doi:10.1017/S0003055413000117

Cold Case File: Indictable Acts and Officer Accountability in *Marbury v. Madison*

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Starting from the position that officer accountability is a core value of American constitutionalism, this article reassesses Marbury v. Madison *in light of the indictable acts connected to the nondelivery of Marbury's commission. First, it reads Chief Justice Marshall's opinion against the background of personal and political hostility among the principals, including between Marbury and President Jefferson. Second, it identifies avenues of further redress open to Marbury before and after the Supreme Court's refusal of the mandamus order, and it considers why they were not pursued. Finally, having identified alternative procedural traditions on which Marshall could have drawn, and reviewed decisions by state and federal judges in analogous suits against officers, it concludes that* Marbury's *deepest contribution was to elevate the principle of jurisdiction over the imperative of remedy in constitutional decision making.*

If members of the APSA section on Law and Courts were polled as to which judicial decisions in American constitutional history belong in the cold case file of the U. S. Supreme Court, it is unlikely *Marbury* v. *Madison* would receive many votes. In the first place, the decision has hardly been forgotten; none has been so analyzed and taught to—well—death as that one. In the second place, cold cases are criminal matters; *Marbury* is remembered for its endorsement of judicial review, the issue that has overshadowed everything else in the case's marathon discussion. In the third place, a cold case file as such would seem at odds with constitutional history and with the history of the Supreme Court in particular. To the extent that it addresses crime, constitutional history narrates the changing rights of accused persons alongside those of other rights holders, within the same frame of institutions; in this setting, the Supreme Court has the function of finally settling, not shelving, disputes that arise.

This article does not so much disagree with the above as indicate its limitations. *Marbury* has indeed been analyzed up, down, and sideways in articles and books at all levels of scholarly sophistication; it has been meticulously assessed for its legal soundness, political motivations, and constitutional impact. A totally new argument at this stage might itself arouse reasonable suspicion. Nevertheless, there is one aspect in plain view that has been routinely brushed over but offers a fresh departure. We refer here to the result of the Court's decision for the immediate parties and what it portended as to the accountability of government officers for wrongdoing, including wrongdoing today. In particular we refer to the fact that William Marbury, appointed by President Adams to be a justice of the peace, left the proceedings without the office the Court agreed was rightfully his, whereas Madison, President Jefferson's secretary of state, who failed to deliver Marbury's commission in violation of what the Court said was his legal duty, emerged scot free.

Again, that this outcome is so well known as to hardly bear repeating merely proves our point. In part, its treatment as mere background can be attributed to its seeming lack of bearing on the leading interpretations of what *Marbury* decided and why. These range from the Chief Justice's extralegal motivations to the history of mandamus as a freestanding writ. But nowhere does the identity of the parties or the character of their actions critically shape the case's resolution or its long-run significance.[1] Our analysis, by contrast, begins with the persons and acts that brought about the litigation, changing the initial focus from Chief Justice Marshall to the plaintiff William Marbury, Secretary of State Madison, and, though unnamed in the suit, the officer who took Madison's place at the start of Jefferson's administration, Attorney General Levi Lincoln. This brings us to the view that *Marbury v. Madison* has nothing to do with crime. We will show that to the extent that Marbury and the other appointees had a rightful claim to their commissions, the non-delivery involved crimes, indictable both under federal and state statutes and at common law.[2] Moreover, behavior like Madison's—ignoring the Court's order to appear and show cause why a mandamus should not issue—was grounds for contempt, punishable by fine and imprisonment.

Of course, neither Madison nor anyone else was criminally charged. For one thing, the political

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The authors are grateful to Joyce Appleby, Richard Ellis, James Pfander, Stephen Skowronek, and reviewers and editors of the *APSR* for helpful comments on earlier drafts. All remaining errors are ours alone.

[1] For a selection, see Amar (1989); Graber (1995); Pfander (2001); and Weinberg (2003), which includes a useful review of other writings. A different reading of *Marbury's* significance is provided by Snowiss (1987) and Hamburger (2008). The best starting point for the older literature is Corwin (1914). Because we are comfortable with a philosophy of history that presumes compound motives and multiple effects, we do not comment directly on any of this work.

[2] There were originally four plaintiffs in the suit. The other three however, vanish from the case, and we, as have other commentators, ignore them.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

situation made it, so-to-speak, optional whether the mandamus order would be obeyed and uncertain that the stars would line up for an indictment. Republicans had made abuse of executive discretion a defining theme of their recent electoral victory, but Madison was one of their own, to say nothing of the new president himself. Federalists may have hesitated to harp on crime, especially common law crime, the legal status of which divided the nascent parties. But that does not gainsay crime's prominence in the *mise-en-scene* of Justice Marshall's opinion—which brings us to the final point raised earlier about the substance of constitutional history and the role of the Supreme Court.

Students of public law know the *Marbury* opinion's core routine by heart. Marbury had a right to his commission; under authority of Section 13, Judiciary Act 1789, the Court had jurisdiction to issue a writ of mandamus ordering the commission's delivery; but under the Constitution, Congress lacked jurisdiction to add writs of mandamus to the Court's original authority provided in Article III; therefore, Section 13 was invalid, and the Court had no jurisdiction to issue mandamus after all. An advanced recital would include Marshall's survey of the discretionary and ministerial boundaries that defined the jurisdictions of the officers involved, including his own as judge. Either way, with members of Congress and Justices of the Court enjoying immunity from suit for their actions, Marbury's quest for a remedy was at an end. Except possibly for an unusual order in taking up these questions, Chief Justice Marshall's opinion performs the preliminary ritual—abstract, technical, exacting—of the common-law court, in which the judge's authority to decide the case takes precedence above all else.

This logic of proceeding has worked as another "given," sometimes challenged for its particular application in this case, but not otherwise questioned. Indeed, outside the constitutional setting, it may have much to recommend it.[3] But redress for officer wrongdoing, and especially criminal wrongdoing, goes to the heart of the constitutional project. Literally as old as the first stirrings of Anglo-American constitutionalism, officers' crimes against citizens and against one another inspired its growth. Their remediation through the ordinary courts is the lifeblood of the rule of law, and wrongdoing by officers continues to set the stage for all constitutional grievances; disputes between private parties and among branches of government begin in identical fashion and must survive the same threshold tests as suits against cabinet members, police officers, and welfare workers. Not all claims against officers concern criminal wrongdoing, as Marbury's did, but many do; more precisely, many would, without damage to conventional definitions of criminality, were it not for a process of jurisdictionally inflected law in which officer accountability resembles nothing so much as a set of Russian dolls, one inside the other, jurisdiction within jurisdiction, right inside right, until a vanishing point is reached of "qualified" and even absolute immunity to remediation of any sort.

The priority *Marbury* affords jurisdiction separate from and at the expense of the remedy the decision concedes is deserved was not a foregone conclusion. The following account shows that Justice Marshall made his decision in the presence of an alternative method of proceeding, one of unexpected provenance, that eschewed this separation. Within this account, the element of officers' crimes is fundamental. Lawmakers of the new Republic were no more eager than their English ancestors to allow its officers to be charged with criminal acts except by its own volition; Congress early provided that the courts it established would hear indictments only when brought by federal prosecutors, and not by citizens, which was then the practice in several states. As had been the case in England for centuries, citizens' damage suits and other civil actions, including mandamus, were available, but their precise connection to other remedial actions was not yet settled.[4] Analyzing *Marbury* in light of this uncertainty displays its formative importance in a way that otherwise remains, as it were, filed away.

Our argument proceeds as follows. We begin by laying out the factual substance of the dispute, including the personal and political relationships among the principal actors and the criminal violations that motivate the case. These particulars also establish officer accountability for crime as *the* central issue in *the* hallmark opinion of American public law, quite before the owls of retrospection bestowed its hallowed status. From there, we indicate the various pathways through which Marbury might have pursued his cause; a degree of detail is necessary to demonstrate that the way was open, even favorable, to punitive actions after the Court's mandamus order. Attending to these pathways, including impeachment, exposes historical traces of a "conciliar" method of judging, rooted in monarchical forms, that is largely covered over today but was still visible in the institutions of the early nineteenth century. We proceed on this historical line to the origins of mandamus. Because our argument concerning Marbury's impact hinges on the "conciliar" alternative to common law, it too must be discussed in sufficient detail to establish its authenticity. Finally, we follow on the trail of not-*Marbury* jurisprudence through several other suits against public officers in the same era. These cases, on either side of Justice Marshall's opinion in 1803, are important evidence of the fluidity of the law concerning officer accountability when the Court decided the case.

It is only in the presence of intentionally injurious acts against persons and property—acts indictable as crimes—committed by the nation's highest officers that we arrive at the full promise of constitutionalism, as well as its protean instrument, judicial review. Enshrined in *Marbury*, patterning similar disputes in every precinct of government into the present day, its

[3] For a discussion of "the idea of jurisdiction," see Dane (1994, 22–44).

[4] Here our study dovetails with those that emphasize *Marbury*'s contribution to administrative law. See Merrill (2004) and Monaghan (1983).

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rendering of jurisdiction is the decision's deepest constitutional effect.

REEKING WITH BLOOD

When asked in the U.S. Supreme Court about events surrounding Marbury's suit for mandamus, Levi Lincoln "took the fifth": He declined to answer on the grounds that his testimony might serve to incriminate him (*Marbury* v. *Madison,* 5 U. S. 137 (1803)).[5] For the first three months of Jefferson's term, he acted as secretary of state for Madison, who stayed in Virginia on family business. Lincoln was no ordinary deputy or, for that matter, witness, but was attorney general of the United States, the nation's chief law enforcement officer and principal legal adviser to the president. Before beginning his legislative career as member of the Continental Congress and later the U.S. House, he was governor, lieutenant governor, and probate judge in Massachusetts. He had plenty of time before the *Marbury* hearing to think over implications of any evidence he might provide. Alongside its repeal of the 1801 Judiciary Act, Congress had postponed the next session of the Supreme Court until 14 months after the preliminary order was issued to Madison in December 1801.[6]

Lincoln would have been aware that there was more than one crime with which he might be charged. First, there was the fact of the commissions' nondelivery. The duty of delivering commissions to the appointees to federal office fell to the secretary of state; its intentional nonperformance was a crime at common law. "Where an officer neglects a duty incumbent upon him, either by common law or by statute, he is indictable for his offense" (Throop 1892, 814).[7] In this case, two of the designated appointees, one of them Marbury, had themselves come to the State Department asking for their commissions and were turned away empty-handed. Second, there was the matter of the physical state of the documents, which had not been seen since Lincoln's watch; their safekeeping was also the duty of the secretary of state. Destruction of official documents was a statutory crime under Maryland law, which, by Section 34 of the 1789 Judiciary Act, was applicable to federal causes heard in the courts of the District of Columbia.[8] Third, Lincoln may have been indictable under a statute of the first Congress that made it a federal crime to obstruct or resist the service of any legal order or process of the United States, "whatever" its nature.[9]

Lincoln was not a defendant in Marbury's suit. That party was Secretary of State James Madison, who, upon taking his oath in May 1801, became the officer in charge of departmental affairs. Madison too might have seen to the commissions' delivery and, if still undelivered, their safekeeping; not having accomplished either made him liable to the same criminal charges as Lincoln. Chief Justice Marshall may well have had this in mind when he remarked in his opinion that an officer's commission "may be accelerated or retarded by circumstances which can have no influence on the appointment" (160). Further, Madison had ignored the Court's preliminary mandamus to show cause why he should not be ordered to deliver the commission, and at the subsequent trial he failed to appear or even send anyone to represent him. These were acts of noncompliance traditionally punishable as contempt of court (Blackstone 1979, 111); moreover, they might have been the basis for indictment under a law of the first Congress that criminalized the avoidance of any writ or process of the federal courts—an offense punishable by a fine not exceeding $5,000, imprisonment not exceeding seven years, and whipping not exceeding 39 stripes.[10]

President Jefferson said the commissions were withheld upon his instructions; this was not to the Court, but years later, in a private letter. (Jefferson 1904–05, 1474). The calendar of his first meetings in office indicates he regarded the removal of objectionable court officers as a task of the highest priority (Ford 1904, 291–93). As President Washington's secretary of state, Jefferson had been a skilled craftsman of administration procedures; his present liability to judicial orders like mandamus, however, was still virgin territory. There is no clear record of Jefferson's views on presidential immunity before he became President, although the tenor of the Kentucky and Virginia Resolutions in 1798 was contrary to the idea that he would not be answerable to ordinary laws.[11] Chief Justice Marshall in *Marbury* agreed, as long as the acts in question were not "political" or discretionary acts. Commissions already signed and passed on by the president to the secretary of state for sealing and delivery, however, lay outside this protected zone: The appointees enjoyed rights that could not legally "be extinguished by executive authority" (167). That was the gravamen of the first section of the Court's decision.

