

## MILESTONES IN HABEAS CORPUS: PART I

### 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

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Copies of all of the sources cited in this Article are available on request from the reference desk of the Deane Law Library of Hofstra Law School.

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And be it further enacted ~~by the authority~~  
 aforesaid, that all the before mentioned courts of  
 the ~~United States~~ States shall have power to issue writs  
 of Scire-facias, ~~subpoena & protection for witnesses~~  
Habeas Corpus, & all other writs not specially  
 provided for by statute, which may be necessary  
 for the exercise of their respective jurisdictions,  
 & agreeable to the principles & usages of law.  
 — And that either of the Justices of the Supreme  
 court, & as well as Judges of the district courts,  
 shall have power to grant writs of habeas cor-  
pus for the purpose of an enquiry into the  
 cause of commitments. Provided that writs of  
habeas corpus shall in no case extend to prison-  
 ers in goal unless where they ~~are~~ ~~are~~  
 under or by colour of the Act.

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United States, or are committed for trial upon  
 some count of the same, or are necessary to be brought  
 to testify.

## I. INTRODUCTION

## A. Summary

Both federal and state prisoners are entitled to challenge the legality of their confinements by asking a federal court to grant them perhaps the most cherished remedy in Anglo-American jurisprudence, the writ of habeas corpus.<sup>1</sup> When Congress seeks to constrict that right, it risks offending the Suspension Clause of the Constitution.<sup>2</sup>

In recent times, because of the restrictions on federal habeas corpus for state prisoners (especially Death Row inmates) imposed by the Antiterrorism and Effective Death Penalty Act of 1996,<sup>3</sup> the federal courts have been increasingly called upon to analyze the Clause. The subject has been before the Supreme Court twice in the past few years<sup>4</sup> and surely will be again soon.

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1. See 28 U.S.C. § 2241 (1994); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment."); see also 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (3d ed. 1998); DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF 59-60 (1996); Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in FREEDOM AND REFORM 55, 58 (Harold M. Hyman & Leonard W. Levy eds., 1967); Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 417, 417 (James Acker et al. eds., 1998); Zechariah Chaffee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143-44 (1952). See generally Stanley Mosk, *States' Rights—And Wrongs*, 72 N.Y.U. L. REV. 552, 552-53 (1997).

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

3. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253-2255 and adding §§ 2261-2266). The background of the statute is canvassed in Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 420-33 (1996), and its practical effects are set forth in Association of the Bar of the City of New York, *The Crisis in Capital Representation*, 51 REC. ASS'N. BAR CITY N.Y. 169, 192-94 (1996).

4. See *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), discussed *infra* note 127; *Felker v. Turpin*, 518 U.S. 651 (1996).

In approaching Suspension Clause issues, the Court,<sup>5</sup> like scholars,<sup>6</sup> proceeds on the assumption that the Clause originally protected only federal, not state, prisoners.

This assumption is a mistake. It should be corrected, lest it undermine the Court's willingness to recognize the applicability of the Clause to state prisoners and encourage Congress to disregard the constitutional limits on its ability to deny those prisoners federal vindication of their rights.

The origin of the mistake is that, according to dicta inserted by Chief Justice John Marshall into *Ex parte Bollman*,<sup>7</sup> Section 14 of the Judiciary Act of 1789<sup>8</sup> withheld from state prisoners access to the federal writ of habeas corpus to test the legality of their confinements. Since it is implausible that the First Judiciary Act violated the Clause, acceptance of Marshall's reading of the statute has stood as conclusive evidence for the proposition that state prisoners' habeas corpus rights were not originally protected by the Constitution.

Based heavily on research into early court records, this Article argues that Marshall's politically convenient pronouncements in *Ex parte Bollman*, and thus the implications that have

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5. See, e.g., *Felker*, 518 U.S. at 659-61, 663-65; *McCleskey v. Zant*, 499 U.S. 467, 477-78 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 77-78 (1977); *Stone v. Powell*, 428 U.S. 465, 474-75 (1976). Under the influence of these examples, the lower courts simply continue to repeat the received wisdom. See, e.g., *Graham v. Johnson*, 168 F.3d 762, 786-87 (5th Cir. 1999); *Green v. French*, 143 F.3d 865, 876 (4th Cir. 1998); see also *Rosa v. Senkowski*, No. 97 Civ. 2468 (RWS), 1997 WL 436484, at \*5 (S.D.N.Y. Aug. 1, 1997), *aff'd on other grounds*, 148 F.3d 134 (2d Cir. 1998).

6. See, e.g., Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 900 (1998); Katy J. Harriger, *The Federalism Debate in the Transformation of Federal Habeas Corpus Law*, 27 PUBLIUS 1, 3 (1997); Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 746-47 (1997); Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1512 (1996); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1081 (1995); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 865 (1994); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1543-44 (1986); Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 64 (1956).

7. 8 U.S. (4 Cranch) 75, 99 (1807).

8. First Judiciary Act, ch. 20, §14, 1 Stat. 73, 81-82 (1789), quoted *infra* text accompanying note 21.

been drawn from them, were simply wrong:

- sensibly read, Section 14 is a grant of power to the federal courts to issue writs of habeas corpus for state prisoners;
- in any event, no statutory authorization was required, since the federal courts could utilize their common law and state law powers to issue such writs.

Indeed, if the statute had really meant what Marshall said it did, it could not have been reconciled with the Suspension Clause. Perhaps because contemporaries recognized how untenable the *Ex parte Bollman* reading of Section 14 was, in several cases—reported only in manuscript and uncovered here for the first time—federal courts simply ignored it and issued writs of habeas corpus to state prisoners.<sup>9</sup>

Although *Ex parte Bollman* proved to be a paper tiger at the prison gates<sup>10</sup> and was sidelined by subsequent statutory developments,<sup>11</sup> Marshall's misreading of Section 14 survives to cloud Suspension Clause analysis. To be sure, the Court to date has wisely assumed "that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."<sup>12</sup> But because the Court's view of the availability of the writ to state prisoners in 1789 is erroneous, it has made that assumption grudgingly, wrongly believing itself to be acting contrary to the original intent.

To the extent that legal arguments regarding the meaning of the Suspension Clause proceed from history,<sup>13</sup> they should recognize that, since the Constitution came into force, the federal courts have had the authority—both by statute and independently of it—to free state prisoners on habeas corpus.

### B. *The Argument*

1. *Background.*—Contemporary debates over habeas corpus have taken place in a historical never-never land.<sup>14</sup> We know

9. See *infra* Part V.

10. See *infra* text accompanying notes 127-37.

11. See *infra* text accompanying note 19.

12. *Felker v. Turpin*, 518 U.S. 651, 664-65 (1996), discussed *infra* text accompanying notes 233-41.

13. See *infra* Part VI.A.

14. See Eric M. Freedman, *The Suspension Clause in the Ratification Debates*,

astonishingly little about issues that all debaters agree would be of great relevance.<sup>15</sup> This Article, which proceeds from an archival investigation,<sup>16</sup> is a first attempt<sup>17</sup> to illustrate and correct a portion of that situation,<sup>18</sup> through a reconsideration of the

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44 BUFF. L. REV. 451, 451 (1996); see also Morton J. Horowitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD. 551, 553-54 (1997).

15. See LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 155-56 (1994).

16. Many of the records of the early federal courts are available on microfilms produced by the National Archives and Records Administration that bear a designation in the form "M-." For purposes of the present project, I have reviewed those microfilms as indicated: M-854, rolls 1-3 (minute books of the Circuit Court for the Southern District of New York, 1790-1841); M-886, rolls 1-2 (minute books of the District Court for the Southern District of New York, 1789-1809); M-931, rolls 1-3 (minute books of the Circuit Court for the District of Maryland, 1790-1867); M-987, roll 3 (habeas corpus files of the District Court for the Eastern District of Pennsylvania, 1791-1840); M-1172, rolls 1-2 (minute books of the District Court for the Southern District of Georgia, 1789-1857); M-1184, rolls 1-3 (minute books of the Circuit Court for the District of Georgia, 1790-1842); M-1212, rolls 1-4 (record books of the Circuit Court for West Tennessee, 1808-1837); M-1213 (minute books of the District Court for Tennessee, 1797-1801, for West Tennessee, 1801-1839, and for the Middle District of Tennessee, 1839-1865); M-1214, rolls 1-2 (minute books of the Circuit Court for West Tennessee, 1808-1839); M-1215 (minute books of the District Courts for West Tennessee, 1803-1839, and the Middle District of Tennessee, 1839-1850); M-1425 (minute books of the District Court for the District of North Carolina at Edenton, 1801-1858); M-1426, roll 1 (minute books of the District Court for the District of North Carolina at Wilmington, 1795-1860); and M-1428, rolls 1-2 (minute books of the Circuit Court for the District of North Carolina, 1791-1866).

There was no principled basis to this selection—it was simply designed to provide a database of reasonable size in light of the research time available—and hence there is no way of knowing how typical the sample may be.

17. As indicated *supra* n.\*, the findings presented in this Article emerge from a larger ongoing project that is planned to result in a book on the history of habeas corpus. That volume will, I hope, benefit from the reactions of other students to the thoughts published here.

18. In addition to its principal aim of ending the misconception that Section 14 of the Judiciary Act precluded state prisoners from obtaining federal habeas corpus relief, see *supra* text accompanying notes 8-9, this Article also intends to refute the erroneous view that pre-1867 federal habeas corpus courts would not examine the factual correctness of the justifications for detentions offered by custodians. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 487 n.120 (1963). In fact, while the ultimate review was of legal questions, see LIEBMAN & HERTZ, *supra* note 1, § 2.4d at 46, the actual proceedings depended on a meticulous weighing of the facts. See *infra* text accompanying notes 106, 128-34 (providing numerous examples). Bator's contrary authority is merely a passage of dictum from *Frank v. Magnum*, 237 U.S. 309, 329-30 (1915), that relates to the special instance of final judgments in criminal cases. See *infra* note 213. I consider Bator's views on *Frank* more fully in Eric M. Freedman, *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. (forthcoming 2000).

scope of the powers of the federal courts to issue the writ of habeas corpus to state prisoners before the Act of 1867 fundamentally altered the legal landscape by explicitly extending federal habeas corpus jurisdiction to state prisoners generally.<sup>19</sup>

2. *Overview.*—As indicated in Part I.A, my thesis is that ever since the government began to function, the federal courts have had the power, both by federal statute and independently of it, to issue writs of habeas corpus in order to free state prisoners held in violation of federal law.<sup>20</sup>

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19. Act of February 5, 1867, ch. 28, 14 Stat. 385. The background of the Act, which forms the basis of the current federal habeas corpus statute, 28 U.S.C. §§ 2241-2255 (1994 & Supp. III 1997), is described in Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 819-25 (1965). See generally William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530 (1970).

Previously, post-*Ex parte Bollman* Congresses had explicitly extended the writ to two specific classes of state prisoners. In 1833, under the impact of the nullification crisis, Congress passed the Force Bill, which, in order to protect federal revenue officers against state interference, authorized the issuance of federal habeas corpus on behalf of prisoners jailed by states "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order . . . of any judge or court thereof," Act of Mar. 2, 1833, ch. 57, § 7 (current version at 28 U.S.C. § 2241(c)(2) (1994)). For discussions of this legislation in its political context, see RICHARD E. ELLIS, *THE UNION AT RISK* 160-77 (1987); WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR* 284-97 (1966); Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 *PUBLIUS* 1, 17-18 (1996). See generally 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854* (1990).

In 1842, new legislation authorized the release on habeas corpus of certain state prisoners held in violation of a treaty or the law of nations. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (current version at 28 U.S.C. § 2241(c)(4) (1994)). This statute was a response to an international incident that erupted after a British force entered American territory to destroy the steamer *Caroline*, which was allegedly being used to support a group of Canadian rebels. When one of the raiders, Alexander McLeod, was—over the protests of the British government—subsequently indicted by the New York state courts on criminal charges arising out of the episode, he was unsuccessful in obtaining a pretrial dismissal on the grounds that his actions had been authorized by a foreign government; he was then acquitted at trial. See *People v. McLeod*, 25 Wend. 483, 603 n.\* (N.Y. Sup. Ct. 1841); Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 *BROOKLYN J. INT'L L.* 493, 517-23 (1990). The story is told accessibly in David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 *EMORY L.J.* 515 (1992); see also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 *AM. J. INT'L L.* 82 (1938).

20. This thesis is similar, but not identical, to that advanced by Professor Pas-

The most obvious objections to this proposition are contained in Section 14 of the Judiciary Act of 1789, which reads (with the insertion of clause numbers for ease in following the argument):

And be it further enacted, [1] That all the before-mentioned courts of the United States shall have the power to issue writs of *scire facias*, *habeas corpus*, [2] and all other writs not specially provided for by statute, [3] which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. [4] *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.<sup>21</sup>

This section appears to pose two fundamental obstacles to the argument presented here. First, the proviso seemingly "ex-

chal in a groundbreaking article that has received less recognition than it deserves. See Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 ("The thesis is . . . that the Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.").

In contrast to Professor Paschal, I do not believe that the Constitution orders the courts to make habeas available. I believe that the framers of the Constitution assumed as an axiom that all future superior courts of record, like all existing ones, would have habeas powers arising either from the common law or state law or both and that the purpose of the Suspension Clause was to limit legislative interference with those powers.

In other words, I "concede that the federal courts are limited to the powers conferred by Article III but argue that insofar as the Article III powers relate to habeas corpus, they are self-executing. On this approach, Congress has no more power to withhold the privilege than it has to suspend it, at least where Congress has established courts constitutionally capable of exercising the power," Dallin Oaks, *The Original Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 156. Professor Paul A. Freund argued the same position in his scholarly Brief for the Respondent at 29-30, *United States v. Hayman*, 342 U.S. 205 (1951) (No. 23).

21. First Judiciary Act, ch. 20, §14, 1 Stat 73, 81-82 (1789) (italics omitted). As the Court noted in *Felker v. Turpin*, 518 U.S. 651, 659 n.1 (1996), "Section 14 is the direct ancestor of 28 U.S.C. § 2241."<sup>9</sup> As more fully discussed *infra* note 150, a printed text of the section loses some of the nuances of the manuscript version. Accordingly, a photograph of the manuscript, in the handwriting of Oliver Ellsworth, is reproduced from the collections of the National Archives *supra* p. 534.

tends to the whole section;<sup>22</sup> that is, clause [4] limits both the first sentence of the section (relating to courts) and the second (relating to judges), with the result that the Act restricts the habeas corpus powers of the federal courts in a way precisely contrary to my thesis. Second, regardless of its scope, the fact that Section 14 is an affirmative grant of habeas corpus power to the federal courts seems to support an implication that they would lack that power without such a grant.<sup>23</sup>

This Article details why these interpretations of Section 14, although adopted by the Supreme Court in *Ex parte Bollman*, are wrong.<sup>24</sup> I argue: First, because it does not apply to the whole section, but only to the second sentence, the proviso in Section 14 is not a limitation on the federal courts, but only on their individual judges. Among the numerous considerations in support of this position, this Article highlights the practical conditions of the early federal judiciary. Because much judicial work was then done by individual judges rather than courts as such, reading the proviso to apply to the former rather than the latter is, contrary to the suggestion in *Ex parte Bollman*, perfectly sensible. The conclusion is that the federal courts have had statutory authorization since 1789 to grant the writ of habeas corpus to state prisoners.

Second, the fact that habeas corpus powers were conferred on the federal courts by statute does not support *Ex parte Bollman's* thesis that they would have lacked those powers in the absence of such a grant. Had the statute never been passed, the federal courts would still have had the power to issue the writ of habeas corpus and, specifically, to issue it to state prisoners. This Article supports that position through a consideration of the debate surrounding the Suspension Clause and an exam-

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22. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807).

23. See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95 (stating that without a statute, "the privilege itself would be lost, although no law for its suspension should be enacted"). *But cf. infra* text accompanying note 113 (noting that under English practice writ could be suspended only by passage of a statute).

24. The conclusions reached in the following two paragraphs of text have also been reached, on somewhat different grounds, by Badshah Khan Mian, *American Habeas Corpus: A Historical View* 207-08 (1980) (unpublished J.S.D. dissertation, Tulane University School of Law) (on file with University Microfilms International). See also George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 407-09 (1953).

ination of the views of the framers of the Judiciary Act and their successors on the federal courts' powers derived from the common law and the laws of the several states.

Both of the major premises of this Article find support in newly-uncovered cases from the lower federal courts during the period when Section 14 was in force.

### C. Outline

Part II recounts the history of the Suspension Clause, in Philadelphia (Part II.A) and during the ratification debates (Part II.B). It concludes that there was a broad consensus that the Clause as written would limit legislative interference with the right that both federal and state courts were assumed to possess: to release on habeas corpus both federal and state prisoners.

Part III takes up *Ex parte Bollman*. It describes the legal, political, and factual background to the case and then reviews the weaknesses of Marshall's opinion by analyzing his responses to the points made at bar. The statements for which the opinion is now cited were dictum in the case at hand and so erroneous on their merits that the result of any serious application of them would have been invalidation of the Section 14 proviso under the Suspension Clause; these passages survive to misdirect modern analysis only because their practical impact proved to be so slight.

Part IV sets forth the way that *Ex parte Bollman* should have interpreted Section 14. Part IV.B makes the statutory argument that the proviso limits the power of federal judges, but not of federal courts. It relies upon the statutory language, policy considerations, prior legislation, subsequent legislation, the real-world environment in which the legislation was passed, and the appropriateness of a construction that avoids raising doubts as to the statute's constitutionality. Part IV.C rebuts the inferences that *Ex parte Bollman* drew from the first sentence of Section 14: (a) that the Suspension Clause is nothing more than an exhortation to Congress to provide for the writ, so that (b) if Congress failed to do so, the federal courts would lack the jurisdiction to grant it. Reviewing the strong consensus of contemporary jurists concerning the powers the federal courts might exer-

cise by authority of the common law (Part IV.C.1) and state law (Part IV.C.2)—a consensus that Marshall himself had joined just a few years before—the Part argues that neither the framers of the Clause nor those of the Judiciary Act believed that the federal courts would lack habeas corpus powers in the absence of an affirmative statutory grant.

Part V discusses several previously unpublished rulings by lower federal courts during the early 1800s. In these cases, the courts—seemingly adopting legal theories consistent with the ones presented here—behaved as though Section 14 did not constrain their power to issue the writ of habeas corpus to state prisoners and sometimes actually discharged such prisoners. Although the cases uncovered so far are too few in number to support any strong conclusions, they do tend to confirm the thesis of this Article.

Part VI briefly suggests by way of conclusion that, while the Suspension Clause should protect the writ as it has evolved to date, legal and scholarly arguments would benefit by basing themselves on the most accurate available history (Part VI.A) and, specifically, should reject the *Ex parte Bollman*-derived idea that the federal writ of habeas corpus was not available to state prisoners prior to 1867 (Part VI.B).

