stated that "apart from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice of this Court has no power to dispose of cases on the merits."¹⁶⁰ He went on to add that "[i]t may be that in time [the Suspension Clause] will justify the issuance of a writ of habeas corpus by an individual Justice," but that the point "has never been decided."¹⁶¹ Although this statement has sometimes been cited, even by the illustrious Professor Charles Alan Wright, for the proposition that "[w]hether an individual justice of the Supreme Court may issue the writ is an open question," it should not be read this broadly.¹⁶² Individual Justices are empowered by statute to issue habeas corpus, as both Professor Wright and Justice Douglas recognized.¹⁶³ In commenting that the Suspension Clause may someday be interpreted to justify the

¹⁵⁸ See 18 U.S.C. §§ 3041, 3141.

¹⁵⁹ See *Bandy v. United States*, 82 S. Ct. 11, 13 (1961) (Douglas, J., in chambers) (declining to grant bail in such a situation because to do so would make the petition for certiorari moot); *Stack v. Boyle*, 342 U.S. 1, 4 n.2 (1951) (leaving open the question of "the power of a single Justice or Circuit Justice to fix bail pending disposition of a petition for certiorari in a case of this kind"); see also *Blodgett v. Campbell*, 508 U.S. 1301, 1303-04 (1993) (O'Connor, J., in chambers) (noting, in the context of an application to vacate an order of the court of appeals remanding a case to the district court, that it apparently would exceed the authority of a Circuit Justice to vacate or to reverse a court of appeals's order, other than one concerning interim relief); STERN ET AL., *supra* note 118, at 760 (noting that because a pretrial bail decision may be appealed and reviewed on certiorari, "a Circuit Justice may well be quite reluctant to grant bail pending trial because this would appear to be tantamount to deciding the merits of such an appeal unilaterally").

¹⁶⁰ *Locks v. Commanding Gen.*, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers).

¹⁶¹ *Id.*

¹⁶² 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4268.1, at 489 n.3 (2d ed. 1988); Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 229 n.13 (1978).

¹⁶³ See *United States ex rel. Norris v. Swope*, 72 S. Ct. 1020, 1021 (1952) (Douglas, J., in chambers) (noting that "an individual Justice . . . has the power to grant the writ"); *In re Johnson* (1952) (Douglas, J., in chambers), reprinted in 1 A COLLECTION OF IN CHAMBERS OPINIONS 67, 69 (Cynthia Rapp ed., 2004) (noting that the "power to issue the writ [of habeas corpus] is given to a Justice"); Wright, *supra* note 162, at 229 (noting that "[e]ither the Supreme Court or a justice thereof may issue the writ"). Indeed, Justice William Douglas once went so far as to state that "[w]hat courts may do is dependent on statutes, save as their jurisdiction is defined by the Constitution. What federal judges may do, however, is a distinct question. . . . [The Suspension Clause] must mean that [habeas] issuance . . . is an implied power of any federal judge." *Parisi v. Davidson*, 405 U.S. 34, 48 (1972) (Douglas, J., concurring in the judgment) (citation omitted).

issuance of habeas by individual Justices, surely Justice Douglas was not suggesting that the longstanding statutory power of individual Justices to grant habeas was somehow unconstitutional. At most, *Locks v. Commanding General* stands for the proposition that, just as an individual Justice should not use the power to grant a stay or bail effectively to displace the Supreme Court's appellate jurisdiction, so too an individual Justice may not use habeas corpus effectively to displace the Supreme Court's appellate jurisdiction.¹⁶⁴

Yet even if *Locks* is read this broadly, and *Clarke's* view of the appellate power of individual Justices to grant habeas is rejected completely, there remains no constitutional impediment to an individual Justice exercising original jurisdiction and issuing writs of habeas corpus as they have been empowered to do since 1789.

CONCLUSION

The Madisonian Compromise, *Marbury v. Madison*, *Tarble's Case*, and the Suspension Clause can all coexist. There is no need to reject, to downgrade, or to weaken any of them. There is no need to reject the Madisonian Compromise because of *Tarble's Case* and the Suspension Clause, nor to weaken the Suspension Clause because of the Madisonian Compromise, *Marbury*, and *Tarble's Case*.

At the outset, this Article posited a situation in which someone detained by the federal executive sought to challenge the legality of his detention, but could not turn to the inferior federal courts because they did not exist, could not turn to the Supreme Court because of *Marbury*, and could not turn to the state courts because of *Tarble's Case*. Even though no one—not Congress, not the Supreme Court, and not the state courts—could be faulted for violating the Constitution, might it be that the privilege of the writ would be unavailable? We can now say that there is some place to which the detainee could go, the chambers of any Justice of the Supreme Court,

¹⁶⁴ See *Norris*, 72 S. Ct. at 1021 (noting that although an individual Justice has the power to grant the writ, it would not be appropriate, absent a showing of exceptional circumstances, to do so until the petitioner "exhausts his remedies by certiorari to this Court").

No matter how one interprets *Locks*, it would be a mistake to rely too heavily upon it as authority. Justice Douglas specifically noted that the issue he raised was "not briefed or argued in the papers which have been submitted," that the "shortness of time (less than one day) allowed [to him] for consideration of the application [did not] permit [him] even to explore" it, and that his decision was "without prejudice to any future ruling . . . [and] was based 'solely on the narrow compass of the authorities submitted.'" *Locks*, 89 S. Ct.

and that there is no constitutional impediment to the exercise of habeas power by an individual Justice.

Moreover, by defending the Suspension Clause, the argument in this Article bolsters the longstanding interpretive canon that statutes should be construed, when possible, to preserve the availability of habeas.¹⁶⁵ Indeed, it adds another layer: even if a statute clearly removes habeas jurisdiction from courts, it might not remove it clearly from individual Justices.

But what if Congress were clearly and unambiguously to close this door, too? If the arguments made in this Article are correct, then if Congress was to make no provision at all for habeas corpus, it would stand in violation of the Suspension Clause. Although this Article does not contend that individual Justices have an inherent power to issue writs of habeas corpus, nor that they could issue such writs without congressional authorization, Congress could not defend its failure to make any provision for habeas by pointing to the Madisonian Compromise, *Marbury*, and *Tarble's Case*, because it had another option: far from having to create inferior federal courts, or to challenge *Marbury* or *Tarble's Case*, it simply could have empowered individual Justices to issue writs of habeas corpus.

Some may think that, absent an argument for an inherent power in individual Justices to issue habeas corpus, there is no difference between the situation we confronted at the outset of the Article and the one we can see now: in either case, the federal detainee cannot obtain habeas relief unless Congress has granted habeas jurisdiction either to inferior federal courts or to individual Justices. But there is an important difference: in the earlier situation, it appeared impossible to find a constitutional violation of the Suspension Clause without jettisoning an existing constitutional principle; now we can.

This insight not only should shape judicial interpretation of statutes, but also—because constitutional interpretation matters to Congress, the President, and the citizenry, as well as to judges—this insight should affect the statutes that get enacted. Congress should

¹⁶⁵ See *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (noting the “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction”). Almost seven score years ago, the Supreme Court stated,

The general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States We are not at liberty to except from [the Supreme Court's appellate jurisdiction through the use of habeas] any cases not plainly excepted by law.

Ex parte Yerger, 75 U.S. (8 Wall.) 85, 102 (1868).

always feel “with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity.”¹⁶⁶

¹⁶⁶ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).