It is interesting to ask why, from late in the nineteenth century when *Marbury* assumed its position as the keystone of American constitutionalism, the criminal aspects of the decision have been submerged (Cooley 1898; Thayer 1901).[12] One explanation may

[5] See William Cranch's report preceding the decision (there are no page numbers).

[6] Act of April 29, 1802, ch. 31, § 1, 2 Stat. 156.

[7] Also: "Every officer commits a misdemeanor who, in the exercise of or under color of exercising the duties of his office, does an illegal act or abuses any discretionary power with which he is invested by law, from an improper motive, the existence of which may be inferred from the nature of the act or from the circumstances of the case" (Throop 1892, 815). Among others, Throop cites the following English and American cases: *Rex* v. *Young*, 1 Burr. 557 (1758); *Rex* v. *Hann*, 3 Burr. 1716 (1765); *Rex* v. *Bembridge*, 3 Dougl. 327 (1783); and *State* v. *Justices of Lenoir County*, 11 N.C. 194 (1825).

[8] United States Statutes at Large, vol. 1, ch. 20. 1 Stat. 73; Laws of Maryland, Ch. XI, 1811, with citations to earlier provisions. Michael McConnell mentions Lincoln's invoking of the privilege against self-incrimination as one of the "oddities" of the trial and suggests it was the documents' destruction that worried him (McConnell 2009, 27).

[9] U. S. Statutes at Large, vol. 1, ch. 9, 2 Stat. 112, Sec. 22.

[10] Ibid., vol. 1, ch. 9, 2 Stat. 112, Sec. 15.

[11] Malone (1962, 400) writes that Jefferson, who was then vice president, believed he would be criminally charged under the Sedition Act were it known he was the Kentucky Resolution's author.

[12] At the time of the trial, Jefferson was said to "commit an act of direct violence on the most sacred right of private property" as the

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

be that crime is not readily associated with nonappointment to public office; with appointment, yes, but not its opposite. Yet for several hundred years, offices were legally treated as property, "vested" like land and other rights; appointments for "good behavior" were referred to regularly in court as "estates," unless otherwise specified, for life (Orren 1994; 2000) At the time of *Marbury,* it was a matter of legal controversy whether there might be circumstances justifying the abridgment of this form of property by legislatures. But that offices were subject to suits for trespass, ejectment, and other criminal injuries was not open to argument.[13]

A second explanation for why crime is downplayed may be the tendency among scholars to regard the office of Justice of the Peace, to which Marbury and the others were appointed, "a sorry little thing," hardly worth the trouble and expense of litigation, yet alone the special rigors of the criminal process (Bloch 2001, 625–26; O'Fallon 1991, 241). This characterization is sometimes offered to buttress the claim of ulterior purposes behind Marbury's bringing suit. In fact, the office was far from trivial. With his justice commission in hand, Marbury would have enjoyed the right to sit in the legislature Congress designed for the District of Columbia; been the chief law enforcement officer in his county for taxes, slaves, and general criminal offenses; been the authenticating officer for all deeds and affidavits; heard grand jury presentments and minor civil matters; appointed the members of the levy court; and filled sundry sensitive political and legal roles as the need arose. For each and every separate service he would have received a separate fee.[14]

Washington, Jefferson, Madison, George Wythe, George Mason—all had held the position; unlike most judicial offices, it did not require legal training. Marbury's biography, however, suggests additional reasons why he would have valued serving as a Justice of the Peace among all appointments. By now a man of considerable wealth, he had grown up the son of an impecunious tobacco farmer who, through hard times and alleged defects of character, lost a sizable inheritance from Marbury's grandfather, a self-made and respected planter with land holdings only slightly smaller than those of Maryland's largest proprietors.[15] The grandson, one of 11 children, made his way upward through a series of positions in state government where his record of honesty in office served him well. Beginning as clerk to the auditor general, in 1796 he was appointed agent for the state of Maryland, making him the principal tax collector and manager of Maryland's public debt. Grandfather Marbury had crowned his own successful career as Justice for his county. The appointment of his scion to the same post would complete the redemption of the family name.

A third explanation for why the criminal aspects of *Marbury* have been obscured is the attention paid, by those commentators who venture outside the strictly legal case, to political party conflict. Tempering an inclination toward an idealized view of the Founding Era, this perspective is sharpened by the place of the judiciary at the conflict's center. In fact, crime and punishment are never far below the surface of politics as usual. Not unlike today, activities that in the eyes of some constituted criminality—land speculation, slavery, trading with France—in the eyes of others were associated with high principle; the Sedition Act, joining freedom of speech and imprisonment, had been a self-inflicted wound to the Federalist Party. Political rhetoric was infused with themes of guilt and innocence. James Callender's pamphlet, *The Prospect before Us,* only one of the more notorious in the 1800 campaign, commends Jefferson as "unspotted by crime," and it portrays the Adams administration as a "tempest" of corruption and "malignant passions" and Adams himself as "reeking" with the blood of his victims. Jefferson praised Callender; President Adams had him imprisoned. On the night Jefferson was proclaimed president, Adams' supporters living in the federal district were advised to display lighted candles in their windows lest their property be attacked by the riotous mob· (J. M. Smith 1954, 161–62).[16]

There are direct links between this vituperative atmosphere and Marbury's suit for mandamus. One of the bitterest charges of corruption made against President Adams concerned his patronage policies—that he had installed "paper-jobbers" as ambassadors and judges and removed meritorious officeholders for no reason other than their disagreement with his own opinions. Taking these counts in order: William Marbury was nothing if not a "paper-jobber," his wealth and political contacts stemming from his success in overseeing government bond transactions, a commerce incidentally made more lucrative through the financial program of Alexander Hamilton, Jefferson's great rival. In that respect, Marbury was one of a large category of men whom the new president thought dangerous to the morals of the Republic. With respect to the second count, from the day of his inauguration, Jefferson repeatedly spoke of his own patronage policy as superior to that of his predecessor for its being based strictly on merit (Appleby 2003, 35–6). In that regard, the nondelivery of Marbury's commission was one of

first act of his administration (Warren 1923, 248) On the other side, Marshall was accused of "criminating" the executive branch (235).

[13] For a selection of relevant cases, see *Fulgham* v. *Lightfoot*, 5 Va. 250 (VA) (1791); *Respublica against William M'Lean esq*., 4 Yeates 399 (PA) (1807); and *Commonwealth against Samuel Fowler esq*., 10 Mass. 290 (MA) (1813). For suits against officers in the antebellum period, see Woolhandler (1987, fn. 87–193 and the accompanying text).

[14] One authority refers to the Justice of the Peace as "the most widely known local officer of that day." (Bundy 1902, 268).

[15] There is scant biographical information on Marbury other than Forte (1996); as a consequence we rely heavily on him for our reconstruction. However, our interpretation of Marbury's motives is altogether different from his.

[16] The "blood" talk did not begin or end in 1800. In the elections for U.S. Senate in 1788, for instance, Patrick Henry predicted "rivulets of blood would run throughout the land" should James Madison be chosen to represent Virginia (Ketcham 1971, 275; also see Howe 1967).

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a large category of acts for which Jefferson's enemies considered him the consummate hypocrite.

Events preceding Marbury's suit engaged both themes. A source of opposition to President Adams was his plan to turn the United States into an important naval power. Orchestrating the resistance from his place in the Senate was Vice President Jefferson, who thought the project hostile to France and a provocation to war. In addition to President Adams himself, an enthusiastic booster was Secretary of the Navy Benjamin Stoddert, another "paper-jobber," one of the largest private bond and land speculators in Maryland. Stoddert's business partner was Uriah Forrest, mayor and leader of the Federalist Party in Georgetown (at that time in Maryland) and President Adams' close friend. Both Stoddert and Forrest were incorporators of the Bank of Columbia, the federal district's most influential financial institution, from which group Adams would appoint six Justices of the Peace, including these two. Forrest had his own history with the vice president. Early in Adams' term, he disclosed to the president the contents of a private letter Jefferson wrote, then circulating in political circles, which was highly critical of the administration's policies and associates. Whether Jefferson was aware of the precise channel to Adams is unknown, but the communication of this information marked an abrupt and permanent cooling of relations between the two.

Marbury was Forrest's protégé: His family lived in a house Forrest owned, he was Forrest's private broker, and Forrest arranged for Marbury to sit on the board of the bank. In 1797, shortly before Stoddert became secretary of the navy, Marbury loaned him a large sum, made necessary by the collapse in the price of local real estate. Once in office, Stoddert appointed Marbury a deputy, with the job of supervising the construction of the Washington Naval Yard and one of several planned 74-gun warships. These projects were plagued by delays, cost overruns, and noisy feuding with contractors (one involving another of the original *Marbury* plaintiffs, Virginian Robert Hooe) and were loudly condemned in Congress.[17] The airing of these problems reached a high pitch in the public press during the same weeks that Adams' commissions to Justice of the Peace were prepared, and it can be safely assumed that Jefferson monitored events as they unfolded.

Jefferson's reasons for animosity toward Marbury, however, went further. Before the election of 1800, Maryland Federalists, aiming to secure the state's support for Adams, embraced the plan of selecting presidential electors by the state legislature rather than by the existing method of popular vote. Marbury joined a cabal to induce the withdrawal of a Federalist candidate unwilling to sign onto this plan; another man in the same race was Marbury's cousin. In the end, the candidate (who went ahead and ran, but on the Republican platform), the Maryland Federalist party, and the electoral plan were all defeated, and the even division of electors proved critical to Jefferson's success. The plot, complete with the claim of a job offer in Adams' second administration to the recalcitrant, was reported in the newspapers. But again, Jefferson of all citizens would not have needed to learn about it there. Throughout the campaign, while gesturing at the aloofness then appropriate in a presidential aspirant, his hands-on mastery of every local political detail, which caused Federalist editorial writers to nickname him "the Chief Juggler" (J. F. Simon 2002, 108), was furiously at work behind the scenes on his own behalf.

There is no record that Jefferson ever spoke publically about the *Marbury* decision or its namesake. But in 1804, at the end of his first term as president, he wrote Abigail Adams saying that the only time that her husband had given him a "moment's personal displeasure" was when he chose his last appointments from among "my most ardent enemies."[18]

WHAT THE CHIEF JUSTICE KNEW

It can be said with fair certainty that this "ardent enemies" list included William Marbury. Given the tentative, individualistic condition of party alliances at the time, the divide between personal and political enemies was tissue thin. The law on the delivery of commissions, in contrast, was boldly drawn. Intentional failure to perform a legal duty, or to instruct its nonperformance, was both a statutory and a common law crime, whether personal or political motives were at work. Where personal feelings toward Marbury, even if grounded in politics, made a difference legally was in the qualifier, "intentional." Intent is the earmark of the criminal act; the law allowed for legitimate excuses.[19] For instance, Jefferson later said he did not believe appointees to five-year terms such as Justices of the Peace enjoyed the same legal protection against removal during their tenure as did appointees to positions granted for "good behavior" (J. F. Simon 2002, 130). The strength of this justification would necessarily be weakened in the face of evidence that Madison or Jefferson acted from motives of personal or political retribution. To the extent that Marbury's injury was due to animus or a desire to settle old scores and not to uphold principle—even if principle associated with only one party—this justification would be further weakened.