## II. THE SUSPENSION CLAUSE<sup>25</sup>

A review of the emergence of the Suspension Clause reveals two salient features: (1) the powerful attachment of all debaters to the writ as a guardian of liberty, and (2) an ultimate consensus that the Clause as written in Philadelphia vindicated those values. It is hard to believe that this consensus among otherwise intense adversaries would have existed if they had known how *Ex parte Bollman* would later read the Clause.<sup>26</sup>

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25. This Part is a condensed, updated, and corrected version of an account originally presented in Freedman, *supra* note 14; see also Freedman, *supra* note 1, at 418-22.

26. See *infra* text accompanying notes 113-16.

### A. *The Suspension Clause in Philadelphia*

As the sources now stand, the history of the Clause at the Convention is sparse but clear.<sup>27</sup> On August 20, 1787, Charles Pinckney of South Carolina moved that: "The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding \_\_\_ months."<sup>28</sup> The motion was referred without debate to the Committee of Detail.<sup>29</sup>

When the matter returned to the Convention floor on August 28, Madison's notes record that:

Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months"

Mr. Rutledge was for declaring the Habeas Corpus inviolable - He did not conceive that a suspension could ever be necessary at the same time through all the States-

Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it".

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The first part of Mr. Govr. Morris's motion, to the word "unless" was agreed to nem: con:—on the remaining part; N. H. ay.

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27. It is certainly much better documented than that of its predecessor, a proposed amendment to the Articles of Confederation that would have created "a federal Judicial Court for trying and punishing all Officers appointed by Congress for all crimes, offences and Misbehaviour in their Offices . . . provided that the trial of the fact by Jury shall ever be held sacred, and also the benefits of the writ of *Habeas Corpus*." 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167 (John P. Kaminski & Gaspare J. Saldino eds., 1984) [hereinafter DOCUMENTARY HISTORY]. Proposed Article 19 was submitted to the Confederation Congress on August 7, 1786 by a committee appointed to consider improvements in the Articles, but was not taken up by the full body. *See id.*

28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334, 340-42 (Max Farrand ed., rev. ed. 1966) (reprinting entry from Convention Journal of Aug. 20, 1787 and Madison's notes based thereon).

29. *See id.* at 340-42.

Mas. ay. Ct. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 7; noes — 3.]<sup>30</sup>

Luther Martin of Maryland has left us further details of the debate on this last motion (in which he sided with the minority):<sup>31</sup>

As the State governments have a power of suspending the habeas corpus act, in those cases [of rebellion or invasion], it was said there could be no good reason for giving such a power to the general government, since whenever the *State* which is invaded or in which an insurrection takes place, finds its safety requires it, it will make use of that power—*And* it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an *act of rebellion*, and suspending the habeas corpus act, may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure in the *remotest* part of the union, so that a citizen of Georgia might be *bastiled* in the furthest part of New-Hampshire—or a citizen of New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection—These considerations induced me, Sir, to give my negative also to this clause.<sup>32</sup>

30. *Id.* at 438.

31. See Luther Martin, Address No. II to the Citizens of Maryland (Mar. 21, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 27, at 456 (“It was my wish that the general government should not have the power of suspending the privilege of the writ of *Habeas Corpus*, as it appears to me altogether unnecessary, and that the power given to it, may and will be used as a dangerous engine of oppression; but I could not succeed.”). For an overview of Martin’s role in Philadelphia and during the ratification debates, see William L. Reynolds II, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291, 294-305 (1987).

32. Luther Martin, Genuine Information VIII (Jan. 22, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 27, at 434; see also Luther Martin, Address to the Maryland Assembly (Nov. 29, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 27, at 291:

Nothing could add to the mischievous tendency of this system more than the power that is given to suspend the Act of *Ha: Corpus*—Those who could not approve of it urged that the power over the *Ha: Corpus* ought not to be under the influence of the General Government. It would give them a power over Citizens of particular States who should oppose their encroachments, and the inferior Jurisdictions of the respective States were fully competent to Judge on this important priviledge; but the Almighty power of decid-

The Clause then moved to the Committee of Style and Arrangement, which substituted the word "when" for "where," resulting in the text we have today.<sup>33</sup>

### B. *The Suspension Clause After Philadelphia*

While the foregoing history is generally well-known,<sup>34</sup> recent years have given scholars increased access to materials illuminating the debates that took place once the Constitution was released to the public.<sup>35</sup> In a development that we should have learned by this time to consider as less surprising than disappointing, the resulting greater volume of the historical record has not been accompanied by any greater insight into the specifics of original intention on matters of particular interest today<sup>36</sup>—as those matters did not happen to be the ones particularly in controversy among the debaters of the time. That fact, however, is itself illuminating. The shared premises of the political opponents may in this instance teach us as much as their disagreements.

ing by a call for the question, silenced all opposition to the measure as it too frequently did to many others.

33. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 596 (reprinting Madison's copy of the committee's report of September 12, 1787).

34. For a detailed consideration, see Paschal, *supra* note 20, at 608-17. See also Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 463-69 (1990-1991).

35. This is primarily due to the continuing appearance of new volumes of the scholarly and comprehensive DOCUMENTARY HISTORY, *supra* note 27, a set far superior in its breadth of coverage to THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 59-60 (Jonathan Elliot ed., 2d ed., 1866) [hereinafter ELLIOT'S DEBATES], which has hitherto been the standard source. See generally Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 148 n.151 (1996).

36. See generally Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J. L. & PUB. POL'Y 9, 35-36 (1995) (describing the tension between an originalist viewpoint and the scarce evidence of original intent); Editorial, *What History Leaves Out*, N.Y. TIMES, Oct. 20, 1997, at A18 (observing that purported John F. Kennedy documents are unlikely to be authentic because "it's all too perfect . . . [they] explain too much . . . In real life, the archive of history is a big, sloppy, indiscriminate mess. Nearly all the good stuff . . . is missing, because it was never written down in the first place").

The participants were united in their belief that the maintenance of a vigorous writ was indispensable to political freedom. Discussions of the Clause revolved about the adequacy of the Constitutional text to achieve the shared goal of liberty preservation. Specifically, the attacks on the Suspension Clause as it emerged from the Convention fell into two groups.

First, some debaters used the existence of the Clause to attack the Federalist premise that a Bill of Rights was unnecessary because the proposed federal government would have only those powers specifically delegated to it. These arguments, described in Part II.B.1.a, offer little direct illumination on the questions of interest today but do reveal a strong underlying consensus as to the importance of the writ.

Second, as Part II.B.1.b recounts, other debaters attacked the Clause as permitting too much suspension of the writ, to which supporters responded that they, too, expected the Clause to operate so as to protect unpopular individuals who might find themselves imprisoned. The supporters of the Clause won this debate, a rare instance in which all parties agreed that the text as written adequately safeguarded a cherished right and that no further protection was required in the Bill of Rights.<sup>37</sup> As Part II.B.2 argues, a holistic view of this history would be that almost all of the participants in the ratification debates expected the Clause to protect the independent judicial examination on federal habeas corpus of all imprisonments, state or federal.

1. *The Issues.*—Discussions of the Clause focused on the power of suspension rather than on the nature of the writ—and for good reason: those discussions did not occur in isolation, but rather took place within the framework of two of the most controversial issues regarding the proposed national government.

*a. The Issue of Delegated Powers*

It is familiar history that, in response to the attack that the

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37. Cf. Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 885-89 (1994) (suggesting as another example the non-inclusion in the Bill of Rights of a Presidential power to suspend the operation of statutes).

Constitution as it emerged from the Convention lacked a Bill of Rights, the Federalists argued, among other things, that the document did not need one, since every power not explicitly granted to the national government was withheld from it.<sup>38</sup>

Thus, for example, in No. 84 of *The Federalist*, Alexander Hamilton argued that there was no need for a Bill of Rights, since under the proposed Constitution "the people surrender nothing; and as they retain everything they have no need of particular reservations."<sup>39</sup> He continued by urging that the in-

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38. See, e.g., George Nicholas, Address to the Virginia Ratifying Convention (June 10, 1788), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 27, at 1135 ("But it is objected to for want of a Bill of Rights. It is a principle universally agreed upon, that all powers not given, are retained."); Edmund Randolph, Address to the Virginia Ratifying Convention (June 10, 1788), reprinted in 13 DOCUMENTARY HISTORY, *supra*, at 1099. See also LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 281-82 (1995).

As the prompt adoption of the Tenth Amendment suggests, this argument was far from impregnable, since—apart from the considerations discussed *infra* text accompanying notes 41-43—it suffered from the serious objection that the document nowhere explicitly stated that which Hamilton, James Wilson and other Federalists said that it meant. See Letter from Cincinnatus I to James Wilson (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra*, at 529, 531; Letter from an Old Whig II to the *Independent Gazetteer* (Oct. 17, 1787), reprinted in *id.* at 399, 400; see also Saul Cornell, *Mere Parchment Barriers? Antifederalists, the Bill of Rights, and the Question of Rights Consciousness*, in *THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED* 175, 197-203 (Ronald Hoffman & Peter J. Albert eds., 1997) (discussing Anti-federalist viewpoints on this issue).

In a letter to James Madison that survives in two versions, Thomas Jefferson made the point with some vigor. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 8 DOCUMENTARY HISTORY, *supra*, at 250; Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), reprinted in 14 *id.* at 488-89 (enclosing different version of letter); see also Samuel Spencer, Address to the North Carolina Ratifying Convention (July 29, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 35, at 152:

The gentlemen said, all matters not given up by the form of government were retained by the respective states. I know that it ought to be so; it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution, and not left to mere construction and opinion. . . . The Confederation says, expressly, that all that was not given up [to] the United States was retained by the respective states. If such a clause had been inserted in this Constitution, it would have superseded the necessity of a bill of rights. But that not being the case, it was necessary that a bill of rights, or something of that kind, should be a part of the Constitution.

39. THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also James Iredell, Address to the North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 35, at 148 ("[The Constitution] may be considered as a great power of attorney, under which no power

### clusion of a Bill of Rights in the Constitution

would even be dangerous. . . . For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government.<sup>40</sup>

The structure and substance of the Suspension Clause enabled opponents of the proposed Constitution to respond that the government was in fact not one of delegated powers. This issue, rather than that of the scope of the writ, was at the heart of much of the debate that took place over the Clause.

Thus, for example, John Smilie drew the attention of the Pennsylvania ratifying convention to the clauses "expressly declaring that the writ of *habeas corpus* and the trial by jury in criminal cases shall not be suspended or infringed" and asked: "How does this indeed agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that everything else, which is not specified, is included in the powers delegated to the government?"<sup>41</sup>

Similarly, a prominent Anti-federalist pamphleteer in New York wrote:

We find they have . . . declared, that the writ of *habeas corpus* shall not be suspended, unless in cases of rebellion. . . . If every

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can be exercised but what is expressly given.").

40. THE FEDERALIST No. 84, *supra* note 39, at 513-14 (Alexander Hamilton). For a fuller description of the Federalists' position on this issue, see Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 309-13.

41. John Smilie, Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 27, at 392.

thing which is not given is reserved, what propriety is there in [the exception]? Does this constitution any where grant the power of suspending the habeas corpus. . .? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted.<sup>42</sup>

In short, as Patrick Henry observed, the statement that the writ of habeas corpus should not be suspended except in certain cases meant that it could be suspended in the ones not covered; the fact that the affirmative grant of power to do so was not contained in the Constitution, but needed to be implied, "is destructive of the doctrine advanced by the friends of that paper."<sup>43</sup>

The Federalist response was to deny any inconsistency, claiming (with considerable plausibility in light of the Convention proceedings described above)<sup>44</sup> that, despite its negative phraseology, the Clause was in fact a grant of power to the federal government. Thus, the Federalist pamphleteer *A Native of Virginia* explained "that as the Congress can claim the exercise of no right which is not expressly given them by this Constitution; they will have no power to restrain the press in any of the States; and therefore it would have been improper to have taken any notice of it."<sup>45</sup> Habeas corpus, on the other hand, presented a different case, one which "corroborates this doctrine."<sup>46</sup> With respect to that issue,

the Convention were sensible that a federal government would no more have the right of suspending that useful law, without the consent of the States, than that of restraining the liberty of the

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42. Letter from Brutus II to the *New York Journal* (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 27, at 528. For additional examples of this argument, see George Clinton, Address to the New York Ratifying Convention (June 27, 1788), reprinted in 6 THE COMPLETE ANTI-FEDERALIST 179 (Herbert J. Storing ed., 1981); William Grayson, Address to the Virginia Ratifying Convention (June 16, 1788), reprinted in 10 DOCUMENTARY HISTORY, *supra*, at 1332; see also Letter from a Federal Farmer XVI to the *Republican* (Jan. 20, 1788), reprinted in 17 DOCUMENTARY HISTORY, *supra*, at 342, 345-48.

43. Patrick Henry, Address to the Virginia Ratifying Convention (June 17, 1788), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 27, at 1345-46.

44. See *supra* Part II.A.

45. A Native of Virginia, *Observations Upon the Proposed Plan of Federal Government*, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 27, at 655, 691.

46. *Id.*

press: But at the same time they knew that circumstances might arise to render necessary the suspension of the habeas corpus act, and therefore they require of the States, that they will vest them with that power, whenever those circumstances shall exist.<sup>47</sup>

In other words, since the Suspension Clause was a grant of power to the federal government (albeit an appropriately circumscribed one), it did not represent a violation of the underlying principle that any power not explicitly granted to the federal government was withheld from it.<sup>48</sup>

For our purposes, the key point is that the Anti-federalists' attack was not on the scope of the writ being protected by the Suspension Clause. They approved of that (as did the Federalists, of course). The Anti-federalist argument, rather, was that the same protections should have been given explicitly to other rights<sup>49</sup>—hence the need for a bill of rights.<sup>50</sup>

Thus, behind the disagreements over the delegated powers issue as it relates to the Clause lie much more significant agreements: that a vigorous writ was a key safeguard of liberty and that the writ protected by the proposed text was one broad enough to serve that purpose.

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47. *Id.*

48. In a variation on this argument, Edmund Randolph asserted "that by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*" and that the Clause was "an exception to that power." Edmund Randolph, Address to the Virginia Ratifying Convention (June 17, 1788), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 27, at 1348; cf. Thomas McKean, Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787), reprinted in *id.* at 417 (suggesting that the Clause limits congressional war powers). For another Federalist response, see the two versions of Jasper Yeates, Address to the Pennsylvania Ratifying Convention (Nov. 30, 1787), reprinted in 2 *id.* at 435, 437.

49. See Letter from Brutus IX to the *New York Journal* (Jan. 17, 1788), reprinted in 15 *id.* at 393, 394-98; Robert Whitehall, Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787), reprinted in 2 *id.* at 398-99. The cited pages contain two versions of this speech, which are consistent on our point, one recorded by Alexander J. Dallas and printed in the *Pennsylvania Herald* of December 15, 1787 and the other captured in James Wilson's notes. Whitehall reiterated his position in a speech on November 30, 1787. See Robert Whitehall, Address to the Pennsylvania Ratifying Convention (Nov. 30, 1787), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 24, at 427.

50. See, e.g., Letter from Centinel II to the *Freeman's Journal* (Oct. 24, 1787), reprinted in 13 *id.* at 466; Letter from a Federal Farmer II to the *Republican* (Oct. 12, 1787), reprinted in 14 *id.* at 45-46; Smilie, *supra* note 41; see also Spencer, *supra* note 38.

*b. The Issue of the Danger of Tyranny*

The second major point of the opponents of the Suspension Clause was that its grant of power to the federal government was a dangerous one. This argument, of course, took place within the framework—long recognized by historians<sup>51</sup>—of a universal agreement among all political debaters that, because human nature was inherently power-seeking, any grant of authority to government officeholders must be scrutinized with extreme care since they would inevitably attempt to abuse that authority.<sup>52</sup>

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51. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 21-22 (1969); JAMES S. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 55 (1966) ("Power made men unscrupulous. . . . The possession of power was seen to unleash men's aggressive instincts, and power-seeking was associated with antisocial behavior."); *THE ANTIFEDERALISTS* at xxix (Cecilia M. Kenyon ed., 1966) ("Self-interest, and . . . a lust for power, were anticipated."); Jack P. Greene, *Ideas and the American Revolution*, 17 AM. Q. 592, 594 (1965) (book review of *PAMPHLETS OF THE AMERICAN REVOLUTION* (Bernard Bailyn ed., 1965)) ("[A] dominant and comprehensive theory of politics had emerged in the colonies by the middle of the eighteenth century. At the heart of this theory were the convictions that man in general could not withstand the temptations of power, that power was by its very nature a corrupting and aggressive force, and that liberty was its natural victim."); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 334-35 (1982) (reviewing historical literature from 1960s through 1980s).

52. See, e.g., 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 83 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter *FIRST FEDERAL CONGRESS*] (Maclay journal entry for June 18, 1789) ("It is the fault of the best Governors when they are placed over a people to endeavour to enlarge their powers."); Broadside from *A True Friend* (Richmond Dec. 5, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 27, at 373-74 ("[I]t is unhappily in the nature of men, when collected for any purpose whatsoever into a body, to take a selfish and interested bias, tending invariably towards the encreasing of their prerogatives and the prolonging of the term of their function."); William Grayson, Address to the Virginia Ratifying Convention (June 21, 1788), reprinted in 10 *id.* at 1444 ("[P]ower . . . ought to be granted on a supposition that men will be bad."); Patrick Henry, Address to the Virginia Ratifying Convention (June 16, 1788), reprinted in *id.* at 1321 ("Look at the predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their powers."); William Lenoir, Address to the North Carolina Ratifying Convention (July 30, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 35, at 203-04 ("[I]t is the nature of mankind to be tyrannical. . . . We ought to consider the depravity of human nature [and] the predominant thirst of power which is in the breast of every one."); Samuel Spencer, Address to the North Carolina Ratifying Convention (July 25, 1788), reprinted in *id.* at 68 ("It is well known that men in power are apt to abuse it, and extend it if possible."); *THE FEDERALIST* No. 51, at 322 (J. Madison) (C. Rossiter ed., 1961) ("[W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government

As the account given above indicates, a proposal for an outright ban on suspensions of the writ was defeated in Philadelphia, on the explicit premise that there were certain circumstances under which the exercise of this power would be appropriate.<sup>53</sup> This decision of the Convention, which Luther Martin promptly made public,<sup>54</sup> drew a good deal of fire during the ratification debates.

The gist of the attack was that "[t]he Congress will suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? the usurper."<sup>55</sup> Accordingly, various commentators suggested that the proposed Constitution should be re-written to forestall these outcomes.<sup>56</sup>

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would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); Letter from John Adams to Thomas Jefferson (Nov. 13, 1815), reprinted in 2 THE ADAMS-JEFFERSON LETTERS 456 (Lester J. Cappon ed., 1959); Letter from Nathaniel Barrell to George Thatcher (June 15, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra*, at 372-73.

