MARBURY V. MADISON AND R (MILLER) V. THE PRIME MINISTER: AN ATTEMPT AT COMPARATIVE CONSTITUTIONAL RHETORIC*

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ABSTRACT

Marbury v. Madison is regarded as one of the most seminal court opinions of modern times. Its enduring legacy is rooted in its constitutional rhetoric, which this Article defines as the operationalization of rhetorical techniques and methodologies for constitutional discourse in court decisions. In the United Kingdom (U.K.), the equivalent of *Marbury* seems to be *R (Miller) v. The Prime Minister*, which concerned the prorogation of the U.K. Parliament in 2019 leading up to the next parliamentary elections and in anticipation of the U.K.'s exit from the European Union (EU). The constitutional rhetoric of both *Marbury* and *Miller* highlights the importance of the persuasive character of judicial opinions meant for their greater audiences. The "how" of constitutional rhetoric concerns the multiple options available to judges that collectively constitute either "cloaking devices," "deflector shields," or a combination of both put through a court opinion's message and reasoning. The composition of *Marbury*'s constitutional rhetoric is genius, with its easily identifiable and logical flow, carving up of the issues, and intentional contrasts and long deductions with a peppering of legal distinctions and delineations, among others. *Miller* has its own distinct and logical flow as well, along with other similarities, but it also has its own bolder, more relevant, more impactful, and more assertive signature of constitutional rhetoric because of its modern context. In the end, it is perhaps unwise to compare *Marbury* and *Miller* because of their differing contexts, but constitutional scholarship is all the better for it.

> *"Laws are a dead letter without courts to expound and define their true meaning and operation."*
> —Alexander Hamilton[1]

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> *"Hey, the Chief Justice wrote another opinion in verse. Want to hear it?"*
>
> —Leo McGarry in *The West Wing*[2]

INTRODUCTION

The decision of the Supreme Court of the United States (SCOTUS) in the case of *Marbury v. Madison*[3] is regarded as one of the most seminal court opinions in modern times. Despite the fact that it was never cited by the SCOTUS for nearly a century after its promulgation,[4] as well as the multitude of legal commentaries regarding either its unoriginality[5] or its overstated mythology,[6] *Marbury* is still "regarded as *the* central decision in the canon of American constitutional law."[7] This is because of its basic and arguably prototypical enunciation of one crucial constitutional principle: the power of the judicial branch of the U.S. Government to hold the final say in settling constitutional cases and controversies and strike down unconstitutional acts

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[1] THE FEDERALIST NO. 22 (Dec. 14, 1787), *available at* https://avalon.law.yale.edu/18th_century/fed22.asp (last accessed Jan. 22, 2021).

[2] *The West Wing: Inauguration: Over There* (NBC television broadcast, Feb. 12, 2003).

[3] [Hereinafter "*Marbury*"], 5 U.S. (1 Cranch) 137 (1803).

[4] There is evidence suggesting that it was resuscitated in modern times for citation in order to advance more expansive views of judicial review. *See* Davison Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case"*, 38 WAKE FOREST L. REV. 375, 375–414 (2003).

[5] *See* Leland Taylor Chapin, *The British Background of the American Theory of Judicial Review* (May 1938) (unpublished dissertation for Doctor of Philosophy, University of Edinburgh), *available at* https://era.ed.ac.uk/bitstream/handle/1842/29650/Chapin_1938redux.pdf; William Michael Treanor, *The Origins of Judicial Review in the United States,* 1780–1803 (2010) (unpublished dissertation for PhD in History, Harvard University); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POL. SCI. 285, 285–302 (1994).

[6] *See* Francene Marie Engel, *The Myth of Judicial Supremacy: Justiciability, Separation of Powers and Constitutional Politics in American Political Development*, 29–125 (May 2001) (unpublished dissertation for PhD in Political Science, University of Southern California), *available at* http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll16/id/96275; Mark Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 609–50 (2003).