The mandamus trial was not a criminal trial. Mandamus was a writ designed to enforce a separate rule that an officer had disobeyed. Here the inquiry was into the legal obligations of the secretary of state and into Marbury's own rights in the instance of an appointment for term, signed by the president. However, the reasons for the particular acts connected to the nondelivery adduced at the hearing would be evidence in any prosecutions that might occur subsequently. When Levi Lincoln called up his Fifth Amendment rights, neither

[17] The scandal resulted in an investigation directed by Albert Gallatin of Pennsylvania, leader of the House Republicans and soon to be named Jefferson's secretary of the treasury, in which position he would promptly move to mothball some of the navy's ships (Malone 1970, 102–3, 263).

[18] Thomas Jefferson to Abigail Adams, June 13, 1804. The Thomas Jefferson Papers, Series 1, General Correspondence.

[19] See n. 2; contra, see Woolhandler (1987, 414–22).

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Marbury's attorney Charles Lee nor Chief Justice Marshall said anything to dissuade him. Lee agreed that the attorney general was not bound to answer what might be incriminating questions; he conceded that the other reason Lincoln gave for not answering questions—that as acting secretary he was in a confidential relation with the president—was also valid, as long as this description did not extend to duties imposed on him by law. Marshall, too, said that Lincoln was not legally bound to incriminate himself; after agreeing to Lincoln's request that the questions be put in writing, however, the Chief Justice ruled that what persons other than Madison might have done with the documents was not relevant to "the present cause," as if anticipating another suit in the future (5 U.S. 137; Cranch).

It was not necessary for Marshall or, for that matter, Lee, to hear evidence that Lincoln might have given for them to know the longer narrative surrounding the dispute at bar. As members of Adams' cabinet, Lee attorney general and Marshall secretary of state, they had witnessed firsthand the ardors and debacles surrounding the naval buildup. Close friends, both of them Jefferson's distant cousins, they had a history of political sparring with Jefferson and Madison in Virginia, home state to all four. Lee had recently described Jefferson as stealthily moving "stone by stone" to dismantle Washington's edifice (Haskins 1981, 166). Lee's brother, Henry "Lighthorse" Lee, was another of Jefferson's potent adversaries, as well as Revolutionary War hero, Virginia's governor, congressman, and confidante of George Washington. When Charles was appointed attorney general late in Washington's term, Madison wrote Jefferson, "Through what official interstice can a ray of republican truths now penetrate to the P?" As for Henry, Jefferson described him as a "miserable tergiversator" for half-truths told Washington that threatened to poison their relations (Malone 1962, 263, 269).

Marshall's hostile relations with the third president are well documented. Suffice it to say that he never hid or changed his belief that Jefferson was an immoral and dangerous man whose political character compared unfavorably with Aaron Burr's (Newmyer 2001, 148; J. F. Simon 2002, 130). It is often noted that Marshall's own dereliction as secretary of state before the changeover in administrations began the saga of nondelivery. Less appreciated perhaps is that Marshall would likely have known the names of the appointees, which included his brother, James Marshall, in advance and be fully aware of the displeasure they would cause the president. He was also acquainted well enough with Madison to be of the opinion that neither he nor anyone acting on his behalf would withhold officers' commissions without Jefferson's instruction, nor would they have ignored the Court's order to show cause except on that basis. It is possible that Madison's absence in Virginia during the critical weeks of 1801 was viewed as more than coincidence; he had a reputation for timidity (Brant 1952, 856–57). Marshall had once admired Madison for his intellect and his advocacy of the nationalist cause; in 1788 he had worked, unsuccessfully, for his selection as U.S. senator. But when shortly afterward Madison experienced a Republican awakening, Marshall and his circle attributed it to Jefferson's corrupting influence.[20]

From there, the two were passionately opposed—on neutrality, on the diplomatic debacle in France in which Marshall was an envoy, and on most other policies. Marshall, in the U.S. House in 1798, voted against the Sedition Act; but when the Virginia Resolution—written by Madison and aimed at arresting the "evil" of that statute—passed the state legislature, Marshall, though not a member, prepared the minority's response.[21] Afterward he wrote to Washington, assuring him that if the ensuing turmoil had not been caused by the Sedition Act, it would have been something else: "There are men who will hold power by any means rather than not hold it; and who would prefer a dissolution of the union to a continuance of an administration not of their own party" (Beveridge 1916, 407). Madison returned the favor, seeing Marshall as corrupt—a tool of Virginia's "monied interests" and a recipient of favors from the Bank of the United States; such charges were known to and declared "malignant" by the Chief Justice (Ibid., 417).

None of these separate details are as important as the fact that the picture as a whole was known to the entire dramatis personae of the *Marbury* courtroom, both the assembled and the called. Moreover, Jefferson, Madison, and likely Lincoln knew that the other principals—and most especially Marshall—knew it all in full, knew of its criminal potential, and also knew that Marshall knew that they knew he knew. Jefferson had always been profoundly wary of his kinsman for what he considered to be his promotion of English ways; in 1800 he wrote, "Nothing should be spared to eradicate this spirit of Marshallism" (Warren 1923, 182). His distrust was not allayed when, as the House made its final choice between Burr and himself as president, Marshall gave as his legal opinion that Congress could appoint someone else altogether. During Burr's trial, Jefferson feared Marshall would have him arrested for failing to answer a subpoena to appear before the District Court in Richmond (Weinberg 2003, n. 157, 158). In that proceeding, the president was summoned as a witness; in the mandamus case, he had instructed the secretary of state to violate a legal duty and perhaps to commit other crimes, including disobedience of the Court's orders.

What Marshall knew gives his opinion in *Marbury* its distinctive color. This is less the scolding so frequently observed—though scolding is there: the president "cannot on his discretion sport away the vested rights of others" (166)—than the taunting insinuation. The

[20] The Chief Justice's ever sympathetic biographer, Albert Jeremiah Beveridge, remarks how Madison entered into the House of Representatives in 1789 "with opinions much subdued and his whole being made pliant for the wizard who so soon was to invoke his spell over that master mind" (Beveridge 1916, 50).

[21] Madison's authorship of the Resolution was not publically acknowledged until 1809 and was known to a certainty only by a handful of party insiders. His travel to Richmond, presumably to write the Resolution and as party leader urge its adoption, was an open secret.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

Supreme Court intermeddle with the president's prerogatives?—"An extravagance, so absurd and excessive could not have been entertained for a moment" (170). The opinion distinguishes between executive prerogatives, acts that are under the Constitution entirely at the president's discretion, and other duties that "perhaps" cannot be legally refused, which Marshall demonstrates illegally were. Marshall explains that the English king cannot be sued at common law for personal wrongs but only for wrongs to property—in other words, like that done to Marbury—because property crimes occur through the actions of other persons, "by whom the king has been deceived and induced to do a temporary injustice" (165). Surely no such deception occurred in this case: Delivery of the commission is something "the President cannot lawfully forbid, and therefore is never presumed to have forbidden" (171). Marshall nevertheless casts a net wide enough to snare the culprit-in-chief: It is "the nature of the thing to be done" (170) that is at issue, not the officer to whom the mandamus is directed.[22]

In a letter he wrote to Justice William Johnson the following year, Jefferson gave his own interpretation of Marshall's purpose: "The object was clearly to instruct any other court having the jurisdiction, what they should do if Marbury should apply to them."[23] This wording would seem to suggest another writ of mandamus. At the time, except for the court in the District of Columbia, the authority of the lower federal courts to issue a mandamus was unclear; to that extent the opinion in *Marbury* paved the way by identifying the required federal question (Pfander 2001). It also prepared the ground for a lower court to hold that a deprivation of property, even property in federal office, arose only at state law. Moreover, should a second mandamus issue—perhaps even issue, as Marshall suggests, from the Supreme Court itself in aid of an appeal of a related issue below—and the order be disobeyed, then the pertinence of the statute of the First Congress, making it a crime to avoid an order of a federal court, could not itself be avoided.

But if this was all that was in the air—if what was contemplated by the principals was only a mandamus by an appropriate court, even one not expected to be obeyed—it would not have made sense for Attorney General Lincoln to fear criminal indictment; nothing that transpired while he was acting secretary of state would make him guilty of avoiding a judicial order issued long afterward. It was Charles Lee who raised the topic of subsequent prosecution in the core of his argument about whether a mandamus writ might be served on a secretary of state. Whereas Marbury could recover his office only by means of mandamus, should an officer fail the public by not performing his duties under law, he "is liable to indictment. A prosecution of this kind might be the means of punishing the officer" (Cranch). Marshall's opinion does not contradict Lee on either point, nor does he ignore his analysis. Indeed, he adds—arguably, reaches to add—that the common law action of detinue, a civil suit by which damages are sought for injuries caused by deprivation of an object of value, was unavailable to Marbury; the monetary worth of an office "not to be sold is incapable of being ascertained" (173).

Marshall concludes, with Lee, that Marbury has a right "to the office itself, or to nothing" (ibid.). Given that a criminal indictment in federal court would be at a prosecutor's discretion, in the name of the public and not as an outgrowth of Marbury's right, this formulation aligns with the care taken throughout the opinion not to preclude future actions against Madison or others, including Jefferson. For instance, the Chief Justice asks whether there is anything about the case that "shall exempt it from legal investigation *or* exclude the injured party from legal redress" (163 [emphasis added]); they are not one and the same. Repeatedly, when speaking of laws that might afford Marbury a remedy, he refers, echoing Lee, to "the laws of his country," in phrasing used by Virginians to mean one's home state, thus leaving open the eventuality of judgment under Maryland statute or common law.[24] Similarly, when Marshall disclaims any intention "in this Court" to inquire into *questions* "that are in their nature political or are by the constitution and laws submitted to the president" (169), the opinion says nothing of *duties,* accountable by legal means.

Seeing the mandamus as preparatory for a possible criminal action helps explain a mystery surrounding the case, which is why the suit was brought in the Supreme Court. Scholars differ about whether a question had been raised about Section 13's validity in the 1790s (Bloch and Marcus 1986, 326–28 and n. 106) At the trial of James Callender in 1800—a trial Marshall attended—Justice Chase had staked a claim for the Court to strike unconstitutional legislation, though only in general terms (Presser 1984, 772). But for a first bite of the apple, obtaining the Court's authoritative finding on the secretary of state's duties was still a recommended strategy. A quarter-century later, Marshall would write Henry Lee, expressing his "deep felt disgust" at Jefferson's posthumously published correspondence; that he, Marshall, was "too old and tired" to defend himself against unfair aspersions; that his public life was an open book that the public might read for itself. And he added this sentence: "Nothing is unknown or can be misunderstood by intelligent men, unless it be the motives which compelled the court to give its opinion at large on the case of *Marbury vs. Madison*." This sentence is sometimes taken to be an enigmatic statement about Marshall's own motives.[25] However,

[22] *Respondeat superior*, a common law rule placing responsibility for injuries on the person ordering the act, and that might have made Jefferson alone answerable did not apply to public officers (Story 1809, 328–29).

[23] Letter to Judge William Johnson, June 12, 1823. http://www.founding.com/founders_library/id.2194.

[24] On this usage see Marvick (2005, 12) and Malone (1967, 132).