The roots of this attitude have been traced deep into American history. See T[imothy] H. Breen, *Looking Out for Number One: Conflicting Cultural Values in Early Seventeenth-Century Virginia*, 78 S. ATLAN. Q. 342, 349 (1979) (Virginia settlers of early 1600's "assumed that persons in authority would use their office for personal gain").

53. See *supra* text accompanying note 30.

54. See *supra* notes 31-32 and accompanying text.

55. Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 27, at 424; see Letter from Montezuma to the *Independent Gazetteer* (Oct. 17, 1788), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 53, 56 ("We do not much like that sturdy privilege of the people—the right to demand the writ of *habeas corpus*—we have therefore reserved the power of refusing it in cases of rebellion, and you know we are the judges of what is rebellion."); see also Letter from John DeWitt II to the *American Herald* (Oct. 29, 1787), reprinted in 4 *id.* at 20, 23 (arguing that supporters of the Constitution must defend the position that "should an insurrection or an invasion, however small, take place, in Georgia . . . it is highly expedient [that federal officeholders] should have the power of suspending the writ of Habeas Corpus in Massachusetts, and as long as they shall judge the public safety requires it").

56. See, e.g., Letter of a Georgian to the *Gazette of the State of Georgia* (Nov. 15, 1787), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 27, at 240 (suggesting that the Clause read: "The privilege of the Writ of Habeas Corpus shall remain, without any exceptions whatever, inviolate forever."); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 8 *id.* at 250 ("I do not like . . . the omission of a bill of rights providing clearly & without the aid of sophisms . . .

The Federalists' response was that they shared the goals of their opponents—which were fully implemented by the Constitutional text. Thus, in a speech to the Maryland Legislature reporting on his doings as a Convention delegate (and responding to the views of Luther Martin), James McHenry said: "Public safety may require a suspension of the Habeas Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power, 'till corruption shall have obliterated every sense of Honor & Virtue from a Brave and free People."<sup>57</sup>

As subsequent developments show, it seems fairly clear that the Federalists won this debate.

2. *The Ratification Process.*—As they ratified the proposed Constitution, a number of states passed sets of amendments that they wished to see incorporated; James Madison collated these, and those that had achieved a reasonable degree of consensus among the states eventually became the Bill of Rights.<sup>58</sup>

for . . . the eternal & unremitting force of the habeas corpus laws"); Dissent of the Minority of the Pennsylvania Convention (Dec. 12, 1787), *reprinted in* 2 *id.* at 630 (calling for a Bill of Rights securing "personal liberty by the clear and unequivocal establishment of the writ of *habeas corpus*"). See also Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *reprinted in* 8 *id.* at 354 (expressing a hope that the Constitution would be amended "by a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus"); Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), *reprinted in* 14 *id.* at 500 (containing same idea).

The exchange between Jefferson and Madison is more fully considered in Finkelman, *supra* note 40, at 329-34, which observes that Madison was skeptical about the ability of any constitutional guarantee against suspension of the writ, however phrased, to stand up against the force of a passionate burst of public opinion.

57. James McHenry, Address to the Maryland House of Delegates (Nov. 29, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 27, at 283.

58. See RICHARD B. BERNSTEIN, ARE WE TO BE A NATION? 264 (1987). There is a detailed narrative in ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997), and a briefer account in PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 69-82 (1999). See also Wythe Holt, *We Some of the People: Akhil Reed Amar and the Original Intent of the Bill of Rights*, 33 U. RICH. L. REV. 377, 387-90 (1999). For a consideration of the process from a political science viewpoint, see WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 242-49 (1996), a work brought to publication after the author's death by Randall L. Calvert, John Mueller and Rick K. Wilson, acting as editors. See also Finkelman *supra* note 40, at 308-13; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54

There were explicit safeguards for numerous rights—from freedom of press and religion, to protections for the civil jury trial and a ban on cruel and unusual punishments—that the Anti-federalists had warned would be in jeopardy under the Constitution as originally proposed, and the entire project thus represented a repudiation of the Federalist position that those and other rights had already been sufficiently protected. But there was not a word about the right to habeas corpus, reflecting the fact that (with one minor exception) the states had not proposed any further protection for that right.<sup>59</sup>

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U. CHI. L. REV. 1127, 1161-67 (1987); John P. Kaminski, *Congress Proposes the Bill of Rights*, in WELL BEGUN: CHRONICLES OF THE EARLY NATIONAL PERIOD 97 (Stephen L. Schechter & Richard-B. Bernstein eds., 1989). The recent publication of the scholarly and comprehensive document collection THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 1997) makes it likely that further productive investigations lie ahead.

59. The exception was New York, which proposed an amendment, "[t]hat the privilege of the *habeas corpus* shall not, by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the passing the act for such suspension." Resolution of the New York Ratifying Convention (July 26, 1788), reprinted in 1 ELLIOT'S DEBATES, *supra* note 35, at 330; see LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION 257-64 (1966) (describing the two sets of resolutions adopted by New York in connection with ratification); see also Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 164 (1996).

Even had this limited proposal had the support of more states than it did, it likely would have had some difficulty in Congress; a similar suggestion in Massachusetts, see [John] Taylor, Address to the Massachusetts Ratifying Convention (Jan. 25, 1788), reprinted in 2 ELLIOT'S DEBATES, *supra*, at 108; see also [Samuel] Nason, Address to the Massachusetts Ratifying Convention (Feb. 1, 1788), reprinted in 2 *id.* at 137, had been laid aside when it was pointed out that the suspension power in that state's constitution was limited to twelve months, but "as our legislature can, so might the Congress, continue the suspension of the writ from time to time, or from year to year." [Francis] Dana, Address to the Massachusetts Ratifying Convention (Jan. 25, 1788), reprinted in *id.* at 108. As noted *supra* in the text accompanying notes 28-30, a proposal for a defined time limit on suspensions had also been rejected in Philadelphia.

In addition to drafting and transmitting proposed amendments to Congress, a number of states also adopted formal statements of political principles in connection with their ratifications of the Constitution. Two of these contained provisions concerning habeas corpus.

New York declared:

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*.

A fair conclusion is that the ratification debates had convinced all parties that the Clause as proposed would satisfy the aims that they shared: to protect the liberties of those who might fall afoul of the organs of power.<sup>60</sup>

Plainly, the Federalists were not worried about preserving state sovereignty—neither in the sense of the dignity of the states as against the federal government, nor in the sense of preserving the rights of state-wide majorities to act as they pleased towards their own citizens. With regard to the first, it was the over-abundance of reserved power in the states that led to the need to write the Constitution in the first place.<sup>61</sup> With regard to the second, it is clear that checking the excesses of local majorities (like Rhode Island's) that might act oppressively towards local minorities (like creditors) was a major Federalist goal.<sup>62</sup>

Resolution of the New York Ratifying Convention (July 26, 1788), *reprinted in* 1 *id.* at 328.

Virginia resolved:

That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied nor delayed.

Declaration of Rights of the Virginia Ratifying Convention (June 27, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 27, at 1552.

60. Another possibility is that those with concerns about habeas rights thought that their desires would be met by the Ninth and Tenth Amendments. However, in view of their specificity in demanding safeguards for other rights, it seems unlikely that they would have left a matter of such importance to generalized provisions.

61. See Richard B. Bernstein, *The Federalist on Energetic Government*, 1787-1788, in *ROOTS OF THE REPUBLIC* 335, 340-41 (Steven L. Schechter ed., 1990); see also *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 729 (1838) ("[O]wing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject matters, on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary."); MERRILL, JENSEN, *THE ARTICLES OF CONFEDERATION* 244-45 (1940).

I have set forth my views on this history in considerably more detail in Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 784 (1993).

62. James Madison made this argument for the new Constitution explicitly at several points in *THE FEDERALIST* No. 10, *supra* note 39, at 84; No. 43, at 275-77. See also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 12 *THE PAPERS OF THOMAS JEFFERSON* 276 (Julian F. Boyd ed., 1950) (noting that flagrant injustices of state legislatures to private individuals were critical to preparing national mind for reform of Confederation); Henry Lee, Address to Virginia Ratifying Convention (June 9, 1788), *reprinted in* 9 DOCUMENTARY HISTORY, *supra*

As for the Anti-federalists, their contributions to the debate over the Clause clearly shows that they, unlike some modern Supreme Court Justices,<sup>63</sup> were not worried about whether the states would sufficiently retain their sovereign rights to imprison or execute people, but were, rather, worried about whether the states would retain their sovereign rights to release them. In particular, they were concerned that federal power might be exerted so as to keep unpopular prisoners—rightly or wrongly branded by the authorities as criminals—from vindicating their rights to freedom. From the Anti-federalist point of view, a power in the general government to release state prisoners, as opposed to a power in the general government to forestall their release, would be an example of federalism as a preserver of

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note 27, at 1074 ("If Pandora's box were on one side of me, and a tender law on the other, I would rather submit to the box than to the tender law."); Edmund Randolph, Address to Virginia Ratifying Convention (June 6, 1788), reprinted in *id.* at 972-73 (denouncing unjust and oppressive legislative acts since the Revolution); Jasper Yeates, Address to Pennsylvania Ratifying Convention (Nov. 30, 1787), reprinted in 2 *id.* at 438-39 (arguing that by such enactments, "the government of laws has been almost superseded. . . . [But the Constitution will be] the glorious instrument of our political salvation"). See generally Letter XII of The Landholder to the *Connecticut Courant* (Mar. 17, 1788), reprinted in 16 *id.* at 405 (condemning Rhode Island tender acts).

63. See *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (denying federal habeas corpus review because a capital prisoner had filed a state habeas corpus appeal three days late, in an opinion beginning, "This is a case about federalism."). But see Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 KAN. L. REV. 993, 1011-12 (1997) (showing that by the time of Declaration, patriots had already rejected a federalism based on protecting states from central control as a strategy for safeguarding liberty); Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 KAN. L. REV. 1015, 1043 (1997) ("[W]hen today's state sovereignty plurality applies its state sovereignty theory of constitutional federalism, it is not enforcing the Founders' First Principles."); Freedman, *supra* note 14, at 466-67 n.59 (criticizing *Coleman* for adopting a conception of federalism that "is simply the opposite of the founders"); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425-26 (1987) (criticizing the Court's use of "federalism" in many contexts "to thwart full remedies for violations of constitutional rights," and seeking to reclaim the concept as one "designed to protect, not defeat . . . individual rights").

For a full history of *Coleman* that canvasses numerous failings during the legal process and raises haunting doubts as to whether an innocent man may have been executed, see JOHN C. TUCKER, *MAY GOD HAVE MERCY* (1997). For insightful reviews of the book, see Larry Hammond, *Profound Questions*, 82 JUDICATURE 136 (1998); Stuart Taylor, Jr., *Was an Innocent Man Executed?*, AM. LAW., Dec. 1997, at 40.

liberty—an instance of the virtue of a federal, as opposed to a national, government.<sup>64</sup>

Hence, the fact that both sides ultimately agreed that the Clause as drafted met the goals that they proclaimed in common—as evidenced by the lack of any effort to amend it during the ratification process—suggests that all parties read it as protecting broadly against Congressional interference with the power that federal and state courts were each assumed to possess:<sup>65</sup> to order the release on habeas corpus of both federal and state prisoners.<sup>66</sup>

### III. *EX PARTE BOLLMAN*

#### A. *Background*

*Ex parte Bollman* was decided against the backdrop of the

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64. See Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 647-51 (1995) (noting that shared belief of Federalists and Anti-federalists in liberty-preserving virtues of federalism, conceived of as concurrent state and federal power over as many subjects as possible, was central to many key political compromises in founding generation). See generally THE FEDERALIST No. 51, *supra* note 39, at 323 (James Madison):

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allocated to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

65. See *infra* notes 85, 113-16, 160, 203 and accompanying text; Part IV.C.

66. With respect to the powers of the state courts, the assumption was certainly sound. For example, prior to the highly controversial decisions in *Tarble's Case*, 80 U.S. (13 Wall.) 197 (1871), and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), state writs of habeas corpus were used in Massachusetts "on numerous occasions to test the validity of military enlistments, and in the majority of the cases the enlistees were released." William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflicts of Laws*, in LAW IN COLONIAL MASSACHUSETTS 419, 457 (Daniel R. Coquillette ed., 1984). See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 125-56 (1980); Amar, *supra* note 63, at 1509. Cf. Daniel A. Farber, *The Trouble With Tarble's: An Excerpt for an Alternative Casebook*, 16 CONST. COMMENTARY 517 (1999) (fantasizing modern consequences had decision been the opposite).

As Nelson, *supra*, at 457, insightfully notes, it is anachronistic to see "the issue as one of federal-state power." For contemporaries, the question was one of the rights of the individual against the government—in this example, the right of the citizen to invoke the protection of civil authority against military authority.

upheaval in American politics that followed the Presidential election of 1800. The key effects for our purposes of the historic victory of Thomas Jefferson and his Republicans in that election were:

- The elevation of Secretary of State John Marshall to the Chief Justiceship and to the titular leadership of the judicial branch, now the Federalists' last bastion,<sup>67</sup> and

- Connectedly, the ruling in *Marbury v. Madison*,<sup>68</sup> in which Marshall read Section 13 of the Judiciary Act as conferring authority on the Supreme Court to exercise original mandamus powers and then held the section unconstitutional because it expanded the original jurisdiction of the Supreme Court beyond the limits laid down in Article III.<sup>69</sup>

When the Jefferson Administration completed its first term in office, Vice President Aaron Burr (who had been indicted in New York and New Jersey for murder as a result of having killed Alexander Hamilton in a duel) found it prudent to travel west.<sup>70</sup> There, he allegedly conspired with others to separate some of this country's newly acquired western territories from their allegiance to the United States.<sup>71</sup> Among his alleged co-conspirators were Samuel Swartwout and Dr. Erick Bollman. In December, 1806, they were seized by General James Wilkinson, the American Army commander in New Orleans (who was himself heavily and discredibly involved in the alleged events).<sup>72</sup> "Both men were denied counsel and access to the courts and

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67. See William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 932-33 (1978).

68. 5 U.S. (1 Cranch) 137 (1803).

69. See GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 199-201 (1981); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 453-63 (1989); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 653-54 (1982).

70. See Eric M. Freedman, *The Law As King and the King as Law: Is a President Immune From Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 22 & n.47 (1992).

71. For a full account, see THOMAS PERKINS ABERNATHY, *THE BURR CONSPIRACY* (1954). See also JOSEPH J. COOMBS, *THE TRIAL OF AARON BURR*, at v-iii (1864); HASKINS & JOHNSON, *supra* note 69, at 248-55. A brief summary incorporating modern scholarship can be found at ARNOLD A. ROGO, *A FATAL FRIENDSHIP: ALEXANDER HAMILTON AND AARON BURR* 277-82 (1998).

72. See 2 HENRY ADAMS, *HISTORY OF THE UNITED STATES DURING THE ADMINISTRATION OF THOMAS JEFFERSON* 242-43 (1889).

sent by warship<sup>73</sup> to Baltimore via Charleston—in defiance of writs of habeas corpus granted by territorial judges in New Orleans<sup>74</sup> and a District Judge in Charleston.<sup>75</sup>

They arrived in Washington on Friday, January 23, 1807; “[t]hat afternoon, to ensure that the prisoners would not be freed with another writ of *habeas corpus*, Senator William Branch Giles introduced legislation to suspend the writ for three months . . . legalize Wilkinson’s arrest of Bollman and Swartwout and to keep the pair in confinement.”<sup>76</sup> Meeting in closed session, the Senate passed the measure with only a single dissenting vote, but by Monday, January 23, the atmosphere had cooled, and the House by a vote of 113-19 bluntly rejected the proposal as unworthy of consideration.<sup>77</sup>

On the following day, the United States attorney moved the Circuit Court for the District of Columbia for an arrest warrant in order to have the pair committed to stand trial on a charge of treason.<sup>78</sup> A divided bench granted the motion.<sup>79</sup>

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73. *Id.* at 255.

74. See 1 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 982-83 (Mary-Jo Kline & Joanne W. Ryan eds., 1983). Several detailed accounts appear in the February 18, 1807 edition of *The New York Evening Post*, which also reports Henry Clay’s much-publicized comment in the Senate on February 11, “that the late seizure of men at New Orleans, by military force, and the transportation of them to the Atlantic coast, was one of the most arbitrary and outrageous acts ever committed.” *Extracts from Letters to the Editor of the U. States Gazette*, N.Y. EVENING POST, Feb. 18, 1807, at 1.

75. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 302 (1924).

76. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 355 (1996). “Senator Giles of Virginia [was] well known as Jefferson’s unofficial representative in the Senate.” HASKINS & JOHNSON, *supra* note 69, at 256.

Meanwhile, Bollman was meeting with Jefferson to describe his version of the events. See MILTON LOMASK, AARON BURR: THE CONSPIRACY AND YEARS OF EXILE, 1805-1836, at 202 (1982).

77. See SMITH, *supra* note 76, at 355; Paschal, *supra* note 20, at 623-24; AM. MERCURY, Feb. 12, 1807, at 1 (reporting House debate). The entire sequence of events calls to mind the fears expressed by Luther Martin, see *supra* text accompanying note 32.

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

79. See *Bollman*, 24 F. Cas. at 1189. The Chief Judge, William Cranch, a Fed-

The prisoners then applied to the United States Supreme Court for a writ of habeas corpus.<sup>80</sup> As Justices Johnson and Chase expressed doubts as to the Court's jurisdiction, Chief Justice Marshall set that preliminary question down for full argument.<sup>81</sup> "Interest in the argument that followed was at fever pitch, almost the whole of Congress being in attendance."<sup>82</sup>

### B. Arguments of Counsel

The leading role in argument was taken by the prominent Federalist politician Robert Goodloe Harper. He divided his presentation into the questions (1) whether "this court has the power generally of issuing the writ" and, if so, (2) whether the fact of the circuit court's having committed the prisoners barred the issuance of the writ.<sup>83</sup> He then proceeded as follows:<sup>84</sup>

(1)(A). First, Harper argued:

The general power of issuing this great remedial writ [of habeas corpus], is incident to this court as a supreme court of record. It is a power given to such a court by the common law. . . . [A court that] possessed no powers but those given by statute . . . could

eralist, opined that there was insufficient probable cause, but was outvoted by his two Republican colleagues. See 6 THE PAPERS OF JOHN MARSHALL 486 n.11 (Charles F. Hobson et al. eds., 1990). Extended accounts of the proceedings appear in the *National Intelligencer* of Feb. 2, 1807 and Feb. 4, 1807. See also WARREN, *supra* note 75, at 304 (reprinting letter from Cranch to his father describing surrounding atmosphere).

80. See WARREN, *supra* note 75, at 305-06.

81. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 76 n.(a) (1807). These doubts seem not to have been shared by the Attorney General of the United States, who "declined arguing the point on behalf of the United States." *Ex parte Bollman*, 8 U.S. (4 Cranch) at 79. In fact, he told the Court that if it should determine "to issue a writ of Habeas Corpus he should cheerfully submit to it." *Extract of a letter to the department of War*, N.Y. EVENING POST, Feb. 14, 1807, at 1.