[7] Douglas, *supra* note 4, at 378. (Emphasis in the original.)

and legislation, if necessary—i.e. judicial review. *Marbury*'s centrality has spawned many theories regarding how the decision is to be properly read,[8] but suffice it to say that its resilient legacy and influence as a cornerstone of modern judicial or constitutional review, especially in the context of upholding the rule of law, have reached beyond the United States (U.S.)[9] and, for the decision's seemingly unassuming paragraphs, have established a firm place in the legal imagination of the world.

Marbury's enduring legacy and influence can rightly be credited to its rhetoric—i.e. the opinion's persuasive style and structure meant for the eyes of the parties involved and the public at large. Indeed, the academic discourse on American constitutional rhetoric has some valuable insights as to how courts, particularly the SCOTUS, frame and address constitutional issues in their judicial opinions. These opinions are public documents that are both explanations of a court's logic and attempts at persuading its intended audiences. With proper identification and analysis of rhetorical techniques and methods utilized in American judicial opinions—enough to explain the immediate structuring and arrangement of themes, arguments, and topics related to American constitutional adjudication—one can distill enough identifying features of *Marbury*'s rhetoric to establish the criteria for a case to be dubbed a country's "*Marbury* moment."

In the United Kingdom (U.K.), there have been two assertions as to which judgment of the U.K. Supreme Court ("UKSC")—which only started

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[8] *See* Peter Schotten, *Marbury v. Madison, Rightly Understood*, 33 PERSPECT. POL. SCI. 134, 134–41 (2004); Thomas Haggard, *Marbury v. Madison: A Concurring/Dissenting Opinion*, 10 J.L. & POL. 543, 543–78 (1994); William Van Alstyne, *A Critical Guide to Marbury v. Madison,* 18 DUKE L.J. 1, 1–47 (1969); Samuel Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 391–440 (2004); Robert Nagel, *Marbury v. Madison and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613, 613–34 (2003); Harry Tepker, *Marbury's Legacy of Judicial Review After Two Centuries*, 57 OKLA L. REV. 127, 127–42 (2004); Edward Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 538–72 (1914); James Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1515–1612 (2001); Winfield Rose, *Marbury v. Madison: How John Marshall Changed History by Misquoting the Constitution*, 36 PS: POLITICAL SCIENCE & POLITICS 209, 209–14 (2003); Jeffrey Anderson, *John Marshall's Opinion in Marbury v. Madison Does Not Rely on a Misquoting of the Constitution: A Response to Rose*, 37 PS: POLITICAL SCIENCE & POLITICS 199, 199–202 (2004); Christopher Budzisz, *How History Has Changed John Marshall's Interpretation of the Constitution: A Response to Winfield H. Rose*, 37 PS: POLITICAL SCIENCE & POLITICS 385, 385–89 (2004); Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1463–1573 (2003); William Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 733 WAKE FOREST L. REV. 733, 733–92 (2003).

[9] *See* Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 251-74 (2004); James Crawford, *Marbury v. Madison at the International Level*, 36 GEO. WASH. L. REV. 505, 505–14 (2004).

operation in 2009—constitutes the country's *Marbury* moment. One has put forth that *R (Miller) v. Secretary of State for Exiting the European Union*[10] is deserving of the title.[11] Another contends that the case of *R (Miller) v. The Prime Minister*[12] ("*Prorogation Case*") is the one true *Marbury* of the realm.[13] This Article argues on behalf of the *Prorogation Case* using the standard of constitutional rhetoric. In fact, the *Prorogation Case* seems to have established itself as a new modern standard in terms of a supreme or constitutional court's "setting up shop" *vis-à-vis* judicial review.