[25] The letter, written October 25, 1829, is quoted in Weinberg (2003, 1273–74). Bloch (2001, 625–26) also reads the quote to refer to the suit, believing it suggests Marbury's own aim to see judicial review established.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

in our interpretation of events, it can be read to refer instead to Marbury's bringing suit.

IF MEN WERE ANGELS

The idea that criminal charges might be brought, yet alone successfully, against a member of Jefferson's cabinet, and perhaps even against Jefferson himself, will seem the purest quixotism until one remembers a few things about the historical period. First, the office of the presidency did not impart to its occupant the status of "living embodiment of the nation" as it would decades later, and certainly not to his inner circle (McDonald 1994, 425). Second, when the *Marbury* suit began, the permanence of the Federalists' decline was not evident, nor was the extent to which the institutions of government would come to be dominated by patterns of electoral conflict only just emerging. Its filing was in December 1801 after the razor-close election of 1800 and a full year before the Republican landslide in the elections of 1802 that were widely viewed as a referendum on the recent repeal of the 1801 Judiciary Act, a peak achievement of Adams' term.[26] Enforcement of federal law was still in the hands of the previous regime. Aware of the political sensitivity of the offices involved, Jefferson had moved quickly to wield the patronage authority.[27] However, he could do nothing to remove life-tenured district judges, all of whom were Washington or Adams appointees, several put in office when Adams moved their predecessors to the new circuit courts (Carpenter 1915, 520).

Jurisdictional lines among venues of America's motley legal system in its early decades were raggedly drawn and at virtually every point contested. A learned scholar has called the foundational Judiciary Act of 1789 "an instrument of reconciliation deliberately framed to quiet still smoldering resentments" (Goebel 1971, 458). Charles Lee, seemingly cognizant of doubts lately raised about the validity of Section 13, anticipated the Court's possible reluctance to find it had authority to issue the mandamus. He poses that as the first strictly legal question the Justices must answer; he went so far as to argue that deciding the legality of a cabinet member's act was not original but appellate—this based on the background of English government, where royal officers acted within so many "courts," their actions following on petitions and established rules (Cranch; Orren 1994, 68).[28] Nevertheless, had the case been heard as expected—in the Court's next term scheduled to start in June 1802—and had the Justices made the self-denying decision they eventually did, the outlook for seeking a second mandamus in a lower court was favorable in every venue. The circuit judges outside of Washington, D.C. were arguably authorized to issue mandamus under the "All Writs" provision of the 1789 Judiciary Act (Weinberg 2003, 1307–8).[29] All were Adams appointees, including in the most likely district of Maryland. In 1801, the circuit court in the District enjoyed this authority derived from Virginia and Maryland law.[30] It had been created in time for two of its three members to be Adams appointees as well; in fact Adams had appointed all three members, but one of them delayed resigning from another position, allowing Jefferson to appoint the third, and chief, of the group (Turner 1965, 518). Should the state route be the strategy decided on, the General Court of Maryland exercised jurisdiction "concurrently" with federal courts. It then consisted of two judges appointed by Federalists and one by a Republican.[31]

In a subsequent criminal action, a critical phase would be the indictment. If the venue was Maryland, under one or more violations of Maryland laws, Marbury could prosecute on his own; this method was still available in that state.[32] If the charges concerned federal crimes, only federal district attorneys were authorized under U.S. law to bring suit.[33] These last officers

[26] This claim was repeated when, shortly before the *Marbury* trial, Congress turned aside a memorial from the "midnight judges" asking how, with least inconvenience to the public, they might obtain legal remedy for their dispossession. 12 *Annals of Congress*, 438; quoted in Ackerman (2005, 177–79). For the place of the Judiciary Act in the Federalist scheme of government see Turner (1965). The repeal spurred a second case *Stuart* v. *Laird*, 5 U.S. 599 (1803) that concerned whether a circuit court hearing an appeal of a decision under the Judiciary Act of 1801 was properly constituted under the Judiciary Act of 1802. Framed obliquely, without any implication of legal wrongdoing, it was decided against the plaintiffs and has taken its place among the less visited landmarks of "popular constitutionalism." See Kramer (2004) and Levinson (2003).

[27] For instance, of the 20 federal marshals, in charge of empaneling both grand and petit juries, Jefferson replaced 18; of the 21 U. S. Attorneys, responsible for federal prosecutions and related investigations in their states, Jefferson would change 13 by the end of his first term (Prince 1970).

[28] William Branch Giles and John Randolph had both raised this issue during the House debate on repeal of the 1801 Judiciary Act. 11 *Annals of Congress*, 596, 662. Samuel Chase had also doubted the legislature's authority to expand the original jurisdiction of the Court in a letter to Marshall on April 24, 1802, asking him to share the letter with his brethren. The letter is reprinted in Haskins (1981, 172–77, n. 182).

[29] Section 14 reads, in part, "*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." We use the word "arguably" to convey that scholars disagree whether the provision of appellate mandamus authority to the Supreme Court excluded that writ from the district courts' original jurisdiction (e.g., see Pfander 2001, 1587).

[30] United States Statutes at Large, session 2, chapter 15, section 1, reads: "That the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said stat to the United States. . .; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States."

[31] The holding that state courts could not issue mandamus to federal officers lay two decades ahead, in *McClung* v. *Silliman*, 19 U.S. 598 (1821), at 604. The authority of the D.C. court was affirmed in *Stokes* v. *Maryland*, 37 U.S. 524 (1838), at 615–26.

[32] For a Maryland case, see *Anderson* v. *Johnson*, 3 H. & J. 162 (1810). For more detailed treatments of private prosecution in the colonial and early periods, see Van Alstyne (1952) and Steinberg (1984).

[33] Judiciary Act 1789, Section 35: "And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States."

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

were removable at Jefferson's discretion; however, on assuming the presidency, he had retained slightly more than one-third of their number, including in Maryland, where the district attorney remained the Federalist Zebulon Hollingsworth, a Revolutionary War veteran from a distinguished patriot family appointed to the office by Washington (Sawyer 1993, 28). In general, federal prosecutors acted with a high degree of autonomy, supervised not by the attorney general but by the secretary of state—though in the circumstance at hand, either one of these cabinet members might have found themselves inhibited, if not altogether legally enjoined, from interfering locally (Bloch 1989, 585–86).

The importance of the district attorneys in any future plan was driven home in the setting of the D.C. circuit, when, with the Marbury affair still in its early stages, the Republican organ *The National Intelligencer* published a letter on June 12, 1801, signed "a friend of impartial justice;" it defended Jefferson's removal of federal marshals and attorneys and, in not much less than so many words, accused the entire life-tenured federal bench of ongoing corruption. Outraged, the two Federalist-appointed judges sitting on the D.C. circuit court called for prosecution of the newspaper's editors. When the D.C. grand jury obliged with a presentment for libel, the Republican district attorney refused to argue the case, and the matter ended without an indictment (Haskins 1981, 161). But were a new mandamus suit entered in the D.C. circuit and should the judges subsequently move to begin criminal action, it was not clear that events would meet the same end. It is significant that the prosecution in the libel case went as far as it did. Marbury's suit did not involve the unpopular charge of libel but acts prohibited as crimes by the First Congress; following on the original order to show cause, it would enjoy the U.S. Supreme Court's express endorsement of his property right.

Prospects continued favorable even after April 1802 when the Congress, worried about the constitutionality of the repeal of the 1801 act and perhaps also sensing trouble brewing in the Marbury affair, postponed the Court's next term. We say this in the presence of a different, state-level case, *Whittington v. Polk* (1 H.&J. [Md. 1802] 238) which occurred in the meantime and, it may be safely assumed, would have been watched with interest by all of the *Marbury* principals. Emboldened by Congress's plans to replace the Judiciary Act of 1801, the recently installed Republican majority in the Maryland legislature proceeded to abolish all judicial venues of the state below the General Court, ousting their judges, only to turn around and re-create them anew for Republican appointees (Shugerman 2002). When the former chief judge of the fourth state circuit sued for reinstatement of his "freehold," the General Court turned down his plea, despite two of its three members being Federalists. The opinion, in words famously foreshadowing *Marbury*, reaffirmed the General Court's authority to review acts of the legislature[34]; however, it also averred that not every act "repugnant to the Constitution" was an occasion to intervene "in a way which subverts the government and reduces the people to a state of nature" (238). This ruling avoided immediate confrontation, but it could not have been anything other than an embarrassment politically. Marbury's second mandamus suit in this same court would offer a chance at full rehabilitation in the eyes of the party. No repudiation of any legislation would be at issue, but instead a violation of a property right, affirmed by the nation's highest tribunal. Nor could it be detrimental to the plaintiff's cause that one of the General Court judges was Robert Chase, cousin and intimate since childhood of Supreme Court Justice Samuel Chase. Who, in this world of cousins, could have protested?[35]

The *Whittington* decision was handed down in June 1802. By that time the Judiciary Act of 1801 had been repealed and the Judiciary Act of 1802 put in its place. Despite the political diatribes that accompanied the change, the legal consequence was to return jurisdictional lines close to where they stood when Jefferson was elected. Any implication for Marbury's plans was modest. The circuit courts and judges put in place by Adams were eliminated, substituted by a circuit bench comprised of the local federal district judge plus one member of the Supreme Court. Almost all of the district judges were still Federalists, appointed by either Washington or Adams; no district judge would be appointed by Jefferson in Maryland (or Delaware, with which Maryland was joined in the Fourth Judicial Circuit) until 1806; no Supreme Court justice would be appointed by him until March 1804. After the Judiciary Act's repeal, however, it is possible that the only federal court willing to assume jurisdiction of a suit for mandamus would be the D.C. Circuit. All things weighed in the balance, Marbury still would have been best advised to pursue his plan of vindication through "the laws of his country," Maryland.

JUSTICE DELAYED

These remarks call up another mystery of the *Marbury* decision, which is why Marbury and Lee did not subsequently seek a mandamus order from a lower court after Marshall's virtual invitation to do so. One answer might lie in the widely held expectation that the new administration would not comply, which is what some

[34] "It is the office and province of the court . . . to determine whether an act of the legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the constitution in the legislature" (244).

[35] *Whittington* has been interpreted as a sign of judicial weakness, which in a sense, it was. Shugerman (2002, 16) writes that it showed Chief Justice Marshall how he might "bark" about mandamus authority existing in the lower courts, knowing a subsequent "bite" was unlikely. Whittington's attorneys, both bitter enemies of Jefferson, were Luther Martin, who represented Maryland at the Philadelphia convention and was perhaps the most esteemed member of the American bar, and Robert Goodloe Harper, principal author of the 1801 Judiciary Act. The successful maneuver of the Maryland legislature became background for Justice Samuel Chase's tirade on rabid democracy to the Baltimore grand jury that would contribute to his impeachment (Presser 2009, 362).

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

have seen as the chief reason for Chief Justice Marshall's deciding as he did (Corwin 1914; McCloskey 1960). Indeed, this view is supported by an incident that occurred only weeks after *Marbury* was decided, when a federal district judge in Pennsylvania, Richard Peters, in the face of declared resistance by the Republican state legislature, held back a final mandamus order to the state treasurer that he restore certain prize monies, for years illegally deposited with a former treasurer's descendants, to its rightful owners.

Then again, not so fast. Six years later, in 1809, with a new U.S. president in Washington for one month, with foreign policy woes momentarily abated, and Republicans far less united than at the start of either of Jefferson's terms, the Pennsylvania prize claimants renewed their litigation. Represented by Federalist notables William Lewis, himself a retired federal district judge, and Francis Scott Key, Georgetown lawyer and nephew of "midnight judge" Francis Barton Key of Maryland, they obtained a mandamus from the U.S. Supreme Court ordering Judge Peters to follow through on his earlier order (9 U.S. 115 (1809)). To the astonishment of the state's (new) Republican governor, President Madison declined to intervene and the writ was enforced, although not without the muster of the state militia, whose general and several other officers were fined and imprisoned and swiftly pardoned by the White House (Rowe 2005).