82. Paschal, *supra* note 20, at 625.

83. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 79. The prior caselaw suggesting that the second point might present an issue is described *infra* notes 91-92.

84. For convenience, I have used the same numbers to label counsel's arguments in this section of the text, as I have used to designate Marshall's responses and my own analysis in the two succeeding sections. For the same reason, I have relied on the version of the argument reprinted in the United States Reports. Another version, which is very similar but perhaps preserves Goodloe's oratory slightly better, was published in two parts in the *National Intelligencer* on Feb. 18, 1807 and Feb. 20, 1807.

not protect itself from insult and outrage. . . . It could not imprison for contempts in its presence. It could not compel the attendance of a witness. . . . These powers are not given by the constitution, nor by statute, but flow from the common law. . . . [T]he power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.<sup>85</sup>

(1)(B). Turning to Section 14, Harper argued that the first sentence contained "two distinct provisions," *viz.*, clause [1] and the remainder of the sentence.<sup>86</sup> The authority to issue writs of *habeas corpus*, he argued, "is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers

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85. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 79-80; *see also infra* note 203 (quoting elided passage). Counsel supported this argument with a survey designed to show "that all the superior courts of record in England," whether or not they had any criminal jurisdiction or statutorily-granted *habeas* jurisdiction, "are invested by the common law with this beneficial power, as incident to their existence." *Ex parte Bollman*, 8 U.S. (4 Cranch) at 80-82; *see infra* note 160 and accompanying text.

As an example providing "a conclusive authority in favour of the doctrine for which we contend," *Ex parte Bollman*, 8 U.S. (4 Cranch) at 81, Harper cited a case that would have been very familiar to his audience as a monument to English liberty, *Bushel's Case*, 124 Eng. Rep. 1006 (C.P. 1670). In that case, the court of common pleas released on *habeas corpus* a juror who had been imprisoned because, contrary to evidence that the trial judge considered convincing, he had voted to acquit William Penn on a charge of unlawful preaching. *See* David C. Brody, *Sparf and Dougherty Revisited: Why The Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 93-94 (1995) (describing case); Eugene Cerruti, *New Initiative from the Second Circuit in the Nullification Wars*, N.Y.L.J., Sept. 10, 1997, at 1, 11 (criticizing *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997) for having forgotten lesson of case); *see also* Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, 1277-80 (1999) (criticizing *Thomas* on same grounds). *See generally* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111 (1998).

Harper then asked whether the American people had not "as good a right as those of England to the aid of a high and responsible court for the protection of their persons?" *Ex parte Bollman*, 8 U.S. (4 Cranch) at 80-81.

86. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 83; *see supra* text accompanying note 21 (numbering clauses of Section 14).

which such courts usually possess.<sup>87</sup>

(1)(C). Harper next addressed the problem posed by *Marbury*, namely, that the final sentence of Section 13 of the Judiciary Act,<sup>88</sup> which bore an uncomfortable resemblance to the first sentence of Section 14, had been held unconstitutional as an attempt to confer upon the Court original jurisdiction beyond the confines of Article III.<sup>89</sup> He asserted that “[t]he object of the habeas corpus now applied for, is to revise and correct the proceedings of the Court below. . . .”<sup>90</sup> Hence, the proceedings were appellate. Moreover, the Court had in fact granted relief on similar facts in *United States v. Hamilton*<sup>91</sup> and *Ex parte Burford*.<sup>92</sup>

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87. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 83.

88. “The Supreme Court shall . . . have power to issue . . . writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.” First Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80 (1789).

89. See *supra* text accompanying notes 68-69.

90. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 86.

91. 3 U.S. (3 Dall.) 17 (1795). This case, which arose out of the Whiskey Rebellion, is described at some length in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 514-21 (Maeva Marcus et al. eds., 1998), and I appreciate the courtesy of the editors in sharing their documentation with me in galley form. In substance, Hamilton, who “had been committed upon the warrant of the District Judge of Pennsylvania, charging him with High Treason,” brought a habeas corpus petition to the Supreme Court challenging the sufficiency of the evidence against him. See *Hamilton*, 3 U.S. (3 Dall.) at 17. Rejecting the government’s defense that the decision of the District Judge could be revised only on the “occurrence of new matter” or a “charge of misconduct,” the Court ordered that Hamilton be admitted to bail. *Id.* at 17-18.

Dissenting in *Ex parte Bollman*, Justice William Johnson agreed that the “case of Hamilton was strikingly similar to the present,” but argued “that the authority of it was annihilated by the very able decision in *Marbury v. Madison*,” since the *Hamilton* Court had been exercising original jurisdiction. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 103-04 (Johnson, J., dissenting).

92. 7 U.S. (3 Cranch) 448 (1806). In that case, Burford, confined in the District of Columbia under a commitment charging that he was “an evil doer and disturber of the peace,” petitioned the Supreme Court for a writ of habeas corpus. *Ex parte Burford*, 7 U.S. (3 Cranch) at 450-51. Since the Court was “unanimously of opinion, that the warrant of commitment was illegal, for want of stating *some good cause certain, supported by oath*,” it ordered the prisoner discharged. *Id.* at 450-51, 453. A number of the original documents, including the warrant of commitment and the petition to the Supreme Court, are preserved at the Washington facility of the National Archives, Record Group 267, Entry 26.

Justice Johnson’s dissent in *Ex parte Bollman* reported that he had objected to the Court’s disposition of *Ex parte Burford* but had “submitted in silent deference to the decision of my brethren.” *Ex parte Bollman*, 8 U.S. (4 Cranch) at 107 (Johnson,

(2)(A). As to the second question, whether the prior commitment by the circuit court barred issuance of the writ, Harper appealed strongly to this latter precedent and urged that the whole purpose of habeas corpus was to re-examine the legality of commitments, even where they had been ordered by courts of competent jurisdiction.<sup>88</sup>

### C. Marshall's Response

(1)(A). Marshall's opinion begins by disclaiming "all jurisdiction not given by the constitution, or by the laws of the United States," explaining:

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied . . . The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of *Erick Bollman* and Samuel Swartwout, has been given to this court.<sup>89</sup>

J., dissenting). He also reported that his *Ex parte Bollman* dissent had the support of an absent justice. *Id.* Scholars have long been hopelessly divided as to whether this was Chase or Cushing. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 81 n.131 (1985).

93. See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 91-92.

94. *Id.* at 93-94. The passage contains two further responses to Harper's arguments on the role of the common law. First, Marshall asserted, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Id.* Second, responding to Harper's discussion of the contempt of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals." *Id.* at 94.

It would seem to follow that the case of *Comfort Sands*, described *infra* at text accompanying notes 222-25, would have come out the same way even after *Ex parte Bollman*.

(1)(B). Marshall accepted Harper's assertion that clause [1] of Section 14 is independent of the remainder of the first sentence, but he did so in a way from which the field has yet to fully recover.

(i). He began by quoting the Suspension Clause and suggesting that, "[a]cting under the immediate influence of this injunction," the First Congress "must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."<sup>95</sup> Thus, the statute should receive a robust reading.

(ii). Marshall next observed that, since the restriction in clause [3] plainly did not apply to the second sentence of Section 14, if it were to be applied to clause [1], the result would be that individual judges would have more power than courts, which "would be strange."<sup>96</sup> Moreover, Marshall continued in a lengthy passage, to apply the restriction in clause [3] to clause [1] would render it meaningless.<sup>97</sup> Exhaustively reviewing the varieties of the habeas corpus writ as set forth by Blackstone, Marshall demonstrated to his own satisfaction that, in light of the restrictions on the jurisdiction of the federal courts, there would never be any occasion to issue the writ if it could only be done in cases in "which it may be necessary for the exercise of their respective jurisdictions"—with one exception.<sup>98</sup>

That exception, he wrote—the only power "which on this limited construction would be granted by the section under consideration"—would be the power "of issuing writs of *habeas corpus ad testificandum*."<sup>99</sup> But the "section itself proves that this was not the intention of the legislature" because that variety of the writ was the subject of its own special provision, namely the proviso in clause [4].<sup>100</sup> He continued: "This proviso extends to the whole section. It limits the powers previously granted to the courts . . . That construction cannot be a fair one

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95. *Id.* at 95.

96. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 96.

97. *Id.* at 95-100.

98. *Id.* at 105.

99. *Id.* at 98.

100. *Id.* at 99.

which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted."<sup>101</sup>

(1)(C). Having concluded that he had statutory authority to issue the writ, Marshall turned to the constitutional issue framed by *Marbury* and, accepting counsel's argument, decided in a few terse sentences that the jurisdiction "which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."<sup>102</sup>

(2)(A). On the question of whether the fact of the previous commitment was a bar to the issuance of the writ, Marshall accepted as "conclusive" Harper's argument and acknowledged *Hamilton* as authoritative.<sup>103</sup>

Accordingly, in proceedings stretching over five days, the Supreme Court proceeded to examine the merits. The "clear opinion of the court," Marshall said, is "that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done."<sup>104</sup> With the prisoners present,<sup>105</sup> the Court "fully examined and attentively considered," on an item-by-item basis, "the testimony on which they were committed," held it insufficient, and ordered their discharge.<sup>106</sup>

#### D. Analysis

(1)(A). Marshall's claim that the Court had "repeatedly" explained the reasoning behind the proposition that courts created by written law could only exercise the powers explicitly

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101. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 99.

102. *Id.* at 101; see LIEBMAN & HERTZ, *supra* note 1, § 2.4d, at 43. For a critique of this reasoning, see Currie, *supra* note 69, at 669-70.

103. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100.

104. *Id.* at 114.

105. See Supreme Court Minute Book, M-215, *supra* note 16 (entries of Feb. 16-20, 1807); Letter from Buckner Thurston to Harry Innes (Feb. 18, 1807), Innes Papers (on file with the Manuscript Reading Room, Library of Congress).

106. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 125, 128-36.

granted by such laws was false.<sup>107</sup> "Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect."<sup>108</sup>

(1)(B). The bottom-line conclusion that clause [1] of Section 14 is not limited by the remainder of the sentence is correct, but for the reasons stated by counsel, not those stated by Marshall.<sup>109</sup> And the difference has significant practical conse-

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107. This would not be shocking to scholars, who have repeatedly commented on Marshall's cavalier treatment of precedent, whether favorable or unfavorable. See, e.g., Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301 (showing how Marshall invented non-existent supporting precedent and ignored relevant negative precedent). For an insightful summary, see Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439.

108. Paschal, *supra* note 20, at 628; see also Cantor, *supra* note 1, at 76-77 ("Marshall's reasoning in *Ex parte Bollman* was strained and evasive" and there were no "precedents cited—though Marshall was always weak in this area.").

109. In this conclusion, I differ from the view taken by Professor Paschal, who believed that clause [1] of Section 14 was restricted by the remainder of the sentence and that "section 14 was for courts altogether ancillary in purpose." Paschal, *supra* note 20, at 639. In taking this view, Professor Paschal was reading Section 14 in the way that many scholars say that Marshall should have read Section 13 in *Marbury*. See, e.g., Edwin S. Corwin, *Marbury v. Madison and The Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 541-42 (1914); see also *supra* note 69. It is only fair to Marshall, however, to point out that his approach also has the virtue of consistency since in both instances he read similar language as importing an independent, rather than ancillary, grant of jurisdiction.

Although not specifically so stated in the reports, there are good grounds to believe that Marshall was in dissent in the two cases that Corwin cites in support of his own view, *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821) and *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), but—in keeping with both his own custom, see Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in The Supreme Court*, 42 AM. J. POL. SCI. 874, 878-79 (1998); Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEG. HIST. 118, 119 (1965), and the practice of the period in which these opinions were delivered, see, e.g., *supra* note 92—kept his views private. See generally John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court, 1790-1945*, 77 WASH. U. L.Q. 137, 143-52 (1999); Herbert A. Johnson, *Chief Justice John Marshall (1801-1835)*, 1998 J. SUP. CT. HIST. 3, 7-17.

These grounds emerge from a reading of the illuminating discussion of this practice contained in G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 184-95 (1988) (Volumes 3-4 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States). See also Scott Douglas Gerber, *Introduction: The Supreme Court before John Marshall*, in *SERIATIM* 1, 20 (Scott Douglas Gerber ed., 1998); James R. Stoner, Jr., *Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic*, in *SERIATIM, supra*, at 322, 331-32; Donald G. Morgan, *Mr. Justice William Johnson and the Constitution*, 57

quences. Harper's rationale was based on the sound observation that there might be numerous cases, e.g., a service member arrested for debt in defiance of a federal statute or a foreign seaman held by state authorities contrary to the terms of a treaty,<sup>110</sup> in which the issuance of a writ of habeas corpus might be appropriate to vindicate federal interests notwithstanding that there was no underlying litigation over which the federal court had jurisdiction.<sup>111</sup> Marshall's rationale, in contrast, tends "to deprive the courts of many of the most beneficial and important powers which such courts usually possess."<sup>112</sup>

(i). Marshall's suggestion—sheer dictum in the case at hand and unsupported by any authority—that Congress could suspend the writ by doing nothing at all certainly would have come as a

HARV. L. REV. 328, 331-35 (1944). Both opinions were delivered by Marshall's frequent adversary, Jefferson's appointee William Johnson. *McIntire* was delivered in the absence of Justices Washington and Todd, normally Marshall supporters. The opening line of *McIntire*, "I am instructed to deliver the opinion of the court in this case," *McIntire, supra*, at 505, implies division among the Justices, and it is unlikely that Marshall would have been in the majority in the two cases but not written the opinion in either. See generally G. Edward White, *The Working Life of the Marshall Court*, 70 VA. L. REV. 1, 37-43 (1984).

On the other hand, both *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803), and *United States v. More*, 7 U.S. (3 Cranch) 159 (1805) (Marshall, C.J.), seem clearly enough to be cases in which the Court read clause [1] of Section 14 as simply providing the procedural mechanism for exercising such appellate jurisdiction as might be granted by Congress. See generally Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 U.C.L.A. L. REV. 503, 529-30 (1992).

110. These examples are drawn from actual cases described *infra* text accompanying notes 216-21, 226-29.

Another such example would be a state's arrest of a foreign diplomat enjoying diplomatic immunity. See *infra* note 151 (discussing framers' concerns with such situations). Just this had occurred prior to *Ex parte Bollman* in *Ex parte Cabrera*, 4 F. Cas. 964, 966 (C.C.D. Pa. 1805) (No. 2,278), discussed *infra* note 152, and although the holding reached there—that the proviso to Section 14 precluded issuance of the writ—might have supported Marshall's opinion, the obvious undesirability of the result probably made it an unattractive case to rely upon. See also *supra* note 107 (discussing Marshall's disdain for precedent).

111. Justice Johnson's dissent seems not to have considered these possibilities. See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 105 (Johnson, J., dissenting) ("To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and *habeas corpus*, without an object or end to be answered by them."). One wonders whether he would have adhered to this view if he had foreseen *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.D. S.C. 1823) (No. 4,366). See discussion *infra* note 152.

112. *Supra* text accompanying note 87.

shock to all of the debaters over the Suspension Clause, whose positions were described in Part II above, particularly since suspension of the writ in England or its colonies had required an affirmative Act of Parliament.<sup>113</sup>

Under Marshall's view, the Constitution as it emerged from Philadelphia did not preserve a pre-existing writ from suspension, but only whatever writ Congress might choose to vouchsafe in the future.<sup>114</sup> In light of the tenor of the ratification debates—in which both sides vied in expressions of their appreciation for the importance of the writ—it seems hard to believe that if any substantial body of opinion had shared Marshall's view the writ would not have been preserved by an amendment in the Bill of Rights.

But the ratifiers saw no need to do this because, since "the writ was not constitutionally granted in positive terms in many state constitutions, and [was] only recognized indirectly by a limitation placed upon the authority to suspend its operations,"<sup>115</sup> they naturally assumed "that the non-suspension clause in the federal document also functioned in oblique fashion, implicitly conferring the right of the privilege."<sup>116</sup>

(ii). Marshall's reasoning that clause [1] of Section 14 could not be read more restrictively than the second sentence of the section, since it would be "strange" to read the statute as granting more power to individual judges than to courts,<sup>117</sup> is sound.<sup>118</sup> Indeed, the actual holding of the case—the perfectly reasonable conclusion that the Court had jurisdiction over the proceedings before it—might appropriately have rested on this

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113. See WILKES, *supra* note 1, at 61.

114. *But see* Oaks, *supra* note 20, at 156 ("[T]he clause does stand as evidence that the Framers contemplated the existence of the privilege whose suspension they forbade."); *infra* note 195 and accompanying text (collecting views of historians to this effect).

115. Cantor, *supra* note 1, at 75.

116. *Id.*; *cf.* *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (implying an individual right to money damages from Fourth Amendment prohibitions on government action).

117. See *supra* text accompanying note 96. Justice Johnson's dissent did read the statute this way; however, see *Ex parte Bollman*, 8 U.S. (4 Cranch) at 105-06. See generally John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992).

118. See Paschal, *supra* note 20, at 629-30.

ground.<sup>119</sup>

(iii). However, the heart of the *Ex parte Bollman* opinion for present purposes is not its holding, but rather its pronouncement that the proviso in clause [4] of Section 14 (the limitation on granting the writ to those in state custody) "extends to the whole section,"<sup>120</sup> that is, restricts the exercise of power both by courts and by their individual judges.<sup>121</sup>

This statement is arrant dictum—since the case at hand involved federal, not state, prisoners and, indeed, ones who secured their release after full judicial investigation into the justification for their confinement. Its presence in the opinion is perhaps best explained by a perceived political need for federal judges to appear solicitous of state prerogatives. Particularly in the wake of the results of the election of 1800 and the 1805 attempt to impeach Justice Chase,<sup>122</sup> strong considerations of political prudence suggested that Marshall do everything possible to minimize the opportunities for confrontations between the federal and state judicial systems.<sup>123</sup> In any event, the *Ex parte Bollman* opinion is the mirror image of the *Marbury* opinion. In *Marbury*, Marshall wrote a decision spiked with harsh dictum, but he did not order the Jefferson administration to deliver the plaintiff's commission. In *Ex parte Bollman*, Marshall ordered the Jefferson administration to release the prisoners, but he wrote a decision softened with placatory dictum.

Legally, however, the reasons given by Marshall for his pronouncements are weak. There is substantial reason to doubt his position that only the writ of habeas corpus ad testificandum would remain if the first sentence were construed as authorizing

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119. See *id.*

120. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 99.

121. This distinction is elaborated *infra* note 144 and accompanying text. The alternative to Marshall's position is considered *infra* Part IV.B.

122. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 249-59 (1998) (describing proceedings); Robert R. Bair & Robin D. Coblentz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365 (1967); see also Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1995).