Part I briefly summarizes the *Prorogation Case* and presents what has been said about its similarities to *Marbury*. Part II then introduces the discourse of American constitutional rhetoric, which will be this Article's lens in reading both cases. Part III deals specifically with the constitutional rhetoric of *Marbury* itself, with a detailed breakdown of *Marbury*'s rhetorical structure in establishing American judicial review. This is where the rhetorical criteria for a supreme or constitutional court's *Marbury* moment will be distilled. Part IV applies the rhetorical criteria to the *Prorogation Case*, and Part V analyzes this juxtaposition—considering the more modern age in which the UKSC finds itself and briefly mentioning reasons why the first *Miller* case fails to make the cut for the title of "U.K.'s *Marbury*." The Article concludes with a basic conceptual realization: ultimately, it might not be wise to compare the two cases, but there is still some wisdom to be gleaned from such an attempt.

I. PROROGATION PROLOGUE

First, a brief digest of the *Prorogation Case*: the governmental act involved was the Prime Minister's advice to the Queen that effectively became the basis for a proroguing (suspension) of the U.K. Parliament. The lawfulness of said advice was questioned because of allegations that "[P]arliament might be prorogued so as to avoid further debate in the run-up to [Brexit] day,"[14] or more eloquently, that the advice toward proroguing "was motivated by the improper purpose of stymying Parliamentary scrutiny [over] the executive."[15] The UKSC unanimously ruled that the Prime Minister's act

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[10] 2017 UKSC 5.

[11] David Campbell, *Marbury v. Madison in the UK: Brexit and the Creation of Judicial Supremacy*, 39 CARDOZO L. REV. 921, 921–46 (2018).

[12] [Hereinafter "*Prorogation Case*"], 2019 UKSC 41. This case is alternatively known as Cherry et al. v. Advocate General for Scotland.

[13] Sam Shirazi, *The U.K.'s Marbury v. Madison: The Prorogation Case and How Courts Can Protect Democracy*, 2019 U. ILL. L. REV. ONLINE 108, 108–22.

[14] *Prorogation Case*, 2019 UKSC 41, ¶ 23.

[15] *Id.*, ¶ 24.

of advising the Queen toward an improper and unlawful proroguing of Parliament was justiciable, and that such an act could be—and had in fact been—declared null and void by the Court.[16] Details of the judgment's doctrinal ruling will be revisited later for purposes of rhetorical analysis.

Sam Shirazi's article, which puts forward the *Prorogation Case* for the title of "U.K.'s *Marbury*," does a good job in arguing for its cause, but only to a certain extent. It begins by stating that in the case, "[l]ike [in] *Marbury*, the UKSC was forced to grapple with difficult constitutional questions in the midst of political conflict," and that "[b]oth decisions show Supreme Courts coming into their own and asserting themselves as important players in the constitutional balance of power by not shying away from difficult political issues."[17] Shirazi correctly points out that the UKSC "had to formulate a criteria to judge prorogation," and thus, it "formulated a standard that looks at the function of Parliament, as opposed to merely focusing on legal doctrine."[18] Ultimately, the Court zeroed in on the reasons justifying the prorogation—of which there were none—for its unanimous decision. The article also does a fine job of establishing the background of the UKSC, the lead-up to the prorogation controversy, and the early mixed reaction to the Court's judgment. However, the meat of Shirazi's work is his four "main similarities between the *Prorogation Case* and *Marbury*."[19]

The first is that "both Supreme Courts acted in a confident manner when confronted [with] a difficult political question."[20] Just as "the U.K. Supreme Court refused to take a back seat and understood that it had a role to play," so did the SCOTUS in *Marbury* when it "was willing to analyze and criticize the actions of both the executive and legislative branches, even in the midst of political conflict between the two major parties" at the time.[21]

The second is that "both decisions expanded the roles of each Supreme Court relative to the other branches of government."[22] This is one part where the article could have gone deeper. Although clearly, "*Marbury* completely revolutionized the role of the Supreme Court by enshrining the role of judicial review,"[23] Shirazi merely states that the UKSC in the *Prorogation*

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[16] *Id.*, ¶¶ 69–71.