Might not the plaintiff's side in *Marbury* have been waiting, like their Pennsylvania associates, for a more propitious moment? For instance, in the autumn of 1802, Spain closed the port of New Orleans, and through the spring of 1803 the Federalists called for its capture by force. Would it not have been prudent to wait until after the crisis on the Western frontier had passed? Then too, after the purchase of Louisiana in late April, would Marbury and Lee not have been well advised to delay until the summer's jubilation died down? Upon reflection, the single hardest blow dealt Marbury's vindication may have been Congress's vote to cancel the Supreme Court's 1802 sessions. The venues in which redress must be sought in late 1803 would have been as politically porous as when the case was first filed, but the inflow was of lower pressure and markedly less favorable to the Republicans, especially before the 1802 fall elections. Marbury, however, did not enjoy the luxury of time afforded the Pennsylvanians. It is not clear whether a claimant to a five-year appointment might wait another six years to sue, but either way, having the defendant in the case presently installed as U.S. president would not have made the legal situation less complicated.

The Pennsylvania case also strikes another chord sounding throughout *Marbury*, which is impeachment. It is unknown if Judge Peters initially held back his final mandamus due to fear of impeachment, but he was given warning it might be pending.[36] When Marshall issued the *Marbury* opinion late in the month of February 1803, the impeachments of Supreme Court Justice Chase and District Judge John Pickering were already anticipated; Jefferson sent evidence on Pickering to the House in January, and it was openly speculated that the Chief Justice was the next target. Around this time also, the Pennsylvania legislature impeached an outspoken county judge, another Federalist, who had, among other things, endorsed federal jurisdiction over common law crimes (Jay 1985, 1330). The impeachment of Jefferson himself had been called for in the Federalist press within months of his taking office (Bowers 1936, 63–65).[37] Lee, in his *Marbury* argument, refers to the possibility back-handedly: "I declare it to be my opinion, grounded on a comprehensive review of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution" (Cranch).

Whatever the timing, Lee and Marbury could not leave impeachment out of their calculations. Setting aside any move on Jefferson's part, were a lower court to issue mandamus and Madison disobey, the judge, whether state or federal, might rule that legal action against a secretary of state for resisting federal judicial process should occur outside the judiciary, in the Congress (see Throop 1892, 816).[38] Another trigger might be Madison's conviction, by either a judge or jury, for one or more crimes, but without the judge removing him from office as a penalty (M. Simon 1994, 1661 and *passim*). The prospects for both scenarios would change with the passage of events. But even under the most advantageous of circumstances, and on the remote chance that the House could be shamed into inquiring into the established wrongdoing of a high executive officer possessed himself with major responsibility for the enforcement of federal law, impeachment was a distant second choice. It might satisfy Marbury's desire for revenge, but could not restore his office; this limitation was imposed by the Constitution.[39]

Although by no means the esoteric political event it would become for later generations, the process itself was riddled with uncertainty. Impeachments involved "indictments," "prosecutors," "trials," and "convictions." But must the act be a crime indictable in the

[36] Republicans were enraged by Peters' vote in another decision, *Fries Case,* 9 F. Cas. 924 (PA 1800), which resulted in a death sentence for treason of John Fries for stirring up resistance to federal taxation in western Pennsylvania. Ruling alongside Judge Peters was Justice Chase, who circulated his opinion before the case was actually heard. See Annals (8th Cong., 1st Session, 823–24, 850, 873–74); Beveridge (1919, 172).

[37] Joyce Appleby (2003, 53) describes the Federalists' frame of mind: "Summoning a constitutional remedy like impeachment to rid themselves of this interloper seemed appropriate to the Federalists. They had come to think of themselves as the custodian of the Constitution, a sacred text now put in jeopardy by the new president's wildly unorthodox views."

[38] But cf. *State* v. *Glasgow*, 1 N.C. 264 (1800), where the same officer was indicted and found guilty for abuse of office for issuing duplicate warrants to military land. See Blackstone's *Commentaries* (1979, vol. 4, 121) and Bishop's *Commentaries on the Criminal Law* (1882, 289; cited by Throop).

[39] Article I, sec. 3: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

ordinary courts? Might it be a crime only at common law? Might the "wrong" accused be political, not formally criminal and even legal, but demonstrably injurious to the public interest? Marshall in his *Marbury* opinion might have been hinting at the impeachability of President Jefferson on that ground: "[I]n cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable" (166). Ambiguity likewise clouded the availability of a jury trial. Article III provides juries for "all crimes, except impeachment" and impeachment is not mentioned in the Sixth Amendment, but nothing prevented Congress from affording that privilege.[40] More unnerving still would have been the sheer principle—the spirit—of flexibility and improvisation that attended impeachment proceedings. This striking contrast with the exacting common law protocol of Kings' Bench was neither an effect of American rebelliousness nor of the legislative setting. Instead, it implemented a version of "conciliar" jurisprudence, associated with the equitable doctrines of the English Courts of Chancery, epitomized in that arm of the Privy Council entrusted with the discipline and punishment of royal officers, the court of Star Chamber.

For the analysis at hand, impeachment provides a direct—and as it turned out, permanent—link between the Constitution and a style of justice still dispensed at many stations in the early Republic, including in the American courts of common law, and with a regularity that belies the controversy surrounding equity in general and the notoriety of Star Chamber in particular (Barnes 1961; Kessler 2005; Pfander 2004). A criminal tribunal, presided over by the Lord Chancellor and a court "of conscience" like his own (from whence its writs often originated), Star Chamber was dedicated likewise to remedying injuries "where the law faileth or is too severe" (Jacob 1811, 388). Punishing by fine and imprisonment but not bodily harm, its authority was premised on the moral superfluity of the procedural tangles and implacable rules associated with common law, then as now. Specializing in crimes committed by royal officers and by lawyers and other corruptors of the public business, Star Chamber was immune to writs of prohibition, orders issued to courts on exceeding their jurisdiction; this immunity was based on the rationale that the offenses and offenders under judgment warranted suspending the usual rules of procedure in the interests of law and order (Gray 1994, xxviii–xxix).

The judges were a changing assortment of Privy Council members, Chief Justices of other royal courts, and special appointees, who rotated and conducted business unbound by precedent and without a jury; the centerpiece of this sprawling process was the "motion," routinely granted the parties without argument, and each becoming a protracted "case-within-the-case." Witnesses could be examined outside public view, ex parte, often in written interrogatories; thus its famous "inquisitorial" reputation. Despite this procedural laxity or perhaps because of it, Star Chamber was admired for its innovations, and observers rated the quality of its justice high. Lord Coke, who sat as judge ex officio—being Chief Justice of Kings Bench and, before that, of Common Pleas and even earlier as reporter and attorney—ranked it "the most honorable court, our Parliament alone excepted, that is in the Christian world" (Crompton 1881, ix).

When, early in the seventeenth century, a recently energized House of Commons took it upon itself to supplement Star Chamber's efforts through its own process of impeachment, it would evince no more interest in rigorous procedures than its predecessor (Roberts 1956, 222). Nor did America's own history of impeaching officers induce greater adherence to legal rules or categories than the English exemplar. The impeachments that occurred in colonial legislatures were mainly show trials for the sins of empire, with no binding force (Hoffer & Hull 1978, 656ff). During the Senate's first trial, of William Blount of the Tennessee Territory in 1798 for illegal land speculation, those in favor of providing a jury to weigh the evidence invoked the common law maxim, *expressio unius est exclusio alterius:* To say one thing logically excludes its opposite. Article II provided impeachment of the president and other civil officers for bribery, treason, and "other High crimes and misdemeanors;" therefore impeachment must be a criminal proceeding protected by the Sixth Amendment. The majority's reading of English history, however, showed such removals to be a "unique instrument," neither fish nor fowl, something the rhetoric of the early Republic called a *tertium quid,* situated in many different courts—common law, chancery, admiralty, impeachment, and others—adjusted to whatever remedy was required to repair the public trust (Melton 1993, 450).

"ALL ITS DIVISIONS"

When Marshall issued the order to show cause, another one of his (and Jefferson's) cousins, Congressman John Randolph of Virginia, stood in the House of Representatives and denounced the Supreme Court's "inquisitorial capacity" (Warren 1923, 207). As usual, this brilliant and erratic horseman (himself a leader of a faction of the legislature known as "the *tertium quid*") was spot on. The order, after all, had followed a hearing held without the defendant present and without a jury; Randolph justly could have hurled the same barb in 1803 at the trial, which went forward with the additional feature of the attorney general being provided interrogatories in writing. Redolence of royal proceedings was no more accidental here than it would have been in an impeachment. In contrast to the British mainland, where Privy Council's judicial oversight was abolished in 1641, it was maintained in the colonies, refashioned

[40] Some states provided jury trial in impeachments, one being Virginia. Virginia Senator Henry Tazewell proposed a jury for the 1798 impeachment trial of William Blount (see the later discussion), supported by the historical research of countryman and presiding officer Vice President Jefferson. State constitutions provided impeachment variously for "corruption," "misbehavior," "mal-behavior," and "maladministration." For a good discussion of ambiguities of the impeachment process, at that time and generally, see Pious (1999).

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

as the Lords Commission on Trade and Plantations (later "the Board of Trade"). Like Star Chamber—comprised of Privy Councilors and chief judges, joined occasionally by an archbishop, with jurisdiction over such charges as misconduct of officers, oppression, fraudulent accounts, and impermissible legislation—the Lords Commission exercised inquisitorial powers in summoning persons and papers, examining under oath, and exercising all authority "necessary and proper for carrying out the royal intentions." Cases that in other courts would have been heard variously at equity, admiralty, and common law were handled procedurally alike (J. H. Smith 1950).

A medley of this sort would characterize American courts straight through the Revolution. Consider the Superior Courts of colonial Massachusetts whose judges, according to a contemporary observer, professed to enjoy the "power of Parliament, King's Bench, Common Pleas, Chancery, High Commission, and Star-chamber, and all other Courts of England" (Goodman 1957, 318, n. 43). In the same vein, a governor of South Carolina writes to his superiors in England that a judicial body he had commissioned was now "on record as resolving itself by turn into a Court of Chancery, a Court of Admiralty, an Orphans' Court, and a [criminal] Court of Oyer and Terminer, according as the business in hand might require" (Surrency 1967, 267). Or later, in 1790, Edmund Randolph, attorney general in Washington's cabinet (and another Marshall-Jefferson cousin), reporting to Congress on defects in the new federal judiciary, laments that a Supreme Court Justice "must be a master of the common law in all its divisions, a Chancellor, a civilian" (Frankfurter and Landis 1925, 1019). Indeed, the English conciliar style characterized entire colonial governments. Thus in Virginia, where both Marshall and Jefferson cut their constitutional teeth, the Virginia General Court was an appendage of the Governor's Council, comprising a dozen or so members with the governor as Chief Justice; also serving as the upper legislative chamber, this group exercised original and appellate jurisdiction over both criminal and civil cases, hearing suits at both common law and equity. Parties unhappy with a verdict at common law could be granted a new one at equity and vice versa, although it is doubtful either procedure was carefully followed (Chitwood 1905). Most General Court judges lacked formal legal training, which is perhaps why they frowned on lawyers; during the mid-eighteenth century they prohibited lawyers from pleading cases there (Rankin 1962, 142).