123. See generally Wythe Holt & James R. Perry, *Writs and Rights, "clashings and animosities": The First Confrontation between Federal and State Jurisdictions*, 7 LAW & HIST. REV. 90, 111-12 (1989); *infra* text accompanying notes 138-40.

merely ancillary uses of the writ;<sup>124</sup> and even if this were so, there is no logical connection between this observation and the conclusion that the proviso governs the entire section. Moreover, as fully set forth in Part IV.B below, strong arguments of statutory construction affirmatively support the contrary reading.

(1)(C); (2)(A). The ruling that the Court's habeas jurisdiction was appellate rather than original was certainly important to John Marshall—it enabled him to meet the immediate political imperative of releasing *Bollman* and *Swartout* from Republican hands while leaving *Marbury* intact<sup>125</sup>—but, while it led the Supreme Court into a variety of doctrinal muddles,<sup>126</sup> it may have had little practical impact on prisoners.<sup>127</sup> As Professors

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124. See Paschal, *supra* note 20, at 630-32; Mian, *supra* note 24, at 193.

125. See Paschal, *supra* note 20, at 650-51.

126. See Oaks, *supra* note 20, at 177-82. See generally *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) (explaining that habeas corpus petition addressed to the Supreme Court "is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction").

One approaching the issue afresh, unencumbered by *Ex parte Bollman*, might well come to a different conclusion. If indeed the Supreme Court created by the Constitution had the inherent power to issue writs of habeas corpus—whether as a matter of common law, see *infra* Part IV.C.1, or implicit constitutional design—that power might most sensibly be thought of as part of the Court's original, rather than appellate, jurisdiction because this allocation would best implement the framers' intent to keep the power free of Congressional control except to the extent specified in the Suspension Clause, see *supra* note 20. But I do not explore the question here, as the arguments of this Article, see *supra* text accompanying notes 20 & 18, would be unaffected by whatever answer might be reached.

127. In theory, this might change if Congress were to seek to repeal the Supreme Court's statutory authority to grant habeas corpus relief. Leaving the Suspension Clause entirely aside, such a statute would seemingly violate Article III if the Supreme Court's habeas jurisdiction were original, but not if it were appellate. See Oaks, *supra* note 20, at 155-56.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the State of Arizona—reversing its position below—argued in the Supreme Court that Congress did take such an action in 1996 when it amended 28 U.S.C. § 2244 (1994 & Supp. III 1997) to provide for restrictions on successive petitions, see Yackle, *supra* note 3, at 391-93. According to the state, the statute applies to original writs filed in the Supreme Court, and this result does not violate the Suspension Clause. The Article III point was considered only inferentially, by reliance upon *Ex parte Bollman*. See Petitioner's Brief on the Merits at 7-8, *Stewart*, 523 U.S. 637 (1998) (No. 97-300). *But cf.* James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts, 98 COLUM. L. REV. 696, 865-66, 882-84 (1998) (explaining Article III and Supremacy Clause restraints on Congressional control of appellate judicial

Liebman and Hertz have documented, the Court reviewed the cases of state prisoners through the direct appeal mechanism of writ of error to the same extent that it did for federal prisoners through habeas corpus.<sup>128</sup>

As the proceedings on the merits in *Ex parte Bollman* show, the Court did this with scant concern for whatever factual or legal conclusions may have been reached below.<sup>129</sup> Similarly, the lower federal courts in exercising their original habeas jurisdiction were not bound by the returns to their writs, but commonly conducted evidentiary hearings to examine the substantive legitimacy of detentions.<sup>130</sup>

power in habeas cases).

Because the prisoner in *Stewart* showed convincingly that (a) Congress did not intend to limit the Supreme Court's authority to issue the writ, see *Felker*, 518 U.S. at 656-61, and (b) the case should be decided on entirely different statutory grounds, see Brief for Respondent at 15-16, *Stewart* (No. 97-300), the Court wisely decided the case on the merits without considering these issues. See *Stewart*, 523 U.S. at 637.

128. See LIEBMAN & HERTZ, *supra* note 1, § 2.4d, at 43-46. See generally Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997); David Rossman, "Were There No Appeals": *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 525 (1990).

129. See *supra* text accompanying notes 104-06. As the illuminating account in WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 30, 35-41 (1990) demonstrates, the concept of a strict separation of roles between courts (primarily fact-finders, tightly constricted in legal rulings) and appellate courts (primarily law-declarers, tightly constricted in factual review) is a modern one. See Daniel R. Ernst, *Law and American Political Development, 1877-1938*, 26 REV. IN AM. HIST. 205, 210 (1998); see also *infra* text accompanying note 194.

Least the strictures of Bluebook form lead to their role going unacknowledged, this separate sentence gratefully records the important contribution to scholarship made by Professors Wythe Holt of the University of Alabama School of Law and L.H. Larue of Washington and Lee University School of Law in performing the extensive editorial labors necessary to bring Professor Ritz's invaluable work to publication after illness rendered him unable to complete it.

130. This took place most frequently in the context of challenges to military enlistments, where the return would invariably be that the alleged soldier had regularly enlisted, and the court would conduct an evidentiary hearing to determine whether, for example, he had been drunk or underage at the time. See, e.g., *Beglee v. Anderson*, M-1214, roll 1 (C.C.D. Tenn., Aug. 5, 1812), *supra* note 16; *Smith v. Armstead*, M-931, roll 1 (C.C.D. Md., June 16, 1814), *supra* note 16; *United States v. Towson*, M-931, roll 1 (C.C.D. Md., May 27, 1812), *supra* note 16. In both these latter cases, the records of the National Archives and Records Administration housed in Philadelphia contain additional documentation beyond that on the microfilm. See also *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 682, 685 (E.D. Pa. 1855) (No. 16,725) (finding after hearing that return to writ, which denied custody over claimed slaves, was "evasive, if not false"); *Ex parte Bennett*, 3 F. Cas. 204 (C.C.D.C 1825) (No. 1,311) (examining anew at habeas corpus hearing witnesses

Thus, to take one typical example, on December 31, 1827, George Peters submitted a petition to the United States District Court for West Tennessee setting forth that he was being held by Captain Robert Sands on the claim "that your petitioner has been enlisted as a soldier in the United States Army for five years."<sup>131</sup> But, "your petitioner avers most positively if he has enlisted it was done at a time when he was wholly incapable of transacting business or understanding it by reason of intoxication."<sup>132</sup>

The court issued the writ as requested and, having the parties before it, listened to full evidentiary presentations by both sides. Whereupon, it concluded,

that at the time the said Peters enlisted, he was not in a state of mind which would make his contracts binding—but the undersigned is satisfied at the same time that the conduct of Capt. Sands was entirely honorable and correct as it appeared in evidence that a stranger would be unable to detect the alienation of the said Peters' mind altho' it might exist at the time of conversation.<sup>133</sup>

Accordingly, the Court ordered "that the said Peters be discharged from the Service of the United States, and that his enlistment be taken for nothing."<sup>134</sup>

For prisoners, then, *Ex parte Bollman* may have represented a Cheshire cat guarding the jailhouse door. Although it did have a body real enough to bar state prisoners' access to the federal courts, particularly the lower federal courts, from time to time,<sup>135</sup> it was largely insubstantial as a practical matter even before it was mooted by the statutory expansion of the writ in 1867.<sup>136</sup> That may be one reason why it was subject to so little testing that would have exposed its weaknesses and forestalled

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who had appeared before committing magistrate); *United States v. Irvine*, M-1184, roll 1 (C.C.D. Ga., May 8, 1815), *supra* note 16 (discharging petitioner because, despite having been given opportunity, detaining officer had failed to provide proof to support statement in his affidavit that the enlistment had obtained the parental consent required by the Act of Mar. 16, 1802, ch. 9, § 11, 1 Stat. 135).

131. *Matter of Peters*, M-1215 (D. W. Tenn., Dec. 31, 1827), *supra* note 16.

132. *Id.*

133. *Id.* (Jan. 1, 1828).

134. *Id.*

135. See *infra* note 152.

136. See *supra* text accompanying note 19.

its transformation into what it has now become—a lingering grin that survives to disorient today's travelers in the woods of doctrine.<sup>137</sup>

#### IV. *EX PARTE BOLLMAN'S ERRORS*

##### A. *The Background of the First Judiciary Act*

As shown in Part II, the path of political wisdom in the debates over the Suspension Clause lay in presenting the habeas corpus powers of the federal judiciary as having not been unduly constricted. The path of political wisdom in the debates over the First Judiciary Act lay in presenting the habeas corpus powers of the federal judiciary as having not been unduly enlarged.<sup>138</sup>

The reason for this change is simple enough. As a result of fears expressed during the ratification process over the expansive constitutional language regarding federal judicial authority, there was heavy political pressure on the First Congress to limit the scope of the federal court system.<sup>139</sup> Because so many of their constituents "desired significant restrictions upon, or elimination of portions of, national-court jurisdiction," the challenge facing the members of the First Congress—overwhelmingly ardent Federalists—"was to cater to these demands without seriously crippling the national judiciary."<sup>140</sup> They accomplished this by writing a statute that "was as astute politically as it was legally. It was an ingenious collection of compromises, using both tight, detailed wording and broad, open-ended wording in different places."<sup>141</sup>

137. See LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* 90 (Martin Gardner ed., 1960).

138. For an overview of these debates, see Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 13 (Maeva Marcus ed., 1992). See also Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, *supra*, at 281, 290-95; David Eisenberg et al., *The Birth of the Federal Judiciary*, in *WELL BEGUN*, *supra* note 58, at 81.

139. See RITZ, *supra* note 129, at 5.

140. *Id.* at 20.

141. *Id.* at 22. See William R. Casto, *Oliver Ellsworth*, 1996 J. SUP. CT. HIST. 73, 77 ("In crafting the Judiciary Act, Ellsworth brought to bear the full extent of his

In the case of federal habeas corpus for state prisoners, the authors wrote a statute containing the appearance rather than the substance of a limitation on federal court authority.<sup>142</sup> This argument rests upon two pillars. In the present state of our knowledge, the first of these is more solid, but further scholarship may well change that situation.

First, as Part IV.B argues, assuming that the provisions of the Judiciary Act exhaustively set forth the habeas corpus powers of the federal courts, *Ex parte Bollman* misread the statute in a way that wrongly narrowed those powers.

Second, there are sound reasons to believe that the assumption just set forth is wrong and that the framers of the Judiciary Act expected the federal courts to have powers additional to those specifically set forth by statute, powers derived from the common law (discussed in Part IV.C.1) and from state law (discussed in Part IV.C.2).

### B. *Misinterpreting the Statute: Why the Section 14 Proviso Applies to Judges, Not Courts*

As already indicated,<sup>143</sup> the first two sentences of Section 14 distinguish between courts (i.e., tribunals composed of a quorum of their members) and judges (i.e., individual members of those tribunals).<sup>144</sup> In those two sentences, the section authorizes first courts and then individual judges to issue writs of habeas corpus.<sup>145</sup> It then contains a proviso, clause [4], saying that the power generally extends only to prisoners in federal custody.<sup>146</sup> *Ex parte Bollman* stated in dictum that the "proviso

remarkable ability to broker pragmatic compromises.").

142. Cf. Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 479-82 (1999) (making a similar argument regarding the Seventh Amendment).

143. See *supra* text accompanying note 22.

144. For a modern-day example of the same distinction, see FED. R. APP. P. 27(c) (differentiating between powers of a single Court of Appeals judge and those of the whole court to act on motions). Similarly, 28 U.S.C. § 2101 (c), (f) (1994) contain specific grants of authority to individual justices of the Supreme Court. See also *infra* note 153.

145. See *supra* text accompanying note 21.

146. See *id.*

extends to the whole section,<sup>147</sup> i.e., that it limits the power of both courts and individual judges.<sup>148</sup>

This interpretation of the statute has little to recommend it.<sup>149</sup> Soundly read, the proviso limits judges but not courts. This conclusion finds support in at least six considerations.

1. *Language.*—First, while the argument to be drawn from the language of the section is not particularly compelling in either direction, it would certainly be most natural to attach a proviso to the sentence that immediately precedes it, rather than the two that do.<sup>150</sup>

2. *Policy.*—Second, the framers were plainly aware that state authorities could obstruct national policies, e.g., by jailing foreign officials,<sup>151</sup> and it is implausible to adopt a statutory

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147. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807).

148. *See supra* text accompanying notes 120-21.

149. *See supra* text accompanying note 124.

150. *See Paschal, supra* note 20, at 642-43. Professor Paschal comments, "I have not been able to determine if there is any special significance in the peculiar punctuation used [between the first and second sentences]—a period followed by a dash." *Id.* at 642 n.143. Neither have I, and there are of course very distinct limits to what weight is to be put on punctuation, especially at this period. But I have examined the manuscript copy of the Act in the National Archives in Washington, this section of which was prepared by Oliver Ellsworth, and—subjective as the impression may be—was left with the distinct feeling that the period followed by a dash at the end of the first sentence was intended to definitively close the thought it contained, while the single space underline after the second sentence and before the third is almost in the nature of a ligature. The reader is invited to confirm this impression by examining the photographic reproduction *supra* p. 534.

151. *E.g., Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 n.1 (Pa. 1796) (refusing to release the defendant in a civil suit alleging that, as Governor of Guadeloupe, he had improperly confiscated the plaintiff's brig; the defendant was released after the government of France complained to the government of the United States).

*See William R. Casto, The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490-95 (1986) (describing the widespread concern caused by the national government's inability to protect diplomats under the Confederation, the attention paid to this issue in the Philadelphia and ratification debates, and the creation by the First Congress of criminal sanctions and of federal alien tort jurisdiction as Section 9 of Judiciary Act); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L. L. & POL. 1, 11-28 (1985) (reviewing history, including "well-publicized incidents of criminal and tortious offenses against ambassadors and other foreign dignitaries" that had occurred prior to the enactment of the Judiciary Act, noting awareness of framers that injustices to aliens could lead to war and concluding that "it appears that the Alien Tort Statute and other provi-

interpretation that would have the Congress denying the federal government the ability to protect its interests.<sup>152</sup>

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sions of the Judiciary Act concerning aliens were largely intended to avoid denying justice to aliens. That intention was consistent with the overall attempt of the Framers to establish authority in the federal judiciary over actions affecting foreign relations."); see also FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION*, at x (2d ed. 1986) (arguing that "the conduct of foreign affairs" under the Confederation was the "overriding concern" that "gave rise to the Constitution, [and] provided the winning issue in state campaigns for ratification"). See generally Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1227-41 (1999) (tracing subsequent history).

One person who was particularly concerned with assuring that the federal courts had ample power to prevent both the moral injustice and practical consequences of local violations of international law was Oliver Ellsworth, see William R. Casto, *Correspondence*, 83 AM. J. INT'L. L. 901 (1989), who played a leading role in framing the Judiciary Act, see *infra* note 197. Indeed, as noted *supra* note 150, the original manuscript of Section 14 is in his handwriting.

152. See Paschal, *supra* note 20, at 647-48; see also *supra* note 19 (discussing 1842 legislative amendment strengthening federal habeas powers in the international context).

Several well-known cases illustrate the adverse results of interpreting the statute as *Ex parte Bollman* did. In *Ex parte Cabrera*, 4 F. Cas. 964, 966 (C.C.D. Pa. 1805) (No. 2,278), Pennsylvania brought criminal charges against a secretary to the Spanish legation, notwithstanding his diplomatic immunity. Both judges thought the state's conduct was indefensible but held that they lacked jurisdiction to remedy it, with Justice Bushrod Washington pointedly lamenting the restrictions put upon the court's power by the proviso. *Ex parte Cabrera*, 4 F. Cas. at 966.

In *Elkison v. Delisseline*, 8 F. Cas. 493 (C.D.S.C. 1823) (No. 4,366), South Carolina had passed a statute providing that any free colored person serving as crew member aboard a ship arriving from another state or country "shall be seized and confined in gaol until such vessel shall clear out and depart from this state." *Elkison*, 8 F. Cas. at 493. Ruling on a motion for habeas corpus submitted by a seaman so confined, Justice William Johnson, sitting on circuit, ruled that, although the statute was unconstitutional under the Commerce Clause and was "an express violation of the commercial convention with Great Britain of 1815," *id.* at 495, he was prevented by the proviso from granting the writ. *Id.* at 497. The issue was extremely controversial, both between the North and the South and between the United States and Great Britain, and led to two formal opinions by successive Attorneys General taking opposite positions. Compare 2 Op. Att'y Gen. 659, 661 (1824), reprinted in *THE CONSTITUTIONS AND THE ATTORNEYS GENERAL* 36, 38 (H. Jefferson Powell ed., 1999) (concluding that law "is void, as being against the constitution, treaties, and laws of the United States, and incompatible with the rights of all nations in amity with the United States"), with 2 Op. Att'y Gen. 426, reprinted in *THE CONSTITUTIONS AND THE ATTORNEYS GENERAL*, *supra*, at 41 (concluding the contrary): For descriptions of the political context of *Elkison*, see Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 386-89 (1989); Donald G. Morgan, *Justice William Johnson on the Treaty-Making Power*, 22 GEO. WASH. L. REV. 187, 189-98 (1953). See also SMITH, *supra* note 76, at 472-73. For a discussion of its international ramifications, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617,

3. *Previous Legislation.*—Third, the framers well knew that “the power of individual judges, out of term, to issue the writ,” had been “the immediate incitement for the most significant habeas corpus legislation ever enacted,”<sup>153</sup> the English Habeas Corpus Act of 1679,<sup>154</sup> which was widely influential throughout the United States.<sup>155</sup> The English Act had been largely inspired by the ordeal of Francis Jenkes, who was imprisoned for

1655 & n.163 (1997).

In the purely domestic arena, the result of the *Ex parte Bollman* interpretation was that the more obstructively a state behaved, the greater would be its power to evade federal review, as is persuasively shown by *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845). Following Dorr's Rebellion, Thomas Dorr was sentenced by Rhode Island to life imprisonment. See *Ex parte Dorr*, 44 U.S. (3 How.) at 103. Counsel wished to seek review by writ of error pursuant to Section 25 of the Judiciary Act of the legal point whether treason could be committed against a state. See *id.* But Rhode Island blocked counsel from having access to Dorr, “in consequence of which his authority could not be obtained for an application for such a writ.” *Id.* at 104. Counsel accordingly sought habeas corpus from the Supreme Court to bring Dorr before it so that counsel could ascertain his wishes and, if so advised, pursue the remedy that Section 25 concededly made available. See *id.* at 105. But the Court ruled that the proviso to Section 14 forbade issuance of the writ, thereby rewarding Rhode Island's behavior. See *id.*

153. Paschal, *supra* note 20, at 645. As indicated *supra* note 144, the issue of the powers of single members of multi-member tribunals can still arise under modern conditions, compare *In re Pirinsky*, 70 S. Ct. 232, 233 (Jackson, Circuit Justice 1949) (ruling that an individual Justice did not have power to grant bail pending review of denial of application for writ of habeas corpus), with *In re Johnson*, 72 S. Ct. 1028, 1031 (Douglas, Circuit Justice 1952) (ruling the contrary). See SUP. CT. R. 49, 346 U.S. 999 (1954) (current version at SUP. CT. R. 36) (resolving controversy). In contrast, the “out of term” issue—which persisted through our early national period because courts were “in vacation” outside of their statutorily-fixed terms, see *infra* Parts IV.B.4-5—is now largely obsolete, as the terms of modern federal courts run continuously. See, e.g., SUP. CT. R. 3; N.D.N.Y. LOCAL R. 77.3. Thus, in contrast to the situation in the period discussed in this Article, see *infra* text accompanying note 166, a single district judge today has the same judicial authority at all times, rather than having to act “in chambers” between sittings of the court, see, e.g., *infra* notes 171-78 and accompanying text.