[17] Shirazi, *supra* note 13, at 108.

[18] *Id.* at 113.

[19] *Id.* at 115.

[20] *Id.*

[21] *Id.* at 116.

[22] *Id.*

[23] *Id., citing* Nicandro Iannacci, *Marbury v. Madison: The Supreme Court Claims its Power, Nat'l Constitution Ctr.: Constitution Daily,* CONST. DAILY, Feb. 24, 2019, *at*

Case "established that it had an important role in arbitrating the relationship between Parliament and the Prime Minister"[24] without any expansive argument as to why exactly this is so.

The third is that "both Supreme Courts explained that there must be a central role for the judicial branch in the balance of power, and [that] the courts are not simply confined to theoretical legal questions."[25] Whereas *Marbury* was for the SCOTUS a "watershed moment that marked the beginning of its relevance to the American political system, as opposed to simply the legal system" because of its newfound power to declare what is or is not federal law, the article simply states that "the U.K. Supreme Court grabbed the legal bull by the horns and inserted itself into the heart of the divisive Brexit debate" as "an active participant in the government with an important role in safeguarding democracy."[26] Again, there is no expansive argument as to why this is exactly so.

The fourth and final main similarity is that "both decisions are so similar because of when they were decided in relation to the creation of each Supreme Court,"[27] with the *Prorogation Case* being decided 10 years after the UKSC's establishment and *Marbury* being decided only 14 years after the U.S. Constitution was ratified in 1789[28]—indeed a unique parallel between the two.

Shirazi also identifies three important differences between the two cases: "[f]irst, the [SCOTUS] in *Marbury* ultimately declined to rule on the merits of the underlying dispute, unlike the *Prorogation Case*;"[29] second, "the *Prorogation Case* overturned a decision of the executive branch, whereas *Marbury* overturned a decision of the legislative branch;"[30] and lastly, "the [UKSC] is limited in its ability to strike down primary acts of Parliament" because of "the doctrine of parliamentary sovereignty, wherein statutes passed by Parliament are supreme to other aspects of the U.K. constitution."[31]

With main similarities that are not substantially explained, and key differences that can be enough to show how the two cases strongly contrast

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https://constitutioncenter.org/blog/marbury-v-madison-the-supreme-court-claims-its-power/.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 116

[27] *Id.* at 117.

[28] *Id.* at 108.

[29] *Id.* at 117.

[30] *Id.*

[31] *Id.*

each other, how does the article really see the *Prorogation Case* as *Marbury*'s Second Coming in the U.K.?

A synthesis of the article would likely identify a moment in time for a supreme or constitutional court when it was faced with a choice to expand or define its powers *vis-à-vis* other entities in the constitutional setup. There is an easy answer to what this is for present purposes: for the SCOTUS more than 200 years ago, it was the ongoing conflict between the Federalists and Democratic Republicans,[32] and for the UKSC, it was (and still is) the ongoing drama of Brexit. However, that still does not solve the problem. Perhaps for now, it is not a question of when in time, or what was faced at the time, but instead, the "how" of the matter.

Shirazi's article somewhat identified the "how" in his second and third main similarities between the two cases, but it did not explain the process through which both expanded or established judicial review and declared the central role of the judiciary in both constitutional setups. It is this process that comes to the foreground and, as stated earlier, this Article identifies constitutional rhetoric as deserving of the title.