Considering Jefferson's role in *Marbury* and his angry reaction to Marshall's opinion, it is worthwhile to review his work as principal draftsman of Virginia's constitution of 1776. Upon his recommendation, an "institutionalized conscience" was to be lodged in a High Court of Chancery, hearing all evidence in public session, however, and saddled with a jury (Singleton 1968, n. 1). He also proposed that charges against government officers be litigated in a special Court of Appeals, whose personnel need have no professional qualifications and whose deliberations would be joined on an advisory basis by judges drawn from the other two major courts (Jefferson n.d., 346). A draft he wrote in 1783 envisioned a Court of Impeachments, a body made up of three judges serving in the superior courts of Chancery, Common Law, and Admiralty, plus three members of the Governor's Council appointed by the Assembly and three members of the Assembly itself—one from the Senate and two from the House (Ibid., 343). In the end, these courts were not established, but they suggest Jefferson's awareness of the usefulness of crossovers among judicial compartments where the accountability of government officers was concerned. His plans also attest to the deep impression made by English practices (Prakash and Smith 2006, 114–16).

As we have seen with impeachment, the mix of conciliar and common law is essential background to *Marbury.* At roughly the same time that Parliament intervened to improve on the efficiency of royal discipline, the Court of King's Bench—for the seemingly benign aim of relieving Privy Council of disputes that were of little importance to the crown—introduced the writ of mandamus into its own proceedings.[41] Again, remedy was of the essence. Edward Coke describes the writ's purpose in harmony with that of the Star Chamber, the place of its origin and where Coke at the time served ex officio as Chief Justice of King's Bench: Mandamus would "correct errors and misdemeanors . . . so that no wrong or injury, either public or private, can be done but that the same shall be reformed or punished by the due course of Law" (11 Co. Rep. 93b (1615), 98a). The occasion was *James Bagg's Case,* in which Coke ordered reinstatement of a burgess (or magistrate) of the town of Plymouth, ousted and disenfranchised for criminal acts consisting of contemptuous and disruptive utterances about fellow officers. Coke holds that the town had no jurisdiction under either its charter or the Magna Carta to oust Bagg or anyone else from his office without resort to a court of law, which had not happened. Notably, he announces this result only after he first spends a longer section of his opinion surveying the manifold misdeeds for which officers or citizens might be legally deprived of their privileges; deciding that the allegations supported "good causes to punish [Bagg], and to commit [him] till he has found Sureties of his Good Behaviour;" and entertaining the possibility that the charges against Bagg might prove untrue, in which case any imprisonment or other injury he might have suffered as a result of his unlawful removal from office entitled him to redress, including trespass or false imprisonment, punishable as felonies as well as torts (Cameron 1985, 1835).

It is not recorded whether Coke's preliminaries caused the same outrage on the losing side in *James Bagg's Case* as Marshall's more reserved opinion along these lines did on the winner's side in *Marbury*. We may safely assert, however, that Marshall would have

[41] We describe this effort as "seemingly benign" because mandamus would prove a potent weapon in the common law courts' battle for authority later on, and in this battle Coke was a leading general.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

known the earlier decision backward and forward, as would have Charles Lee; it is perhaps no coincidence that they both pose three questions for the U. S. Court to answer, as did Coke the English, and that each judge expends more energy in their opinions on two of the questions than generations of Marbury's critics have found legitimate. But without the "dicta" in *Marbury*—without Marshall having assumed the part of an American High Chancellor, offering a morally inflected disquisition on the administration's illegal acts and on the available remedies, and all this before finally ruling that the parties were in the wrong courtroom—the constitutional effect of the decision as we understand it here would not have occurred. The Court's overturning of the statute's provision, yes, but *Marbury* would not have had the same consequence for officers' accountability it did—or at least not for officers outside of Congress. To elevate the rules of jurisdiction above a remedy for an officer's wrongdoing, and to do so definitively, required that the wrongs themselves be acknowledged—indeed judged.

Mandamus's sway over adjacent government branches has caused *James Bagg's Case* to be heralded as a precursor to American judicial review (Jaffe 1958, 414–15). The movement of the writ into the courts of common law was the precondition for the Supreme Court's supervisorial authority over lower courts that James Pfander sees as *Marbury's* principal contribution (Pfander 2001). More broadly, this development, with mandamus later replaced by the equity action of injunction, provides the basis for what Louise Weinberg calls "the foundations of public law" (2003, 1239). But only through belittling the Office of Justice of the Peace and turning Marbury's suit into a put-up controversy engineered by Federalist politicians have the indictable acts in the foundations of America's constitutionalism gone unremarked. "The prisoner is to go free because the constable blundered" is a hard-won concession to citizens' civil liberties; in the case of the rights of officers, the compromise has perhaps less constitutional appeal.[42] In that sense, Marshall does Lord Coke one better. In *James Bagg's Case*, the force of jurisdiction upheld the plaintiff's right and the remedy for its injury; what Bagg was alleged to have done, although criminal, did not justify his dismissal and he was restored to office. In *Marbury*, the injured party's right to his office was likewise affirmed, but left to twist, unremedied, in the wind.

Nothing planned or structural caused *Marbury's* long-term impact on officers' accountability. As we have argued, Marshall's opinion went out of its way not to foreclose any avenue of future redress that Marbury and his lawyers might have pursued elsewhere; neither did any jurisdictional hurdles in place at the time determine the foreshortening of his cause, which must be chalked up to the changeable climes of politics. Over constitutional history, *Marbury* has instead led by example. For suits against officers that follow, the opinion demonstrated that jurisdiction trumps remedy, even in the face of a defendant's possible crimes. Assuming Marshall's reading of Section 13's unconstitutionality was sincere, that Congress had "blundered," were there other rulings he might have made that would have done less damage to officer accountability in the long run while still catering to the institutional needs of a new Court, cautiously feeling its way among the other branches?

One approach would have recognized officeholder accountability for the unique "third thing" it was and reasoned less according to the strictures of common law and more in the flexible conciliar tradition that lay behind mandamus in the first place. The Chief Justice might have noted that federal judges under the Constitution were known to treat officer cases prudentially, not according to rigid rules. The judges in the Whittington case had refrained from striking the Maryland statute on grounds that the ensuing disruption would not be justified; Judge Peters in Pennsylvania had also stayed his hand; all had more judicial experience than Marshall. More to the point, the common law had made exceptions to its rules where officers were concerned: the reason Madison was responsible at law for not delivering Marbury's appointment even if he acted according to Jefferson's instructions was that the common-law rule *respondeat superior* did not relieve public officers of penalties for wrongdoing. At a minimum, Marshall might have asked Congress to resolve ambiguities in the statute before deciding on a remedy.[43]

A different tack would have been to strike the statutory provision, making clear that mandamus was available in a lower federal court, but without discussing the status of Marbury's right. If Marshall had denied jurisdiction at an early stage, it would have allowed Marbury to timely proceed with his action, in early 1802, and eliminated the storm provoked by the order to show cause. Even if Marshall had waited and struck the statute's provision when he did, in late 1803, but without issuing the sections of the opinion criticizing Madison and Jefferson, some interim arrangement may have been reached, preserving the question of crimes for another day. To be sure, this move would have privileged jurisdiction, but the principle of remedy would have been less decisively defeated and the logic of the decision less resonant.

"THE MODE OF EXERCISING"

The long shadow of *Marbury* over analogous cases of officers' wrongdoing—including explicitly criminal wrongdoing—may be represented by the decision-of-decisions in the contemporary canon of officers' accountability, *Nixon* v. *Fitzgerald* 457 US 731 (1982). There, a former Defense Department employee sued President Nixon for injuries incurred through his retaliatory discharge for testifying before Congress about cost overrides, in violation of his rights under the First

[42] The words are Justice Cardozo's, in *People* v. *Defore*, 242 N.Y. 13 (1926), at 21.

[43] See note 22.

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Amendment and two congressional statutes, the second of which imposed criminal punishment for obstructing testimony.[44] Neither statute provided a damage action, and both assumed the attempt at obstruction would occur before the event. But the plaintiff argued that unless the Supreme Court was willing to infer a cause of action, as the district court below had done, the practical effect would be that the president's wrongdoing would go unpunished.

Justice Powell, in his majority opinion holding the president absolutely immune to damage suits, cites *Marbury* as what might be termed a "counter-precedent." Answering Justice White, who referred to that case in dissent for the proposition that under the Constitution every injured citizen must receive the protection of the laws, Justice Powell reminds all who might be interested that Marbury "lost his suit" (754). Upon first hearing, the opinion in *Nixon* v. *Fitzgerald* fairly rings what may seem nonjurisdictional considerations, having to do with the unparalleled responsibilities of the chief executive, the availability of impeachment by Congress in instances of gross abuse, and the needs of government outweighing individual rights (756–57, 759). In our perspective, however, these invoke jurisdiction squared, jurisdiction in state-dinner dress.[45]

It is outside the purposes of this article to offer a full-fledged chronology of officer accountability cases in U.S. law over two centuries. However, in the pages remaining, we bring *Marbury*'s developmental significance into relief by briefly demonstrating how, confronted with other suits against officers involving indictable acts, judges in the early Republic—even, on occasion, Chief Justice Marshall–followed a different path. Both parts of *Marbury*—the remedial emphasis, descended of Privy Council and chancery, and the harder procedural lines of the common law—were alive and well in early American jurisprudence. Jurisdiction is a central consideration in each of the cases discussed next. The important contrast is how jurisdiction is conceived; that is, whether it comprehends remedial authority as part of the judge's predefined function of deciding the matter, or whether it is a purely formal and relational category, defined by the impinging cross-hatch of jurisdictions in any particular case, and that may or may not enclose a possible remedy for an injured plaintiff.

Let us begin with a case in the New Jersey Supreme Court in 1796, *Bergen* v. *Clarkson* 6 N.J.L. 352, in which the local marshal of New Brunswick was sued for having illegally deprived the plaintiff of his freehold property for nonpayment of taxes. The marshal argued he was only carrying out his rightful duty. The freeholder claimed the marshal could not seize property on these grounds, but that his nonpayment was in any case justified because the tax at issue had been approved at a meeting of the local council that was publicly announced as having a different purpose. The court agreed; based on its "strong suspicions of intentional and premeditated deception" by the council in announcing the meeting, it held the tax to be void and the marshal liable (364). Conciliar-style, it decided the council's action was illegal even though the relevant English precedents were "not quite up to the doctrine" it announced.[46]

The New Jersey court was familiar with chicanery in New Brunswick. Two years earlier, it had voided the results of a ballot on a related matter and had chastised town officers for certifying its validity (*State* v. *Justices*, 1 N.J.L. 283 (1794)). The city's sole argument in that case was that proper redress must come from the state legislature. But in that instance too the court was undeterred. Citing *James Bagg's Case* and other English authority, the same Chief Justice as in *Bergen* claimed he enjoyed "an ancient and original jurisdiction," with "power to give redress as unlimited and universal as wrong can be" (288). Notably absent was any reference to the constitution or statutes of New Jersey; nor did the English cases show this proposition endorsed by Parliament. Nonetheless, for this judge jurisdiction for the purpose of providing a remedy existed *ex officio: ergo*, it "must be vested in some tribunal" (292).

A different example is *Ex Parte Gilchrist* 10 F. Cas. 355, a suit for mandamus in the U.S. Circuit Court for South Carolina in 1808. In *Gilchrist,* Supreme Court Justice William Johnson, serving on circuit, ordered the release of a ship seized under the Embargo Act by the collector of the Port of Charleston whom the court said had acted without jurisdiction. According to the collector's testimony, he had made the seizure pursuant to general instructions from the secretary of the treasury, whereas the Act had authorized a seizure based on his personal opinion alone. The potentially criminal character of the collector's act was highlighted by U.S. Attorney General Caeser A. Rodney in a colloquy with Johnson attached to the published decision. Contesting the jurisdiction of a circuit court to issue a mandamus writ to an officer of the executive branch, Rodney argued that according to English precedent the owner might seek remedy through either a damage suit or a criminal indictment for unlawful seizure. Moreover, because according to the Embargo Act, the seizure became permanent only with the assent of the president, Justice Johnson's order was an infringement on

[44] The first, 5 U. S. C. § 7211 (1976 ed., Supp. IV), provides generally that the right of employees to furnish information to Congress may not be interfered with. The second, 18 U. S. C. § 1505, makes it a crime to "obstruct or impede . . . any inquiry or investigation being had by either House or any committee," on penalty of fine and imprisonment up to five years.