154. 31 Car. 2, c. 2.

155. “With the sole exception of Connecticut, which passed its own unique habeas corpus statute in 1821, all of the habeas corpus acts passed in the thirteen original colonies or states were patterned after the English act.” Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 253 (1965). Another indication of the influence of the act appears in *United States v. Bollman*, 24 F. Cas. 1189, 1190 (C.D.C. 1807) (No. 14,622) (described *supra* text accompanying notes 78-79), where a federal court faced with a procedural issue in a habeas corpus case adopted a “practice . . . founded upon the statute” because “the judges considered it as furnishing a good rule of proceeding in all cases.”

making a speech urging that a new Parliament be called.<sup>156</sup> When he sought his release by habeas corpus from the Lord Chief Justice, "his lordship denied to grant it, alleging no other reason but that it was vacation"; when he sought his release by habeas corpus from the Lord-Chancellor, that officer refused on the same grounds,<sup>157</sup> with the ultimate result that Jenkes languished in jail for some months.<sup>158</sup> In response to this case, the "principal new substantive right created by the 1679 act was the power it gave selected judicial officers to issue the writ of habeas corpus 'in the vacation time, and out of term' (§ 3)."<sup>159</sup>

This episode reinforced a basic principle that had been clear throughout the period of over a century and a half between the planting of the English colonies and the framing of the Judiciary Act: all superior courts of record had inherent common-law power to issue writs of habeas corpus;<sup>160</sup> legislation was necessary to confer such powers on individual judges because they "had no common law powers."<sup>161</sup>

4. *Subsequent Legislation.*—Fourth, efforts to increase federal habeas authority in the years immediately after the Judiciary

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156. See Jenkes Case [1676], 6 State Trials 1190 (T. Howell comp. 1816).

157. *Jenkes Case*, 6 State Trials at 1196. For a general view of the surrounding political context, see MARK KISHLANSKY, *A MONARCHY TRANSFORMED* 242-62 (1996). See also ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS* 92-103 (1858).

158. *Jenkes Case*, 6 State Trials at 1196-1205.

159. Oaks, *supra* note 155, at 252; see LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 44-54 (1999) (summarizing English developments in the century leading to Act).

160. See Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585, 592-93 (1976) (explaining that courts in colonies exercised habeas powers as a matter of common law, regardless of statutory authorization); see also WILKES, *supra* note 1, at 60 ("The writ of habeas corpus in England is a common law writ. That is, the writ of habeas corpus was created not by statute but by the judges and the authority for its existence and continuance is judge-made law."); OLIVER H. PRINCE, *A DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 921-23 (2d ed. 1837) (describing English judges' use of statutory habeas powers to supplement common law ones); *Remarks on the Writ of Habeas Corpus ad Subjiciendum, and the Practice Connected Therewith*, 4 AM. L. REG. 257, 262-63, 276 (1856) (arguing that the English statute of 1679 only reiterated common law, which officials had ignored, and noting that "difficulty sometimes exists" in determining whether a court is exercising habeas powers flowing from statute or from common law); *supra* note 85; *infra* note 203.

161. Oaks, *supra* note 155, at 255.

Act focused on judges, not courts. In 1790, Attorney General Edmund Randolph (who had been a delegate to Philadelphia), responding to a request from the House of Representatives to propose improvements in the judicial system, suggested as statutory amendments:

[E]very district judge shall moreover have the same power to issue writs of *habeas corpus*, returnable in vacation before himself, as in session returnable to the court; and

[E]very circuit judge shall moreover have the same power to issue writs of *habeas corpus*, returnable in vacation before himself, as a circuit judge, or before any other judge of his circuit, who shall happen to be within the district, as the circuit court has to issue such writs returnable to the court.<sup>162</sup>

The clear meaning of this proposal is that legislation was needed because, contrary to the interpretation that would later be adopted in *Bollman*, the habeas powers of individual judges were more constricted than those of courts.<sup>163</sup>

5. *Practicalities*.—Fifth, an additional consideration of some force emerges from a review of the early court records. The proposed reading of the proviso makes practical sense. A very great deal of the work of the early federal judiciary was done by judges acting in their individual capacities, in chambers or during

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162. Edmund Randolph, Report on the Judiciary System (Dec. 27, 1790), reprinted in AMERICAN STATE PAPERS: 1 MISCELLANEOUS 21, 25, 30 (Walter Lowrie & Walter S. Franklin eds., 1834) (Miscellaneous Document no. 17). This report is considered at length in Wythe Holt's illuminating and well-documented article "Federal Courts as the Asylum to Federal Interests": Randolph's Report, The Benson Amendment, and the "Original Understanding" of the Federal Judiciary, 36 BUFF. L. REV. 341 (1987), and has been reprinted with a commentary in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 91, at 122-67.

163. Additional evidence of Randolph's views is to be found in his argument in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 421-22 (1793), in which he suggests that if a state were to suspend the writ in violation of the Suspension Clause, "a person arrested may be liberated by *habeas corpus*," which, in context, could only mean federal habeas corpus.

Professor Paschal argues in addition that Section 30 of the short-lived Judiciary Act of 1801, ch. 4, § 30, 2 Stat. 98, which unambiguously attached the proviso only to the powers granted to Justices and judges, "can only be regarded as explanatory of the Act of 1789." Paschal, *supra* note 20, at 643. The Judiciary Act of 1801 was repealed by Act of March 8, 1802, ch. 8, 2 Stat. 182, see ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 23-25 (1987).

vacation, not while sitting on courts formally assembled during regularly stated terms with a full quorum. Hence, to place a limitation on the power of the individual judges was to impose a real restraint on judicial authority.

This argument finds support in two propositions, each of which has substantial evidentiary support.

First, the statutorily-fixed terms of the federal courts were shorter than those of the state courts. And, in light of the difficulties of traveling in the early United States, it was "often impossible for the justices to hold the circuit court as required by [the Judiciary Act of 1789<sup>164</sup>], which gave rise to complaints by them."<sup>165</sup> Prior to 1802, the absence of a Supreme Court Justice meant that there was no "court" in session; if a single district judge were present, he could only take those actions to which his individual authority extended.<sup>166</sup> The record of the United States Circuit Court for the District of Maryland offers an example.<sup>167</sup> Although the court was formally called into session on seventy-five days prior to 1802, it only sat as a "court" on fifty-nine of those days, since it lacked a quorum on the remainder.<sup>168</sup> The reading of the proviso to Section 14 of the Ju-

164. Originally, the Act provided that the circuit courts would consist of two Justices and the district judge, any two of whom would constitute a quorum. See First Judiciary Act, ch. 20, § 4, 1 Stat. 73, 74-75 (1789). This was amended by the Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333, 333-34, which required the attendance of only one Justice and one district judge and provided that the presence of the Justice alone was sufficient to constitute a quorum. This development is described in Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 BUFF. L. REV. 301, 336-38 (1987), an article which presents the overall political context of the developments recounted in this paragraph of text.

165. SURRENCY, *supra* note 163, at 19.

166. In that year, the situation was changed by the passage of the Act of April 29, 1802, ch. 21, § 4, 4 Stat. 158 ("[W]hen only one of the judges hereby directed to hold the circuit courts, shall attend, such circuit court may be held by the judge so attending."). See *Pollard & Pickett v. Dwight*, 8 U.S. (4 Cranch) 421 (1808) (Marshall, C.J.) (rejecting, on the basis of this statute, a challenge to circuit court proceedings conducted only by a district judge); see also *Presentment of Grand Jury for the United States Circuit Court for the District of Georgia*, M-1184 (Dec. 19, 1802), *supra* note 16 (praising the reform "by which one Judge is enabled to distribute Justice in the absence of his colleagues, which we consider as a great improvement in the organization of this Court").

167. Although my overall survey, see *supra* note 16, suggests that there was nothing atypical about this court, I make no claim that it is representative in any statistical sense.

168. The dates prior to April 29, 1802, see *supra* note 166 (discussing the sig-

diciary Act urged here would mean that state prisoners would have been able to obtain habeas corpus only on the latter occasions. So, for instance, a state prisoner seeking habeas corpus after the close of the November, 1797 term would not have been able to obtain it until the court reconvened as such a year later in November, 1798; similarly, a prisoner detained after the two days of that session would not have been able to secure habeas corpus for another year, until November 1799.

Second, in cases where the proviso on any reading was plainly inapplicable (i.e., with respect to persons held under federal authority), individual judges routinely issued writs of habeas corpus and granted or denied discharges from custody as warranted.<sup>169</sup>

The reason of this is, that when a case of unlawful imprisonment, under color of legal process or authority exists, there is a necessity for prompt and speedy action; and hence the party is entitled to be heard before a single judge, without waiting a regular session of a court, which might be months distant, and at a point remote from the place of the imprisonment of the party applying for deliverance.<sup>170</sup>

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nificance of this date), on which the United States Circuit Court for the District of Maryland was called into formal session were as follows, with the dates on which a quorum was not present enclosed in parentheses: May 7-8, 1790; Nov. 8, 1790; May 7, 1791; Nov. 7-8, 1791; May 7-8, 1792; Nov. (7-9), 10, 12, 1792; May 7-8, 1793; Nov. 7-9, 1793; May 7, 1794; Nov. (7), 8, 1794; May (7), 8-9, 1795; Nov. 7, 9, 1795; May 7, 1796; Nov. 7-8, 1796; May 8-9, 1797; Nov. 7-11, 1797; May (7-9), 1798; Nov. 7-8, 1798; May (7-10), 1799; Nov. 7-9, 11-12, 1799; May 7-9, 12-16, 1800; Nov. 7-8, 1800; Mar. 20-21, 1801; Nov. 5-7, 9-11, 1801; and Mar. (20, 22, 23-24), 25-27, 1802.

The source of this data is M-931, *supra* note 16. To the extent that the Supreme Court Justices were present at these sessions, the data may also be traced through entries in volumes 2-4 of DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 91.

The microfilmed minute books on which these figures are based are generally very legible and complete. In the relatively few cases of ambiguity, I have erred on the side of assuming that a quorum was present. Thus, I make no claim of mathematical exactitude but present this data as substantially accurate. I am grateful to Stephen L. Tull of the Project on Documentary History of the Supreme Court of the United States, 1789-1800, for his assistance in this regard.

169. Since such actions did not result in orders of "courts," they were not subject to appellate review by the Supreme Court, *see In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847); *see also In re Kaine*, 55 U.S. (14 How.) 103 (1852), although the rule seemed to erode in later years, *see Oaks*, *supra* note 20, at 165.

170. *Ex parte Everts*, 8 F. Cas. 909, 913 (C.C.S.D. Ohio 1858) (No. 4,581).

The record of the Circuit Court for the District of Georgia seems typical, although perhaps better documented than most.<sup>171</sup> There, judges issued chambers orders:

- requiring a creditor to show cause why his debtor should not be discharged pursuant to federal statute from the prison where he was being held under civil process issuing from a federal court;<sup>172</sup>

- discharging a petitioner from custody after a factual determination that "[he] is a free person of colour;"<sup>173</sup>

- releasing "a negro woman" who had been seized by state authorities and turned over to the federal marshal on suspicion of having been "imported into the United States contrary to law,"<sup>174</sup> but who turned out to be "a free British subject" and resident of Jamaica;<sup>175</sup>

- freeing prisoners who had been committed to the federal

171. The minute books of this court (known as the Circuit Court for the Southern District of Georgia after 1802) are somewhat unusual in recording and separately denominating orders in chambers. But there is every reason to believe that petitioners everywhere regularly approached individual judges when the courts were not formally in session. *See, e.g., Nelson v. Cutter*, 17 F. Cas. 1316 (C.C.D. Ohio 1844) (No. 10,104) (granting habeas discharge in vacation on the basis that the affidavit proffered to justify arrest of defendants for debt in a diversity case was insufficient under Ohio law); *In re Keeler*, 14 F. Cas. 173 (D. Ark. 1843) (No. 7,637) (stating that "clear" power existed to grant an application, presented by a father to the judge in chambers in vacation, to secure son's release from the military but holding the application legally insufficient).

172. *Fitzgerald v. Brownlaw*, M-1172 (C.C.S.D. Ga. Dec. 4, 1809), *supra* note 16. Such proceedings were conducted in chambers as a matter of course. *E.g. Billing v. Hall*, M-1172 (C.C.S.D. Ga. Feb. 2, 1821), *supra* note 16; *Holbrook v. McNeil*, M-1172 (C.C.S.D. Ga. Mar. 18, 1839), *supra* note 16. The applicable federal statute, Act of January 6, 1800, ch. 4, § 2, 2 Stat. 5, provided that persons imprisoned on process issuing from any court of the United States were entitled to be released upon taking a prescribed oath of insolvency.

173. *United States v. Frank*, M-1172 (C.C.S.D. Ga. Feb. 24, 1820), *supra* note 16.

174. That is, she was thought to have been illegally imported as a slave at a time when the trade had been outlawed. *See Act of Mar. 2, 1807*, ch. 22, 2 Stat. 426; *Act of Apr. 20, 1818*, ch. 91, 3 Stat. 450.

175. *United States v. Elizabeth*, M-1172 (C.C.S.D. Ga. Apr. 9, 1823), *supra* note 16. In a similar action by a full court, the United States District Court for the Southern District of New York released on habeas corpus an imprisoned master of a Brazilian ship after being persuaded by his affidavit that the slaves he had on board were his personal property and not for importation. *See Matter of DeSouza*, M-854 (C.C.S.D.N.Y. Dec. 16, 1836), *supra* note 16, a case on which there is additional documentation in the records of the New York regional office of the National Archives and Records Administration.

authorities by the state authorities to stand trial for a larceny allegedly committed "on board of an American vessel lying along side of and fastened to a wharf in the port of Havanna";<sup>176</sup>

- discharging from custody an alleged debtor to the United States on the grounds that the distress warrant was for considerably more than the evidence suggested he owed;<sup>177</sup>

- releasing a prisoner, who had seemingly been held on a charge of theft from the mails, on the presentation of evidence "that the Packet taken from the Post office was not against the Will of the officers of the Post office [in] that the packet had been put upon the floor with old newspapers from whence it was taken," so that although the prisoner may have done something "very improper," it had not been criminal.<sup>178</sup>

In short, contrary to Chief Justice Marshall's argument in *Ex parte Bollman*, a reading of the proviso to Section 14 under which it applies exclusively to the second sentence, i.e., to limit the actions of judges in chambers and out of term, would be a meaningful one.

6. *Constitutionality*.—Sixth, the statutory reading advocated here is strengthened to the extent that Congress either believed itself to be,<sup>179</sup> or might in fact be,<sup>180</sup> constrained by the Constitution from eliminating federal court habeas corpus jurisdiction over state prisoners, since it is a deeply-rooted rule—originating in a pre-*Ex parte Bollman* opinion by Marshall<sup>181</sup> and based largely upon presumed Congressional in-

176. *United States v. Gillis & Donahue*, M-1172 (C.C.S.D. Ga. Feb. 10, 1824), *supra* note 16. The circuit court judge wrote,

I do not think the case cognizable in the Courts of the United States, but if it should be yet it is very uncertain if any offence was committed, and if there was it is undoubtedly very uncertain & hardly capable of being ascertained who did commit it. Under such circumstances, I do not feel warranted in detaining the prisoners for trial in May,

i.e., at the next regular term of court. *Gillis & Donahue*, M-1172.

177. *Bullock v. United States*, M-1172 (C.C.S.D. Ga. Apr. 28, 1824), *supra* note 16. The application was for a preliminary injunction, rather than for a writ of habeas corpus, but the order of the court was that, upon petitioner's giving security in a specified sum, "the Marshal is ordered to confine him no longer." *Bullock*, M-1172.

178. *United States v. Jarvis*, M-1172 (C.C.S.D. Ga. 1825), *supra* note 16.

179. See *infra* note 195 (noting argument of Professor White).

180. See *infra* text accompanying notes 183-85.

181. See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

tent—that statutes are to be construed in a way that avoids calling their constitutionality into question.<sup>182</sup>

In this case, as Wythe Holt has suggested and as the Suspension Clause debates support,<sup>183</sup> there is certainly substantial reason to believe that if the statute had the restrictive effect that Marshall claimed, then it violated the Clause. While no case has yet surfaced of a state prisoner litigating this proposi-

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182. See, e.g., *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (applying rule “that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions” since “[w]e do not assume that Congress, in passing laws, intended” arguably unconstitutional results); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465-67 (1989) (applying rule as decisive consideration where other interpretive factors resulted in “a close question”); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This cardinal principle has its roots in Chief Justice Marshall’s opinion for the Court in *Murray v. The Charming Betsy*, [6 U.S. (2 Cranch) 64, 118 (1804)], and has for so long been applied by this Court that it is beyond debate.”); *United States ex rel. Attorney General v. Delaware & Hudson Corp.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”); see also Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1584-87 (1998) (summarizing scholarly views of the rule and noting that courts have applied it in construing the Antiterrorism and Effective Death Penalty Act of 1996, *supra* note 3). See generally David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2483-85 (1998) (predicting that courts will use the rule to reach narrow interpretations of 1996 statutory provisions constraining judicial review of immigration decisions).

The Justices have employed the doctrine actively in recent years. In *Jones v. United States*, 119 S. Ct. 1215, 1222-28 (1999), Justice Souter, in a characteristically sensible opinion for five Justices, applied it over the dissent of Justice Kennedy, writing for himself and Justices Rehnquist, O’Connor and Breyer. This outcome was the mirror image of that reached on a similar problem the previous Term in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), where Justice Breyer for a five-person majority rejected application of the doctrine, see *Almendarez-Torres*, 523 U.S. at 235-39, over a strenuous and convincing dissent written by Justice Scalia and joined by Justices Stevens, Souter and Ginsburg, see *id.* at 248-56, 264-71. For an analysis of the case, see Roberta Sue Alexander, Note, *Dueling Views of Statutory Interpretation and the Canon of Constitutional Doubt: Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), 24 U. DAYTON L. REV. 375 (1999); see also *Richardson v. United States*, 119 S. Ct. 1707, 1711, 1717-19 (1999).