II. THE ELEMENTS & GADGETS OF CONSTITUTIONAL RHETORIC

This Article defines constitutional rhetoric as an operationalization of rhetorical techniques and methodologies for purposes of constitutional discourse, with a special applied focus on the written output of supreme or constitutional courts—i.e. judgments or court opinions—for both the adjudication of cases and their better reception among said courts' intended audiences. Although the history of rhetoric (especially classical rhetoric) has put prime emphasis on the functional rhetoric of lawyerly advocacy in the courtroom, among other public gatherings, "what is true of the lawyer as advocate is also generally true of the judge."[33] Predominantly, a judge needs rhetoric because:

> Like the lawyer-advocate, the judge has a number of audiences she must persuade that she is right and that the losing party's lawyer is wrong. These audiences include the appellate courts, the legal community, the losing party (who the judge hopes will leave the courtroom quietly and decide not to appeal the case), and the public at large. At this point, the judge has a series of client-like

[32] *Id.* at 116.

[33] Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1560 (1990).

> commitments—to her own decision, to her reputation for getting matters right, to the winning party, and to the reputation of the courts and the rule of law. The reputation of the courts and the rule of law, of course, will be sustained or enhanced by decisions that are perceived as fair, right, and legitimate—and diminished by those that are not.[34]

Jamal Greene notes that "[t]here is a dichotomy between, on [the] one hand, what judges say to *explain* or *justify* their decisions, and on the other hand, what judges say to *persuade* their audience that those decisions, and their associated reasons, are correct."[35] This act of persuasion after a judicial decision on a case's merits is "not simply a logical transcription of the legal justification reached," but a stage in the process that "requires constitutional judges to engage in forms of rhetoric."[36] Indeed, according to Greene, "many judicial opinions in the United States—and nearly all Supreme Court opinions—are rhetorical devices whose content, even when logically grounded, is difficult to understand in purely demonstrative terms."[37] Crucially, Greene notes that these rhetorical devices are either one of Aristotle's "three overarching (and overlapping) forms" of rhetoric, which are *logos* (meaning "appeals to logic"), *ethos* (meaning "appeals to the character of the speech"), and *pathos* (meaning "appeals to emotion").[38] Despite the notion that "[r]hetoric has a bad reputation" and that "fallacious constitutional arguments are made in its service" are seen "to reinforce the fallacy," it can still "serve as a partner to the legitimating discourse of constitutional law."[39]

This truly now becomes a question of "how." Greene points out that "[c]onstitutional law has a set of familiar and overlapping taxonomies of argument forms" that are "implicit limits on the kinds of arguments that 'count.'"[40] Specifically, he posits:

> The kinds of arguments that characterize that discourse are typically said to include textual, structural, historical, precedent-based, and prudential arguments. Most arguments that count within the community of U.S. constitutional lawyers are either about the

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[34] *Id.* at 1561.

[35] Jamal Greene, *Constitutional Rhetoric*, 50 VAL. U. L. REV. 519, 520 (2016). (Emphasis in the original.)

[36] *Id.*

[37] *Id.* at 521. Here, "demonstrative" refers to the "explanatory" or "justificatory" parts of judicial opinions.

[38] *Id.* at 522, *citing* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE (George Kennedy trans., 2007) (1991) 37–46.

[39] *Id.* at 536.

[40] *Id.* at 536–37.

> meaning of the constitutional text; implications generated from constitutional structure or the relationships immanent within the constitutional architecture; historical intentions or the contemporaneous meaning of the Constitution's words; judicial precedent or historical political practice; or the consequences for the institutional legitimacy of the judiciary or for the effective functioning of governmental, and especially federal governmental, institutions.[41]

Within these argument forms, classical rhetoric's three overarching forms place their modifications.[42]