[45] After the suit was filed, the parties reached a settlement for liquidating the damages, but the Court determined it nonetheless had jurisdiction to decide the immunity issue.

[46] It is instructive in this regard to compare Chief Justice Marshall's more constrained opinion 15 years later, denying the U. S. Supreme Court's jurisdiction to examine the motives of state legislators charged with enriching themselves through passage of a statute under challenge: "It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements . . . are examinable in a court of justice" (*Fletcher* v. *Peck*, 10 U.S. 87 (1810), at 130). Crucial for our analysis, however, is that the jurisdiction of the legislature in this case is overcome by a novel reading of the contract clause.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

Congress's jurisdiction to discipline the chief executive by impeachment (358–59).

Answering Rodney, Justice Johnson places jurisdiction on the plane of constitutional necessity. Though he defends his ruling also on statutory, constitutional, and precedential grounds, he avers that if it be conceded that every citizen had the right to carry on commerce from port to port, then he was "bound" to order as he did (360). Other remedies would be inadequate. A suit for damages was a "mock" remedy, an "arbitrary substitution of a compensation instead of his right" (363). Anticipating Justice White's dissent many generations later in *Nixon* v. *Fitzgerald*, he derides any prospect of the collector's indictment: It would be a "farce to institute a prosecution for an offence which the president could and most certainly would have pardoned even before conviction" (364). Johnson considers the removal of an "unprincipled and intrepid" president through impeachment, but "[w]hat benefit results to the ruined citizen from the impeachment of the president, could we suppose it in the power of any individual to effect it?" What if instead of impounding his vessel, the collector had ordered that the owner be hanged? Should the remedy in that situation come through the president's impeachment? (365). "Jurisdiction in a case is one thing," Johnson declares "the mode of exercising that jurisdiction is quite another" (361).

In both *Bergen* and *Gilchrist*, mandamus authority and the power to effectively remedy injuries are incidents of the wider judicial right to pronounce judgment. Within that setting, the criminal circumstances and exigencies of justice are objective considerations that determine the contours of legitimate decision. Without remedial authority, jurisdiction itself is a nullity. In conventional readings of *Marbury*, through a contest of last man standing, jurisdiction emerges from the relations among the plaintiff and officers directly and indirectly involved, and Marbury's right is cordoned off from the means of its enforcement. In these other two cases, by contrast, protecting the integrity of the injured party's right comprises the *ratio decidendi.* Doing less would be an unlawful breach of duty, even if by the rules of immunity judges could not be charged as accessories after the fact.

Recall that in *Marbury*, Chief Justice Marshall knew that a second mandamus and also a criminal indictment remained possible remedies in subsequent actions; he may also have entertained a less jaundiced, more farsighted view of impeachment proceedings than did Justice Johnson. At any rate, five years later, in a different dispute under the Embargo Act, where these recourses were absent, Marshall took what was for him the unusual step of recording an opinion separate from the other members of the Court. In *Otis* v. *Watkins* 13 U.S. 339, a case in 1815 that in some ways resembles a decision under the Fourth Amendment exclusionary rule today, the Court majority held that the collector of Barnstable, Massachusetts, had been unfairly found liable in state court for damages caused to a ship and its cargo; after its seizure, he had ordered its movement to another port 30 miles away, at which point it ran aground and became locked in the ice.[47] The unfairness resulted from the state judge's instructions to the jury that the plaintiff had failed to provide evidence to sustain his plea and that the collector must show he had exercised reasonable care in gathering sufficient facts for his decision, such facts to be reported to the president for his necessary assent to his actions. But because the Embargo Act required only that the collector seize the ship on the basis of his opinion and said nothing about reasonable grounds, the Court held the instructions were improper and therefore the jury's holding the collector culpable for the owner's loss was invalid.

In his separate opinion, Chief Justice Marshall distinguishes the act of seizing the ship under the Embargo Act, which by its terms protected the collector's good faith acts, from the order that the ship be moved to another location, which was not covered by the statute. For the latter action, the collector must provide reasons for what he did, and the Massachusetts judge was correct to signal that the collector had not done so; to that extent the damage award was justified. Moreover, whereas the collector's opinion alone was required for a lawful seizure, it "follows necessarily from the duties of forming an opinion and of communicating that opinion to the president for his decision in the case, that reasonable care ought to be used in collecting the facts to be stated to the president" (358). The judge below, therefore, did not exceed his authority when he conveyed that interpretation of the Embargo Act to the jury. What is notable is how Marshall's opinion recognizes the collector's jurisdiction to embrace duties not included within the limits of Congress's express provision.[48] We must not read too much into a single case. Still, if we locate our reading of *Marbury* somewhere midway in the transition from a seventeenth-century emphasis on remedy to a nineteenth-century emphasis on jurisdiction, *Otis* supports the placement of Marshall among the prime movers but not single-mindedly so.

The division of Justices in *Otis* v. *Watkins* illustrates the slice-and-dice indeterminacy of jurisdiction, however defined. Its aftermath shows further its all-purpose adaptability and its ready subordination to other, arguably extralegal ends.[49] Only two years later, in a

[47] Under the rule established in *United States* v. *Leon* 498 U.S. 897 (1984), "when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system" (908).

[48] Cf., Jerry Mashaw (2007, 1678): "Although, as Watkins [sic] illustrated, the general principle was surely not established as of 1815, Marshall seemed to have held a view that now forms the core of judicial review of administrative action: discretion is always conferred on administrators on the implicit assumption that it will be reasonably exercised." See, in the same vein, Dane (1994, 76) on Marshall's opinion in *McCulloch* v. *Maryland* 17 U.S. 36 (1819): "In McCulloch, for example, the Court rejected a rule of strict construction that would have limited the powers of Congress to those 'expressly conferred.' Instead, it adopted a rule of liberal construction that Congress could choose any means it wished to carry out its enumerated powers 'unless the words imperiously require' a limitation on those means."

[49] Mashaw (2007, 1677) attributes the U.S. Supreme Court's protective stance toward the collector in *Otis* to its knowledge of the Embargo Act's unpopularity in Massachusetts.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

different decision, Marshall's more remedy-friendly view—that the plaintiff's right was not altogether overcome by the federal officer's honest opinion—received the agreement of his brethren.[50] But not for (very) long: On the eve of the Civil War, the meaning of jurisdiction was narrowed again, under the leadership of a Chief Justice more fiercely dedicated than either Marshall (or Story) had been to the cause of the federal judiciary and to its sovereignty over the states (Bestor 1961, 139). In *Freeman* v. *Howe* 65 U.S. 450 (1860) the Court overturned damages awarded by the high court of Massachusetts for replevin, against a federal marshal who attached some railroad cars for nonpayment of debt; replevin is the civil counterpart of the crime of theft. The opinion below had held that unless the cars themselves were proceeded against in federal court, the state had authority to remedy the illegal attachment (*Howe* v. *Freeman* 80 Mass. 556 (1860)). A unanimous Taney Court disagreed. The marshal's right to hold the rail cars was for the federal court to decide; "[W]hether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every court" (457). Other parties might raise state-based claims against the property in the federal court's possession, but they would be heard in that forum as ancillary to the federal suit, even if they lacked diversity (460). If Marshall's position in *Otis* illustrates jurisdiction in full, providing as much room for a remedy as possible while straining to respect the principle of bounded authority, then *Freeman* v. *Howe,* in the name of "the order and harmony of judicial proceedings," reduces matters to jurisdiction pure and simple. Justice Nelson, writing for the Court, was well aware of the trade-off at hand, because he insists that the "question . . . did not depend" on the right of the citizen to a remedy, which he avers federal courts are quite competent to provide, but rather on "which jurisdiction had first attached by the seizure and custody of the property" (460).

By this time, the Taney Court justices had already distinguished themselves as supreme practitioners of the jurisdictional art. For reasons of its own, their defining case, *Dred Scott* v. *Sanford* 60 U.S. 393 (1857), has never replaced *Marbury* as the masterwork of the genre.[51] *Freeman* v. *Howe* remains good law today, credited with beginning "pendent jurisdiction" (Hoar 1984, 898, n. 11) This is an apt rubric in our argument, because remedies available against officer wrongdoing today are regularly subordinated to jurisdiction—even when defined as in that case by the primitive, all but tautological, meaning of physical possession.[52] Nothing about *Marbury* compelled the result in *Freeman*, or the result in *Dred Scott,* or *Nixon v. Fitzgerald,* or any other decision. *Marbury* denied jurisdiction in the Supreme Court in the face of the particular facts and circumstances we have described. The elevation of jurisdiction as the highest precept of constitutional reason—above remedy—even where officers' criminal acts are in question, was the achievement of jurists and commentators who chose to follow the opinion's barest logic, for reasons deserving of a full investigation of its own.

REFERENCES

Ackerman, Bruce. 2005. *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*. Cambridge, MA: Belknap Press.

Amar, Akhil Reed. 1989. "Marbury, Section 13, and the Original Jurisdiction of the Supreme Court." *University of Chicago Law Review* 56: 443–99.

Appleby, Joyce. 2003. *Thomas Jefferson*. New York: Henry Holt.

Barnes, Thomas G. 1961. "Star Chamber Mythology." *American Journal of Legal History* 5: 1–11.

Bestor, Arthur. 1961. "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846–1860." *Journal of the Illinois State Historical Society* 54: 117–80.

Beveridge, Albert Jeremiah. 1916. *The Life of John Marshall: Politician, Diplomatist, Statesman, 1789–1801*. Vol. 2 of *The Life of John Marshall*. Boston: Houghton Mifflin.

Beveridge, Albert Jeremiah. 1919. *The Life of John Marshall: Conflict and Construction, 1800–1815*. Vol. 3 of *The Life of John Marshall*. Boston: Houghton Mifflin.

Bishop, Joel Prentiss. 1882. *Commentaries on the Criminal Law*. Vol. 1. 7th ed. Boston: Little Brown & Co.

Blackstone, William. [1768] 1979. *Commentaries on the Laws of England*. Vol. 3. Chicago: University of Chicago Press.

Bloch, Susan Low. 1989. "The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism." *Duke Law Journal* 561–653.

Bloch, Susan Low. 2001. "The Marbury Mystery: Why Did Marbury Sue in the Supreme Court?" *Constitutional Commentary* 18: 607–27.

Bloch, Susan Low, and Marcus Maeva. 1986. "John Marshall's Selective Use of History in *Marbury v. Madison*." *Wisconsin Law Review* 301–37.

Bowers, Claude G. 1936. *Jefferson in Power: The Death Struggles of the Federalists*. Cambridge, MA: Riverside Press.

Brant, Irving. 1952. "James Madison and His Times." *American Historical Review* 57: 553–70.

Brookhiser, Richard. 2011. *James Madison*. New York: Basic Books.

Bundy, Charles S. 1902. "A History of the Office of Justice of the Peace in the District of Columbia." Records of the Columbia Historical Society, Washington D.C., vol. 5, pp. 259–293.

Cameron, Florence Francis. 1985. "Defamation, Survivability, and the Demise of the Antiquated 'Acto Personalis' Doctrine.'" *Columbia Law Review* 85: 1833–51.

Carpenter, William S. 1915. "The Repeal of the Judiciary Act of 1801." *American Political Science Review* 9: 519–28.

Chitwood, Oliver Perry. 1905. *Justice in Virginia*. Baltimore: Johns Hopkins University Press.

Cooley, Thomas M. 1898. *The General Principles of Constitutional Law*. Boston: Little, Brown.