183. See Wythe Holt, “To Establish Justice”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1511; see *supra* Part II.

tion during the 1807-1867 period when it presented a viable legal issue, not even Marshall's precatory theory of the Clause<sup>184</sup> would have been sufficient to justify an affirmative statutory preclusion of the right of state prisoners to test the federal validity of their detentions.<sup>185</sup>

The significant possibility that *Ex parte Bollman's* reading makes Section 14 unconstitutional provides a strong legal reason why that reading is wrong. It may also provide a practical reason why some courts faced with situations in which the *Ex parte Bollman* dicta might actually have been applicable simply ignored the case.<sup>186</sup>

### C. Over-valuing the Statute: The Non-statutory Habeas Corpus Powers of the Federal Courts

As suggested above, Marshall's statement that courts created by written law could only exercise the powers explicitly granted by such laws was simply an *ipse dixit* conveniently brought forth for the occasion.<sup>187</sup> Although the proposition sounds unremarkable to modern ears, it was at odds with the contemporary legal consensus.<sup>188</sup> And Marshall knew this as well as anyone. Just seven years before *Ex parte Bollman*, he had written:

My own opinion is that our ancestors brought with them the laws of England both statute and common law as existing at the settlement of each colony, so far as they were applicable to our situation. That on our revolution the preexisting law of each state remained so far as it was not changed either expressly or necessarily by the nature of the governments which we adopted.

That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply

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184. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (describing Suspension Clause as creating an obligation on Congress to provide for the writ, since the privilege would otherwise be lost); see *supra* text accompanying notes 95, 113-16.

185. See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WISC. L. REV. 39, 102 n.178.

186. See *infra* Part V.

187. See *supra* text accompanying notes 107-08.

188. See *infra* text accompanying note 195.

themselves to magistrates of the general as well as to magistrates of the particular government. I do not recollect ever to have heard the opinions of a leading gentleman of the opposition which conflict with these. Mr. Gallatin in a very acute speech on the sedition law was understood by me to avow them. On the other side it was contended, not that the common law gave the courts jurisdiction in cases of sedition but that the constitution gave it.<sup>189</sup>

The views set forth in the second paragraph would certainly support the position that no statute of Congress was needed to give the federal courts authority to issue the writ of habeas corpus.<sup>190</sup> And Marshall's words also indicate where that authority might be found instead: in the common law or in state law.

1. *Common Law*.—As William R. Casto accurately states, the Judiciary Act was written in a world in which all lawyers “believed [that] the common law existed independently from the state. Neither kings nor legislators nor even judges were necessary to create the common law. Instead, it was part of the law of nature. . . . [having] an existence outside and independent of the court.”<sup>191</sup> Statutes, of course, might be part of this existing law, but they did not define or exhaust it; rather, they would be absorbed into its overall fabric.<sup>192</sup> Thus, to apply Casto's description to the present subject, “[u]nder this almost Platonic vision of the common law,” the contours of habeas corpus had an objective reality that courts would strive to define for themselves, largely undisturbed by the views of Convention delegates, legislators, or even previous judges' decisions that might, on further

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189. Letter from John Marshall to St. George Tucker (Nov. 27, 1800), reprinted in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 79, at 23, 24 (footnotes omitted). The quoted passage follows one in which Marshall, then Secretary of State, approves of the federal court's exercise of common-law jurisdiction in *Williams' Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708), which is described *infra* note 197.

190. The relationship of those views to *Ex parte Bollman* is critically discussed in Ji-Hyung Cho, *The Transformation of the American Legal Mind: Habeas Corpus, Federalism, and Constitutionalism, 1787-1870*, at 83-90 (1995) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with University Microfilms International).

191. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 34-35 (1995); *id.* at 156 (“Virtually all lawyers agreed that judges did not make the common law; they merely administered the common law that already existed in nature.”).

192. *See id.* at 34-35.

reflection, appear to misrepresent "the true common law."<sup>193</sup>

These ideas were natural ones in the environment from which they came: a substantially non-hierarchical judicial world in which all judges were trial judges, seeking, with counsel, to find (rather than make) the law, in a country in which opinions were written rarely and were, like state statutes, difficult to find in print.<sup>194</sup>

Although historians disagree about what members of the Philadelphia Convention may have thought about the precise role that common law would play in the federal courts generally, they are in accord that the Convention's solicitude for habeas corpus led it to anticipate that the federal courts would exercise common law powers at least in that respect.<sup>195</sup> The debates

193. *Id.* at 35.

194. See RITZ, *supra* note 129, at 28-52; see also WHITE, *supra* note 109, at 154-200 (contrasting intellectual, procedural, and physical environment of the Marshall Court with modern suppositions); *supra* note 129. See generally Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640*, 146 U. PA. L. REV. 323, 352 (1998).

195. Thus, Julius Goebel argues that the Convention did not impose the common law generally on the federal courts but rather exercised "judicious restraint in selecting only specific items from the vast storehouse of the mother law, e.g., habeas corpus." JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 229-30 (1971) (Volume 1 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States). On the other hand, W.W. Crosskey goes further and argues that "the Federal Convention regarded the Common Law, with its British statutory amendments, as constituting *generally*, the standing national law of America, to the full extent that the English law was 'applicable to American conditions.'" W.W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 625 (1953). He finds particular support for this statement in the Suspension Clause. See *id.*

If the argument laid out in G. Edward White, *Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases*, in ORIGINS OF THE FEDERAL JUDICIARY 66, *supra* note 138, is correct, then contemporaries would have believed that, under these circumstances, Congress lacked the power to limit federal court habeas jurisdiction.

Certainly, as Professor Ritz persuasively shows, the Judiciary Act—many of whose framers had been delegates in Philadelphia, see *Myers v. United States*, 272 U.S. 52, 136, 174-75 (1926)—is carefully worded so as to avoid any explicit acknowledgment that whatever judicial power may be vested directly in the courts by the Constitution "is subject to the control of Congress." RITZ, *supra* note 129, at 54. *But cf. id.* at 56 n.9 (presenting views of the editors of the volume, Professors Wythe Holt and L.H. LaRue, disagreeing with this argument and instancing "that Section 14 of the act expressly limits the issuance of national habeas corpus writs to applicants detained by national authority"). While the overall argument, being essentially one from silence, may be very difficult if not impossible to bring to a defini-

over the Judiciary Act provide no specific further enlightenment.<sup>196</sup>

But there is some indirect evidence. The current scholarly consensus—buttressed by strong, albeit certainly not unanimous, contemporary views<sup>197</sup>—is that the framers of the Judiciary Act expected that the federal courts would exercise common law criminal jurisdiction.<sup>198</sup> To be sure, that expectation

tive resolution, I am pleased to have persuaded Professor Holt that the particular example is not on point. See Wythe Holt, *Introduction: Law vs. Order, or Habeas vs. Hobbes*, 51 ALA. L. REV. 525, 528 (2000).

196. As far as I am aware, the only specific mention of habeas corpus to be gleaned from the surviving records of the debate over the Judiciary Act is a note of Senator William Paterson that reads in full, "Hab. Corpus & Sovereignty of the State—", 9 FIRST FEDERAL CONGRESS, *supra* note 52, at 481, a note that the series editors date in the period of June 24-27, 1789. See generally RITZ, *supra* note 129, at 72-78 (canvassing contemporary views as to application of common law in federal court).

197. Key data points include:

- Williams' Case, 29 F. Cas. 1330, 1331 (C.C.D. Conn. 1799) (No. 17,708), in which Oliver Ellsworth, who had been a leading framer of the Judiciary Act, see Holt, *supra* note 183, at 1481-85 (describing Ellsworth's role), and was then Chief Justice of the United States, upheld on circuit a common law prosecution charging an American citizen with waging war on a friendly power; see WHITE, *supra* note 109, at 68; *supra* note 189 (citing John Marshall's approving views on case); see also Henfield's Case, 11 F. Cas. 1099, 1120 n.6 (C.C.D. Pa. 1793) (No. 6,360), which arose on similar facts and whose surviving documentation is described in RITZ, *supra* note 129, at 154, 242 n.14;

- United States v. Worrall, 28 F. Cas. 774, 779-80 (C.C.D. Pa. 1798) (No. 16,766), in which Justice Samuel Chase and District Judge Richard Peters split on the point, a case which is considered at length in Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 58-72 (1978); and

- United States v. Ravara, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122), which has been masterfully recreated with a great deal of previously unpublished documentation by John D. Gordan III, *United States v. Joseph Ravara: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime, in ORIGINS OF THE FEDERAL JUDICIARY*, *supra* note 138, at 106, 108 ("[D]istinguished counsel for Ravara did not dispute that the circuit court had jurisdiction under the act to entertain a criminal prosecution applying federal common law; instead . . . the argument was about how that common law was to be determined.").

Several further cases are collected in Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 920 n.8 (1992). See also *infra* note 198 (describing views of Justice Paterson).

198. Significantly, the June 12, 1789 draft of the Judiciary Act granted to district courts (in Section 10) and circuit courts (in Section 11) "cognizance of all crimes & offences that shall be cognizable under the authority of the United States & defined by the laws of the same" (emphasis added), but the Senate struck out the italicized

was eventually defeated by the ruling in *United States v. Hudson & Goodwin*, which repudiated the concept of common law crimes.<sup>199</sup> But however sound that decision may have been on policy grounds,<sup>200</sup> the members of the First Congress would not

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language. See 5 FIRST FEDERAL CONGRESS, *supra* note 52, at 1176 & n.34, 1178 & n.46; RITZ, *supra* note 129, at 111.

Moreover, Justice William Paterson, who was one of the leading framers of the Judiciary Act, has left us a substantial draft opinion upholding federal common law criminal jurisdiction on a basis very similar to that advanced by Marshall. See *supra* text accompanying note 189; Casto, *supra* note 151, at 480-81. The opinion is reprinted in full in *id.* at 526. Paterson wrote "that the const. of the U. States is predicated upon the common law; it assumes the com. law as an existing rule, and builds upon it as such." *Id.* at 530; see also RITZ, *supra* note 129, at 98, 115, 146-48 (arguing that Congress expected federal courts to exercise common law criminal jurisdiction until passage of a federal crimes act); Holt, *supra* note 183, at 1506 ("[T]he implication is earthshaking. No matter how little common-law jurisdiction Congress may have expected the federal courts to exercise as a stop-gap measure, there seemed to be no doubt that the federal courts, and thus the federal government, could exercise such a power."). See generally HASKINS & JOHNSON, *supra* note 69, at 633-46; MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 9-30 (1992); Andrew Lenner, *A Tale of Two Constitutions: Nationalism in the Federalist Era*, 40 AM. J. LEG. HIST. 72, 76-90 (1996); Wythe Holt, *The First Federal Question Case*, 3 LAW & HIST. REV. 168, 180-89 (1985).

Historians' debate on this issue is well summarized in the symposium on the federal common law of crimes that appeared in 4 LAW & HIST. REV. (1986); in my own view, the most convincing account is put forward by Stephen B. Presser, *The Supra-Constitution, the Courts and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, *id.* at 325.

Paterson also believed that Congress, like the courts, could draw on powers derived from the common law in addition to those granted by the Constitution and (adopting an interpretation consistent with that of Patrick Henry, see *supra* text accompanying note 43) cited the Suspension Clause in support of this view. See William James Hull Hoffer, *William Paterson and the National Jurisprudence: Two Draft Opinions on the Sedition Law of 1798 and the Federal Common Law*, 2 J. SUP. CT. HIST. 36, 42-43, 45 (1997).

199. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that the Constitution prohibits federal courts from exercising common law criminal jurisdiction: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.").

200. See LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 274-81 (1985) (describing threats to freedom of expression posed by federal common law criminal prosecutions in the period prior to *Hudson*); see also Gordan, *supra* note 197, at 140 (concluding that, notwithstanding historical warrant for federal criminal common law jurisdiction, it would have become "in time, an instrument of oppression").

For a comprehensive and scholarly analysis of *Hudson* and its political background, see Stewart Jay, *Origins of Federal Common Law*, 133 U. PA. L. REV. 1003, 1231 (1985). See also Rowe, *supra*, note 197 (exploring the pre-*Hudson* political climate). The post-*Hudson* developments in the Supreme Court are summarized in

have anticipated it.<sup>201</sup> Yet, expecting that the federal courts would exercise common law criminal jurisdiction, the framers of the Judiciary Act maintained a discreet statutory silence on the issue or, at best, intimated their view by indirection in such a way as to not "wave a red flag before opponents."<sup>202</sup>

If the Congress could pass over in silence or near-silence a controversial extension of the powers of the federal courts, it is certainly plausible that—in a climate hostile to such extensions—it would not feel obliged to be particularly explicit in a non-controversial area,<sup>203</sup> trusting the courts to do the right thing by reading Section 14 as working no diminution of the federal courts' common law habeas powers.

2. *State Law.*—The Judiciary Act also left open by silence the question of the extent to which the lower federal courts were to have the powers of the corresponding state courts. At least some petitioners seem to have believed that the meaning of this silence was that those courts had such powers in the habeas corpus context. Two cases from the Eastern District of Pennsylvania show petitioners seeking habeas corpus relief under the

WHITE, *supra* note 109, at 865-70.

201. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. at 49, 73 (1923) (arguing that *Hudson* was wrongly decided as matter of legislative intent). However, by the time the ruling came down, it commanded "strong national support." Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 256 (1998). See generally Nelson, *supra* note 66, at 454-59 (explaining that, although legal thinkers initially turned to common law to define jurisdiction of federal courts, this eventually produced politically unacceptable results in several areas, including that of common law crimes).

202. RITZ, *supra* note 129, at 147.

203. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), counsel sought to capitalize on this difference. Arguing that the federal courts had common law habeas corpus jurisdiction, he urged:

This question is not connected with another, much agitated in this country, but little understood, viz., whether the courts of the United States have a common law jurisdiction to punish common law offenses against the government of the United States. The power to punish offenses against the government is not necessarily incident to a court. But the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature for the protection of the citizen.

*Ex parte Bollman*, 8 U.S. (4 Cranch) at 80; see also *supra* text accompanying note 85 (quoting surrounding context of this passage).

Pennsylvania habeas statute without mentioning the Judiciary Act at all.<sup>204</sup> Since the state courts did have well-developed bodies of habeas corpus law,<sup>205</sup> this issue could be of some practical significance. For example, the detailed and emphatic Pennsylvania statute cited by the petitioners<sup>206</sup> contains explicit provisions regarding the powers of judges to issue the writ in vacation.<sup>207</sup>

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204. These cases are *Thomas v. Keeper of Debtors Apartment*, M-987 (E.D. Pa. July 4, 1822), *supra* note 16, and *Rose v. Keeper of the Gaol of the City & County of Philadelphia*, M-987 (E.D. Pa. Sept. 14, 1821), *supra* note 16.

In *Thomas*, John Thomas and a number of others, seemingly acting *pro se*, alleged that they were being confined in the debtors apartments for the City and County of Philadelphia on account of "some criminal or supposed criminal matters alleged against them with which they are unacquainted or have any knowledge" and prayed "that a *habeas corpus* may be issued forthwith according to the act of Assembly passed in the year of our Lord 1785." *Thomas*, M-987, *supra* note 16, at 4; *see also infra* note 206 (describing the statute). The return to the writ showed that the petitioners were being held to answer federal criminal charges arising out of an alleged assault on the captain of an American vessel on the high seas. *Thomas*, M-987, *supra* note 16.

The second of these petitions, also seemingly filed *pro se*, is very similar. In *Rose*, William Rose and John McFee claimed that they were "unjustly confined as they apprehend in the Jail of the City and County for some criminal or supposed criminal matters with which they are unacquainted or of which they have any knowledge" and requested "that a writ of *Habeas Corpus* may be issued forthwith according to the act of assembly passed in the year of our Lord 1780." Petition of William Rose & John McFee, *United States v. Rose*, M-987 (C.C.D. Pa. Oct. 21, 1821), *supra* note 16; *see also infra* note 206 (discussing this reference). The case files of the Circuit Court for the Eastern District of Pennsylvania for October, 1821, generously unearthed by Robert J. Plowman of the Mid-Atlantic regional office of the National Archives and Records Administration and in the possession of that office, show that these individuals were admitted to bail on September 28, 1821. On October 12, 1821, they pleaded "not guilty" to a federal indictment for "piratically and feloniously endeavor[ing] to make a revolt" on board an American vessel "then lying at anchor on the sea near the city of Havana in Cuba . . . contrary to the act of Congress of the said United States in such case made and provided." On the same day, McFee was acquitted, and the government dropped the prosecution against Rose. *United States v. Rose*, M-987 (C.C.D. Pa. Oct. 21, 1821), *supra* note 16; *United States v. McFee*, M-987 (C.C.D. Pa. Oct. 21, 1821), *supra* note 16.

205. *See Oaks*, *supra* note 155, at 251-52.

206. Having been unable to locate any Pennsylvania statute respecting habeas corpus passed in 1780, I conclude that the reference to one in the petition of Rose and McFee, *supra* note 204, is erroneous. Rather, both that petition and the one filed by John Thomas, *id.*, seem to be bottomed upon Pennsylvania's Act for the Better Securing Personal Liberty, and Preventing Wrongful Imprisonments, passed February 18, 1785. 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 275 (1810).

207. *See Act for the Better Securing Personal Liberty, and Preventing Wrongful Imprisonments*, *supra* note 206, § I. It is, however, unclear what advantage the peti-

Further historical research into the degree of state law powers exercised by the federal courts is plainly called for. We do know that, from the beginning, procedures in the lower federal courts have been a confusing blend of independently federal and state-derived practices.<sup>208</sup> There is, moreover, extensive

tioners in the cases described *supra* note 204 might have hoped to obtain from state as opposed to federal law. As they were being held on federal criminal charges, they were plainly within the reach of Section 14 on any reading. Quite possibly, they were simply copying a state court form.

208. Section 17 of the Judiciary Act, enacted on September 24, 1789, provided that "all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." First Judiciary Act, ch. 20, § 17, 1 Stat. 73, 83 (1789).

Section 2 of the Process Act, enacted five days later, on September 29, 1789, provided that:

until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.

An Act to Regulate Processes in the Courts of the United States, ch. 21, § 2, 1 Stat. 93 (1789). For reasons having nothing to do with matters of civil procedure, this statute was very controversial and was several times extended on a temporary basis. See Freedman, *supra* note 70, at 18-19 & n.34.

Eventually, the situation was stabilized, if not clarified, by the Act of May 8, 1792, which provided,

That the forms of writs, . . . except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act [of September 29, 1789] . . . except so far as may have been provided for by [the Judiciary Act], subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.

An Act Providing for Regulating Processes in the Courts of the United States, ch. 36, § 2, 1 Stat. 275 (1792).

The conformity thus called for in actions at law was a static conformity. The state practice as of September 29, 1789, was to be followed, regardless of changes that the states might thereafter have made. Further the conformity statute made no provision for states subsequently admitted to the union; in those states the federal court could follow whatever procedure it chose. The rule-making power, though utilized in admiralty and equity, was not employed in actions at law, where the Court considered it its duty "to yield rather than encroach" upon state practice.

CHARLES ALLAN WRIGHT, FEDERAL COURTS 424 (5th ed. 1994) (quoting *Fullerton v. Bank of United States*, 26 U.S. (4 Pet.) 604, 614 (1828)).