Colin Starger builds on the taxonomies of Greene and Phillip Bobbitt, the latter having essentially "identified constitutional argument as a self-contained and self-referential discourse that necessarily *assumed* the legitimacy of judicial review."[43] Bobbitt focused on the "core elements" of "legal grammar," which he labels as "the six archetypes of constitutional argument."[44] These are "historical, textual, structural, doctrinal, ethical, and prudential."[45] These taxonomies of Greene and Bobbitt are the "rhetorical *topoi*"[46] or "rhetorical topics"[47] that in Aristotelian terms are "the metaphorical places in a discourse where speakers could look to find stock themes to build their arguments."[48] Starger, citing Aristotle, in turn identifies *logos*, *ethos*, and *pathos* as "rhetorical species of *pisteis*" or "species of proof as well as modes of persuasion."[49] Starger even has a grid or "argument table where the *pisteis* are on one axis and the *topoi* are on the other for mapping out the rhetorical architecture of a court opinion.[50] Thus, "[w]hile *topoi* inspire the content of the argument, *pisteis* provide rhetorical form."[51] And importantly, "[c]onstitutional law *topoi* neither state transcendent truths about the Constitution, nor indicate answers to disputed questions. Rather, they provide subject-matter tools to aid invention,"[52] in line with what Starger describes as the adjudicatory (and not propositional) nature of constitutional

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[41] *Id.* at 537.

[42] *Id.*

[43] Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1350 (2016). (Emphasis in the original.)

[44] *Id.* at 1351.

[45] *Id.* The ethical archetype relates to "value arguments."

[46] *Id.* at 1349.

[47] *Id.* at 1360.

[48] *Id.*

[49] *Id.* at 1354.

[50] *Id.* at 1359.

[51] *Id.* at 1361.

[52] *Id.*

argumentation.[53] In other words, to help decide and not just explain a particular constitutional case or controversy, and not a constitutional principle with absolute finality, judges have a set of time-tested sources and material that they can modify using appeals to emotion, logic, or character/authority.

Erwin Chemerinsky also observes that "[t]he Supreme Court's opinions are rhetoric in that they are reasoned arguments intended to persuade," and that such court opinions are "written to make results seem determinate and value-free."[54] He also notes that "[t]he outcome of the vast majority of Supreme Court cases is indeterminate in the sense that reasonable justices and people can differ as to the proper interpretation of the Constitution as it applies to a specific case," or in other words, "rarely in constitutional cases can any result be justified as the one and only correct choice."[55] Chemerinsky thus posits that "[i]nescapably, value choices need to be made when the Supreme Court interprets constitutional provisions."[56] This is especially important when "the court deals with issues where there are no textual provisions to interpret," and "[e]ven when there are textual provisions, interpreting them inevitably requires value choices as to their meaning."[57] Value choices are also critical when "constitutional cases involve balancing."[58]

U.S. constitutional rhetoric is thus a very thematic, topical, and value-based method of argumentative persuasion, with adjustable and alternative modes of proof that go beyond black-letter doctrine and pure logic in helping courts to resolve and present their resolution of particular constitutional cases and controversies. This is done by—to borrow two phrases from science fiction—constitutional rhetoric being a supreme or constitutional court judgment's operational "cloaking device" and "deflector shield" in one.

Going to a more technical discussion, Shelby Bell also identifies various "strategies and tropes" that the SCOTUS utilizes "to create the appearance of high standards, objectivity in process, and uniformity of interpretation" that "justify legal authority as it makes legal thought and action

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[53] *Id.* at 1335. Here, Starger explains propositional constitutional arguments in a basic form: "*Proposition P (about the Constitution) is true because* [constitutional argument]"—as opposed to adjudicatory constitutional arguments: "*Litigant L wins (the instant constitutional controversy) because* [constitutional argument]."

[54] Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010 (2002).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 2011.

[58] *Id.*

appear superior to other modalities because law looks impartial and fair."[59] These strategies, which form part of the Court's "invisible rhetoric,"[60] are: "1) strategies of argument, including tropes, subject of arguments, and evidence; 2) strategies of structure, dealing with the organization of material; and 3) strategies of style, including syntax and figures."[61]

Regarding strategies of argument, Bell notes that "[t]he deductive form is particularly amenable to judicial opinions [...]" because it "creates the appearance that the judge merely applies the law and the judge appears to have no influence on the outcome of the case," i.e. "the appearance of objectivity, and because it is a form used in formal logic, it sometimes appears logically irrefutable."[62]