[50] In *Slocum* v. *Mayberry* 15 U.S. 1 (1817), the Court confirmed the jurisdiction of a state court to order a federal collector in Rhode Island to return the plaintiff's cargo taken from his seized vessel. Under the Embargo Act owners maintained control over the cargo and had a replevin action in state court in cases of unlawful detention. U. S. Attorney General Richard Rush had argued that such a state order would abridge the jurisdiction of the president, who had approved the collector's action. The opinion, which was unanimous, concedes as much, but then proceeds on the basis that other remedies were unavailable: Because "Congress has refused to the courts of the union the power of deciding on the conduct of their officers" in suits at common law, "any remedy the law may afford. . .could be prosecuted only in the state court" (10).

[51] In *Dred Scott*, Justice Taney held that, as a person of African ancestry, Scott could not be a citizen eligible to sue in federal court, and he said furthermore that the national government had exceeded its jurisdiction under the Constitution when it outlawed slavery in the U.S. territories.

[52] On the proprietary connotation of jurisdiction in the period with regard to the court's own subordinate officers, see Orren (1998, 362–74).

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

Corwin, Edward S. 1914. "*Marbury v. Madison* and the Doctrine of Judicial Review." *University of Michigan Law Review* 12: 538–72.
Crompton, Richard. [1630 or 1641] 1881. *Star Chamber Cases, Showing What Cases Properly Belong to the Cognizance of That Court*. Boston: Soule and Bugbee.
Dane, Perry. 1994. "Jurisdictionality, Time, and the Legal Imagination." *Hofstra Law Review* 23: 1–135.
Ford, Paul Leicester. 1904. *The Works of Thomas Jefferson*. 12 vols. Vol. 4. New York: G. P. Putnam's Sons.
Forte, David F. 1996. "Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace." *Catholic University Law Review* 45: 349–402.
Frankfurter, Felix, and James M. Landis. 1925. "The Business of the Supreme Court of the United States: A Study in the Federal Judicial System." *Harvard Law Review* 38: 1005–59.
Gay, Sidney Howard. 1898. *James Madison*. Boston: Houghton Mifflin.
Goebel, Julius. 1971. *Antecedents and Beginnings to 1801*. Vol. I of *The Oliver Holmes Devise History of the Supreme Court*. New York: Macmillan.
Goodman, Leonard S. 1957. "Mandamus in the Colonies—The Rise of the Superintending Power of American Courts." *American Journal of Legal History* 1: 308–35.
Graber, Mark A. 1995. "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power." *Constitutional Commentary* 12: 67–92.
Gray, Charles M. 1994. *The Writ of Prohibition: Jurisdiction in Early Modern English Law*. Vol. 1. New York: Oceana Publications.
Hamburger, Philip J. 2008. *Law and Judicial Duty*. Cambridge, MA: Harvard University Press.
Haskins, George Lee. 1981. *Foundations of Power: John Marshall 1801–15,* Pt. 1. of Vol. 2 *of The Oliver Wendell Holmes Devise History of the Supreme Court*. New York: Macmillan.
Henderson, Edith G. 1963. *Foundations of English Administrative Law*. Buffalo, NY: William S. Hein.
Hoar, Samuel, Jr. 1984. "Unraveling the Pendent Party Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction." *Boston University Law Review* 64: 895–947.
Hoffer, Peter C. and N. E. H. Hull. 1978. "The First American Impeachments." *William and Mary Quarterly* 35: 653–67.
Howe, John R. 1967. "Republican Thought and the Political Violence of the 1790s." *American Quarterly* 19: 147–65.
Jacob, Giles. [1729] 1797. *The Law-Dictionary: Explaining the Rise, Progress, and Present State, of the English Law, in Theory and Practice; Defining and Interpreting the Terms or Words of Art; and Comprising Copious Information, Historical, Political, and Commercial, on the Subjects of Our Law, Trade, and Government*. London: T. Longman.
Jaffe, Louis L. 1958. "The Right to Judicial Review." *Harvard Law Review* 71: 401–37.
Jay, Stewart. 1985. "Origins of Federal Common Law: Part Two." *University of Pennsylvania Law Review* 133: 1231–333.
Jefferson, Thomas. N.d. "Public Papers, 1743–1826." Electronic Text Center, University of Virginia Library.
Jefferson, Thomas. 1904–05. *The Works of Thomas Jefferson, Federal Edition*. Vol. 12. Letter to William Johnson, June 12, 1823.
Kessler, Amalia D. 2005. "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial." *Cornell Law Review* 90: 1181–275.
Ketcham, Ralph. 1971. *James Madison: A Biography*. New York: Macmillan.
Kramer, Larry D. 2004 *The People Themselves: Popular Constitutionalism and Judicial Review*. Oxford University Press: NY.
Leadam, I. S. [1902] 2009. *Select Cases before the King's Council in the Star Chamber*. Selden Society. Delhi: Pranava Books.
Levinson, Sanford. 2003. "Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either." *Wake Forest Law Review* 38: 553–78.
Malone, Dumas. 1962. *Jefferson and the Ordeal of Liberty*. Boston: Little, Brown.
Malone, Dumas. 1967. "Mr. Jefferson and the Traditions of Virginia." *Virginia Magazine of History and Biography* 75: 131–42.
Malone, Dumas. 1970. *Jefferson the President: First Term, 1801–1805* Boston: Little, Brown.
Marvick, Elizabeth. 2005. "Washington, Jefferson, Madison: Family Experience and Personality in the Politics of Three Virginian Founding Fathers." Unpublished ms.
Mashaw, Jerry M. 2007. "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829." *Yale Law Journal* 116: 1636–1740.
McCloskey, Robert G. 1960. *The American Supreme Court*. Chicago: University of Chicago Press.
McConnell, Michael W. 2009. "The Story of *Marbury v. Madison*: Making Defeat Look like Victory," In *Constitutional Law Stories*, ed. Michael C. Dorf. New York: Thomson Reuters/Foundation Press, pp. 13–31.
McDonald, Forrest. 1994. *The American Presidency: An Intellectual History*. Lawrence: University of Kansas Press.
Melton, Buckner F. Jr. 1993. "Federal Impeachment and Criminal Procedure: The Framers' Intent." *Maryland Law Review* 52: 437–57.
Merrill, Thomas W. 2004. "*Marbury v. Madison* as the First Great Administrative Law Decision." *John Marshall Law Review* 37: 481–522.
Monaghan, Henry P. 1983. "Marbury and the Administrative State." *Columbia Law Review* 83: 1–34.
Newmyer, R. Kent. 2001. *John Marshall an the Heroic Age of the Supreme Court*. Baton Rouge: Louisiana State Press.
O'Fallon, James M. 1992. "Marbury." *Stanford Law Review* 44: 219–60.
Orren, Karen. 1994. "The Work of Government: Recovering the Discourse of Office in *Marbury v. Madison*." *Studies in American Political Development* 8: 60–80.
Orren, Karen. 1998. "A War between Officers: The Enforcement of Slavery Law in the Northern United States, and of the Republic for Which It Stands, Before the Civil War." *Studies in American Political Development* 12: 343–82.
Orren, Karen. 2000. "Officers' Rights: Toward a Unified Field Theory of American Constitutional Development." *Law & Society Review*, 34: 873–909.
Perlin, Adam A. 2010. "The Impeachment of Samuel Chase: Redefining Judicial Independence." *Rutgers Law Review* 62: 725–89.
Pfander, James E. 2001. "Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Power." *Columbia Law Review* 101: 1515–612.
Pfander, James E. 2004. "Article I Tribunals, Article III Courts, and the Judicial Power of the United States." *Harvard Law Review* 118: 643–776.
Pious, Richard M. 1999. "Impeaching the President: The Intersection between Constitutional and Popular Law." *St. Louis University Law Journal* 43: 859–904.
Pollak, Louis H. 2004. "What Did John Marshall Decide and Why?" *Proceedings of the American Philosophical Society* 148: 1–13.
Prakash, Saikrishna, and Steven D. Smith. 2006. "How to Remove a Federal Judge." *Yale Law Journal* 116: 72–137.
Presser, Stephen B. 2009. "Samuel Chase: In Defense of the Rule of Law and against the Jeffersonians." *Vanderbilt Law Review* 62: 349–70.
Presser, Stephen B. and Becky Bair Hurley. 1984. "Saving God's Republic: The Jurisprudence of Samuel Chase." *University of Illinois Law Review*, pp. 771–822.
Prince, Carl E. 1970. "The Passing of the Aristocracy: Jefferson's Removal of the Federalists, 1801–1805." *Journal of American History* 57: 563–75.
Rankin, H. F. 1962. "The General Court of Colonial Virginia: Its Jurisdiction and Personnel." *Virginia Magazine of History and Biography* 70: 142–53.
Roberts, Clayton. 1956. "The Growth of Ministerial Responsibility to Parliament in Late Stuart England." *Journal of Modern History* 28: 215–33.
Roberts, Clayton. 1975. "The Law of Impeachments in Stuart England: A Reply to Raoul Berger." *Yale Law Journal* 84: 1419–39.
Rowe, Gary D. 2005. "Constitutionalism in the Streets." *Southern California Law Review* 78: 401–56.
Sawyer, Jeffrey K. 1903. "Distrust of the Legal Establishment in Perspective: Maryland During the Early National Years." *Georgia Journal of Southern Legal History* 2: 1–40.
Shugerman, Jed Handelsman. 2002. "Marbury and Judicial Deference: The Shadow of *Whittington v. Polk* and the Maryland Judicial Battle." *University of Pennsylvania Journal of Constitutional Law* 5: 58–108.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press

Simon, James F. 2002. *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*. New York: Simon & Schuster.
Simon, Maria. 1994. "Bribery and Other Not So 'Good Behavior': Criminal Prosecution as a Supplement to Impeachment of Federal Judges." *Columbia Law Review* 94: 1617–73.
Singleton, Marvin K. 1968. "New Light on the Chancery Side of Virginia's Evolution to Statehood." *Journal of American Studies* 2: 149–60.
Smith, Joseph Henry. 1950. *Appeals to the Privy Council from the American Plantations*. New York City: Columbia University Press.
Smith, James Morton. 1954. "Sedition in the Old Dominion: James T. Callender and 'The Prospect Before Us.'" *Journal of Southern History* 20: 157–82.
Snowiss, Sylvia. 1987. "From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review." *Studies in American Political Development* 2: 1–67.
Steinberg, Allen. 1984. "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History." *Crime & Delinquency* 30: 568–92.
Story, J. 1809. *Commentaries on the Law of Agency*. Boston: Charles C. Little and James Brown.
Surrency, Erwin C. 1967. "Courts in the American Colonies." *American Journal of Legal History* 11: 253–76.
Thayer, James B. 1901. *John Marshall*. Boston: Houghton Mifflin.
Throop, Montgomery H. 1892. *A Treatise on the Law Relating to Public Officers and Sureties in Official Bonds*. Chicago: T. H. Flood & Company.
Turner, Kathryn. 1965. "The Midnight Judges." *University of Pennsylvania Law Review* 109: 494–523.
Van Alstyne, William Scott. 1952. "The District Attorney—A Historical Puzzle." *Wisconsin Law Review* 125: 125–38.
Warren, Charles. 1923. *The Supreme Court in United States History: 1789–1821*. Vol. 1 of *The Supreme Court in United States History*. Boston: Little, Brown, and Co.
Warren, Charles. 1923–24. "New Light on the History of the Federal Judiciary Act of 1789." *Harvard Law Review* 37: 49–132.
Weinberg, Louise. 2003. 'Our Marbury.' *Virginia Law Review* 89: 1235–412.
Woolhandler, Ann. 1987. "Patterns of Official Immunity and Accountability." 37 *Case Western Reserve Law Review* 396–483.

https://doi.org/10.1017/S0003055413000117 Published online by Cambridge University Press