In response to the various difficulties thus encountered, Congress provided by

evidence that, in the period of interest to us, the lower federal courts had adopted state forms of practice on a widespread basis.<sup>209</sup> And it makes sense to speculate that a court in the habeas context might consider its state law powers additive of its federal ones.<sup>210</sup> Given the ample judicial freedom available in an utterly ambiguous legal situation, a court might well consider itself authorized to rely on state law to justify the issuance of a writ calling for production of a prisoner, even if the ultimate substantive decision as to whether the commitment was legal would necessarily be controlled by federal law.<sup>211</sup>

But proof of this proposition would depend on finding cases in which explicit reliance was had on state law to justify the issuance of writs unauthorized (or thought to be unauthorized)

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statute in 1828 that "procedure in the federal courts sitting in the original states was still to conform to the 1789 state procedure, while procedure in states subsequently admitted was to conform to the 1828 state procedure." *Id.* In other respects, notably the grant of power to the courts to make "such alterations and additions as the said courts respectively of the United States shall, in their discretion, deem expedient," the language of the 1792 Act remained unchanged. *See An Act Further to Regulate Processes in the Courts of the United States*, ch. 68, § 1, 4 Stat. 281 (1828).

209. *See, e.g.*, Rules of the United States Circuit Court for the District of Georgia, M-1184, roll 1 (May 28, 1790), *supra* note 16 (providing that forms of practice shall be the same in law and equity cases as in the state superior court; in equity proceedings, "any one of the Judges of the Court, may in the Vacation make such Rules and Orders in any matter or cause therein, as shall be necessary to prepare the same for a final hearing"); Minutes of United States Circuit Court for the District of Maryland, M-931, roll 1 (May 8, 1790), *supra* note 16 (ordering that "law proceedings of this Court be conducted according to the usage and practice of the General Court of this State, until further Order"); Rules of the United States District Court for the Southern District of New York, M-886, roll 1 (Feb. 4, 1800), *supra* note 16 (stating that "in all cases not specially provided for by Rules of this Court, the Rules established for Regulating the Practice in the Supreme Court of the State, so far as the same are applicable, [shall] be Rules for Regulating Practice in this Court").

210. In dealing with the related problem of the extent to which, notwithstanding the rule of static conformity, *see supra* note 208, later state acts ameliorating imprisonment for debt applied in federal courts, the Supreme Court seems to have concluded that the federal scheme implicitly allowed federal courts and judges to exercise the additional discharge powers conferred by state statutes where they could "be executed just as conveniently and properly, by the federal courts and judges, as they can be by the state courts or judges." *Duncan v. Darst*, 42 U.S. (1 How.) 301, 310 (1843).

211. It is possible that *United States v. Desfontes & Gaillard*, M-1172, roll 2 (C.C.S.D. Ga., Feb. 12, 1830), *supra* note 16, fits this description. *See infra* text accompanying notes 226-29 (describing case).

by Section 14. And such cases remain to be found.

## V. SOME SUGGESTIVE EARLY COURT DECISIONS

Research has revealed that early jurists did in fact sometimes act as though only individual judges—and not courts—were bound by the proviso. My survey<sup>212</sup> has turned up three contemporary judicial decisions in which overriding federal interests led courts to the issuance of the writ to state custodians and in two instances to the actual discharge of the petitioners.

Concededly, the cases are neither sufficiently numerous nor sufficiently unambiguous to carry alone the burden of supporting the thesis of this Article. That is hardly surprising. After all, *Ex parte Bollman* was the law from an early date. Moreover, the substantive federal rights that state prisoners might have had to vindicate in federal court were few.<sup>213</sup> And, finally, there is almost surely additional evidence to be found in the unpublished archival records of individual federal courts that have not yet been reviewed.

Nonetheless, the three cases presented here are at least suggestive. They not only provide examples of courts acting in ways that would not have occurred if the proviso in Section 14 “extends to the whole section”<sup>214</sup> but, to the extent that their rationales can be inferred, seemingly doing so on the basis of theories that comport with the ones presented so far.<sup>215</sup>

One of the better documented cases is that of George Daze

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212. See *supra* note 16.

213. This is particularly so because of the limitations on habeas corpus for all prisoners, whether state or federal, after conviction in criminal cases. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 207-09 (1830); LIEBMAN & HERTZ, *supra* note 1, § 2.4d, at 43-46.

214. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 98.

215. The use in the text of the word “seemingly” arises from another limitation on our available information; in virtually all cases, the surviving records of even those cases that can be identified as being of interest are frustratingly fragmentary. Thus, we are at present left to speculate about matters that may yet be illuminated in the future by historical research that is not only wider, i.e., seeks to examine the records of additional courts, but deeper, i.e., seeks to learn more about individual cases through research into such further sources as newspaper accounts and individuals’ diaries or letters.

(also referred to as George Stouts).<sup>216</sup> In May 1814, he presented to United States District Court for the Eastern District of Pennsylvania a petition setting forth that he was "an enlisted seaman in the service of the United States," currently "in confinement in the debtors apartment of the City and County of Philadelphia by virtue of an execution" issued on a state court judgment for debt; that "by the provisions of an Act of Congress approved the 11th of July 1798,"<sup>217</sup> he was "exempted from all personal arrests for any debt or contract";<sup>218</sup> and praying for "a Habeas Corpus directed to the keeper of the debtors apartment that he may be discharged according to Law."<sup>219</sup>

Of course, if the *Ex parte Bollman* reading of Section 14 were correct, the court would have had no power to grant this petition, since the petitioner did not fall within the terms of the proviso. In fact, the court promptly issued the requested writ, requiring the keeper of the debtors apartment to produce Mr. Daze "forthwith."<sup>220</sup>

It appearing from the keeper's return to the writ that the petitioner had correctly set forth the cause of his detention, the court rendered an endorsement order the same day, May 27, 1814: "Discharged. The Act of Congress forbids arrests of persons lawfully engaged in *naval* Service."<sup>221</sup>

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216. See *Daze v. The Keeper of the Debtors Apartment*, M-987 (D. Pa., May 22, 1814), *supra* note 16.

217. See Act of July 11, 1798, ch. 72, § 5. The statute provides:

[T]he non-commissioned officers, musicians, seamen and marines, who are or shall be enlisted into the service of the United States; and the non-commissioned officers and musicians, who are or shall be enlisted into the army of the United States, shall be, and they are hereby exempted, during their term of service, from all personal arrests for any debt or contract.

218. Petition of George Daze, *Daze*, M-987, *supra* note 16.

219. *Id.*

220. The court thereby implicitly decided not only that it was not restricted by the proviso to Section 14, but also that the writ extended to civil confinements, a question that had been left unresolved in *Ex parte Wilson*, 10 U.S. (6 Cranch) 52 (1810), a case in which the opinion reads in full: "Marshall, C.J., after consultation with the other judges, stated that the court was not satisfied that a *habeas corpus* is the proper remedy, in a case of arrest under a civil process. Habeas corpus refused." In *Ex parte Randolph*, 20 F. Cas. 242, 252-53 (C.C.D. Va. 1833) (No. 11,558), District Judge Barbour reviewed the cases and decided that the writ did extend to such confinements; sitting with him as Circuit Justice, Chief Justice Marshall expressed his concurrence. See *Ex parte Randolph*, 20 F. Cas. at 257.

221. The survey described *supra* note 16 turned up two other cases that appear to have involved similar facts, although the documentation is less clear.

Nor was it necessary that the federal interest be expressed in a statute. In our second case, arising in the Circuit Court for the Southern District of New York in 1800, Comfort Sands was subpoenaed to appear as a witness.<sup>222</sup> “[I]n coming from his place of residence on Long Island to the City of New York to attend as a Witness in consequence of the service of the Subpoena aforesaid,” he was “in contempt of the authority of the Court and in breach of the privileges of the said Witness taken and arrested by the Sheriff of the City and County of New York and is now in his custody upon a writ” issued by the state courts to enforce a civil judgment.<sup>223</sup> On being so advised, the court peremptorily ordered that because “the arrest of the said Comfort Sands upon the process aforesaid being a direct breach of his privileges as a witness is illegal . . . he . . . be discharged forthwith from the custody of the said Sheriff.”<sup>224</sup>

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In April 1832, Samuel Miller filed a petition on behalf of George Richards. *Petition of Samuel Miller, for George Richards, M-987 (E.D. Pa. Apr. 26, 1832), supra* note 16. It alleged that the latter was a serving United States marine who had been arrested on a civil process for debt arising out of a state court action and was in custody of the keeper of the Philadelphia debtor’s apartment and sought his release pursuant to the same Act of Congress as in the *Daze* case just described in the text. The District Court for the Eastern District of Pennsylvania issued a writ requiring the keeper to produce Richards at a hearing, but the court records have not yielded an order discharging the prisoner from custody. Thus, there is no proof—only a most plausible guess—that one was in fact issued.

Similarly, a May 9, 1822 case from the Circuit Court for the District of Maryland reads in full as follows:

James D. Snow	)	
v.	)	Habeas Corpus
William Brown	)	
William Handell	)	

Discharged by the Court from the cause of action upon which they were detained in prison, and delivered to the custody of Captain James D. Snow.

*Snow v. Brown, M-931, roll 1, frame 346 (D. Md. Cir. May 9, 1822), supra* note 16.

Here, although the court’s action is clear, we must supply, first, the inference (based upon their release to a Captain who had petitioned on their behalf) that the prisoners were military men and, second, the inference (based upon the use of the phrase “cause of action”) that they were being held on state civil process.

222. The underlying litigation was between Cavalier Jouet and Thomas Jones. *See Jouet v. Jones, M-854, roll 1, frame 91 (C.C.S.D.N.Y. Apr. 7, 1800), supra* note 16.

223. *Jouet, M-854, supra* note 16.

224. *Id.* On June 22, 1811, Joseph Cobb made similar allegations to the Circuit Court for West Tennessee, viz., that while attending court as a witness, he had been

It is implicit in this order that the court (which included Justice Bushrod Washington, who later sat on *Ex parte Bollman*) did not consider itself restricted by the proviso to Section 14, since the decree was that Sands be discharged from state custody, not that he be brought into federal court to testify. Rather, the court plainly drew its conception of itself and its privileges entirely from the common law.<sup>225</sup>

The third case came before the United States District Court for the Southern District of Georgia on February 12, 1830 under the caption *United States v. Desfontes & Gaillard*.<sup>226</sup> As reported by the District Judge:

The French Counsel petitioned for and obtained a Habeas Corpus to bring before me the prisoners alleging that by the treaty between the Governments of France and America<sup>227</sup> they ought to

arrested by the Sheriff of Davidson County "by virtue of a writ of *capias ad respondendum* issued from the Circuit Court of Davidson County at the Suit of Jenkin Whitesides against him in alleged trespassing." Minute Entry (Cobb), M-1214, roll 1 (W. Tenn. Cir. June 22, 1811), *supra* note 16. The court granted Cobb a rule directing the Sheriff to show cause why Cobb should not be discharged. Minute Entry (Cobb), M-1214, *supra* note 16. However, on hearing argument on July 17, 1811, the court "ordered that the said rule be discharged." *Id.* The reason for this disposition does not appear. Possibly, however, the court found Cobb's allegations to be factually unsubstantiated. If it had believed itself without jurisdiction to order his release, it presumably would not have granted the rule in the first place. *Cf. Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison."); *United States v. Lawrence*, 26 F. Cas. 887, 891 (C.C.D.C. 1835) (No. 15,577) (Cranch, C.J.) ("[B]eing perfectly satisfied that I have no authority to discharge the prisoner upon the alleged ground of insanity, if it were established; and that if brought up by habeas corpus he must be immediately remanded, it seems to me that it would be useless to issue the writ, and that it is my duty to refuse it."); *Ex parte Davis*, 7 F. Cas. 45, 46 (N.D.N.Y. 1851) (No. 3,613) ("[I]t is an obvious as well as an established rule that when, upon an application for a habeas corpus, it appears that it would be fruitless to the petitioner if allowed, it is not to be granted.").

225. For the reasons indicated *supra* note 94, this use of common law powers, although inconsistent with an interpretation of the proviso to Section 14 as applying to the whole section, might well be consistent with *Ex parte Bollman*.

226. M-1172, roll 2, *supra* note 16.

227. The treaty in question is the Convention of Navigation and Commerce, June 24, 1822, U.S.-Fr., 8 Stat. 278. Article 6 authorizes the consular officers of each country to apply "to the Courts, Judges and Officers competent" in local ports for the return of deserting sailors "in order to send them back and transport them out of the country" and provides that, upon proof that the wanted "men were part of said crews . . . delivery shall not be refused." *Id.*

be delivered up as deserters. The persons named in the Writ were this day brought before me with the cause of their arrest and detention. By this return it appears that Gaillard was assaulted and beat by Desfontes on board of the Venus a French Merchant Vessel now in this Port and for which offence the one was committed to take his trial at the ensuing Term of the Court of the State of Georgia having cognizance of the offence and the other as the prosecutor and witness according to the State Laws, both being unable or unwilling to give bail for their appearance in the State Court. Mr. Leake for the Counsel of France now moves for their discharge. These prisoners do not appear to be deserters. They are prisoners of the State of Georgia charged with a violation of the law of that State. I have carefully examined the Treaty between the American and French governments and the Act of Congress produced in argument<sup>228</sup> and I am satisfied that I have not the power to discharge the Prisoners. Let them both be returned to the prison from whence they were brought.<sup>229</sup>

Although the statement "I have not the power to discharge the Prisoners" might at first glance suggest otherwise, the most reasonable reading of this ruling is as one on the merits, i.e., that the prisoners are not deserters under the treaty and for that reason not entitled to their discharge, rather than one of jurisdiction, i.e., that whether or not they fall within the terms of the treaty, the court has no power to release them. After all, if the latter meaning were intended, there would have been no reason to discuss the terms of the treaty at all. However, the fact that the court considered itself free to examine the merits necessarily implies that it was not constrained by the proviso to Section 14, but would, if it had believed the terms of the treaty so required, have issued an order releasing the prisoners from state custody. Although the court's allowance of a writ of habeas corpus to bring the sailors into court to determine their status

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228. Almost surely, this was the Act of May 4, 1826, 4 Stat. 160, which was passed to implement the treaty described *supra* note 227. Tracking the treaty's terms, the statute provided that "on the application of a consul or vice consul of France, made in writing, stating that the person therein named has deserted from a public or private vessel of France" and on proof thereof after a hearing, "the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice consul, to be sent back to the dominions of France." Act of May 4, 1826, 4 Stat. 160.

229. *Desfontes & Gaillard*, M-1172, roll 2, *supra* note 16.

was not inconsistent with Section 14, the grant of such an order of discharge would have been.

In short, all three cases show state prisoners successfully invoking federal habeas corpus jurisdiction—and in two of them going on to success on the merits—in circumstances under which the federal courts could not have proceeded if, as *Ex parte Bollman* stated, they were bound by the limitations of the proviso to Section 14. This adds some support to the idea that it was not in fact the courts, but only their individual judges, who were restricted, either because, as a matter of statutory interpretation, the proviso had nothing to do with courts, or because courts were thought to have additional powers independent of federal statute that enabled them to grant the writ to state prisoners regardless of the terms of the Judiciary Act.

## VI. IMPLICATIONS

### A. So What?

One could certainly argue that, even if the thesis of this Article is correct, it is of purely academic interest. To be sure, the “fact” that Congress effectually withheld the federal writ from state prisoners in 1789 has been a premise of substantially all judicial and academic writing on the Suspension Clause.<sup>230</sup> On the other hand, the statutory grant of jurisdiction has been unambiguous since 1867,<sup>231</sup> and even before then, courts sometimes managed to solve the Section 14 problem.<sup>232</sup>

Most critically, the Court in *Felker*, even while repeating the erroneous statement that state prisoners had no right to the federal writ under Section 14,<sup>233</sup> assumed “that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”<sup>234</sup> This assumption is an en-

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230. See *supra* notes 5-6 and accompanying text.

231. See *supra* text accompanying note 19.

232. See *supra* Part V.

233. See *Felker v. Turpin*, 581 U.S. 651, 658, 664 (1996).

234. *Felker*, 581 U.S. at 664; see also *Schlup v. Delo*, 513 U.S. 298, 341 (1994) (Scalia, J., dissenting) (observing that the Suspension Clause constrains the Court's power to curtail federal habeas corpus review of state convictions); *Alexander v. Keane*, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) (discussing the assumption in *Felker*);

tirely sound one, and for reasons having nothing to do with the field of history.<sup>235</sup> Indeed, legal theories too closely tied to current scholarship—whether the field be eugenics,<sup>236</sup> economics,<sup>237</sup> child psychology,<sup>238</sup> or history<sup>239</sup>—may suffer for it.<sup>240</sup>

Still, to the extent that legal arguments are going to be based on history, it does seem to be reasonable to insist that “they get the facts right.”<sup>241</sup> In the case of the Suspension Clause, the Justices are more likely to reach an appropriate interpretation if they are aware that their *Felker v. Turpin* assumption is not based on a frail, lawyerly “arguendo,” but is, rather, solidly grounded in a robust historical record.

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*supra* text accompanying note 12.

235. See LIEBMAN & HERTZ, *supra* note 1, § 7.2d; Steiker, *supra* note 6, at 871-74; Mello & Duffy, *supra* note 34, at 456; see also *Rosa v. Senkowski*, No. 97 Civ. 2468 (RWS), 1997 WL 436484, at \*10-11 (S.D.N.Y. Aug. 1, 1997) (adopting this view), *aff'd on other grounds*, 148 F.3d 134 (2d Cir. 1998); cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) (arguing that “[i]t can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers,” but acknowledging that due process requires some protections for habeas rights).

236. See *Buck v. Bell*, 274 U.S. 200, 205-07 (1927). Modern scholarship respecting this case is summarized in G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 404-08 (1993). See generally Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 66-67 (1998).

237. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

238. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 & n.11 (1954). See generally Richard Sobel, *A Colloquy with Jack Greenberg about Brown: Experiences and Reflections*, 14 CONST. COMMENTARY 347, 354-57 (1997).

239. Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 n.5 (1938), with *RITZ*, *supra* note 129, at 165-67.

240. Cf. Solveig Singleton, *Reviving A First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 320-21 (1999) (describing *Buchanan v. Warley*, 245 U.S. 60 (1917), which invalidated a Kentucky law segregating residential neighborhoods notwithstanding “extensive and well-documented briefs . . . collecting the best evidence of the day from social scientists that segregation was healthy”).

241. Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934 (1996); see Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 117 n.94 (1997) (commenting on this passage). See generally Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 490-95 (1996); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997).

### *B. Conclusion*

Chief Justice Marshall erred in *Ex parte Bollman* both in reading Section 14 of the Judiciary Act of 1789 as not granting the federal courts the authority to free state prisoners by habeas corpus and in concluding from this supposed absence of statutory authorization that the courts lacked the power. Modern courts and scholars should pursue Suspension Clause analyses unbeguiled by his dicta.