Another relevant strategy is one that "create[s] the appearance of evidence when it is absent," such that "the authority of the speaker serves as the evidence for the claim." In other words, "without evidence for an argument, the audience is left to use the speaker's credibility to evaluate the arguments. This appeal is especially useful for the Supreme Court as the Justices are granted institutional authority by virtue of their position."[63]

Another similar relevant strategy is "enthymematic reasoning" that "can create the appearance of self-evidence."[64] An enthymeme is "a syllogism where one of the premises or the conclusion was left unstated for the audience to fill in for themselves," and "[w]hen the audience participates in the construction of the argument[,] it can feel as though the conclusions were self-evident."[65] When this and the two previous strategies of argument are successfully employed, "judicial decisions appear incontestable."[66]

Regarding strategies of structure, Bell cites a variety of manuals of judicial style that identify the basic fivefold structure of judicial opinions that conform to classical rhetoric:[67]

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[59] Shelby Bell, *Inventing the Rule of Law: A Rhetorical Analysis of US Supreme Court Per Curiam Opinions,* at 24 (May 2016) (unpublished dissertation for PhD in Communication Studies, University of Minnesota-Twin Cities), *available at* https://conservancy.umn.edu/handle/11299/181680.

[60] *Id.* at 26.

[61] *Id.*

[62] *Id.* at 27.

[63] *Id.* at 28–29.

[64] *Id.* at 29.

[65] *Id.* at 29–30, *citing* ARISTOTLE *supra* note 38, at 164–71.

[66] *Id.* at 31.

[67] *See* JAMES HERRICK, THE HISTORY & THEORY OF RHETORIC: AN INTRODUCTION 109 (2000), which notes the Roman rhetorician Quintilian's division of judicial speeches into

> 1) [A]n orientation paragraph(s) explaining the nature and history of the case, 2) a summary of the legal issues, 3) a description of the material facts of the case, 4) an analysis of the issues, meaning the arguments justifying the decision, and 5) a conclusion that disposes of the case and offers instructions to parties and lower courts.[68]

Even an orientation paragraph is of such rhetorical import because it "allows the judge to frame the remainder of the opinion and to prime certain issues for the audience," and "[i]f written strategically," it "should allow the opinion writer to draw attention to the issues that aid their argument and divert attention from issues that might detract from agreement with the opinion."[69] In order to "accomplish the goal of conveying key information quickly" to typical consumers of judicial output in the legal profession, a "journalistic" or "reporting style" is usually employed "to create the appearance of neutrality and objectivity" and give a "description of the case in such a way that the arguments used in the later parts of the opinion appear justified in response."[70]

Going to the second part of the fivefold structure, Bell emphasizes that "[a]fter the orientation, the [judicial] opinion often describes the legal issues in the case, including what law or rule will govern the case."[71] Indeed, "[o]ften the issues section will also preview the Court's conclusion stating the Court's decision and what rule was used to reach that decision," i.e. this is a preliminary self-evident "collapsible syllogism" since the *ratio decidendi* is presented much later in the opinion.[72]

As to the third part dealing with material facts, rhetorical selection is involved in that judges "includ[e] in their opinion those facts that influenced their decision[s] or are otherwise material to the case," which "should work to frame the cause to suit the outcome of the opinion."[73] The fourth part,

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five parts: 1) the *exordium*, "an introduction designed to dispose the audience to listen to the speech;" 2) the *narratio*, "a statement of facts essential to the understanding of the case, and intended to reveal the essential nature of the subject about which they were to render a decision;" 3) the *confirmatio*, "a section designed to offer evidences in support of claims advanced during the *narratio*;" 4) the *confutatio*, "the refutation, in which counterarguments were answered;" and 5) the *peroratio*, the concluding section "in which the orator demonstrated again the full strength of the case presented."

[68] Bell, *supra* note 59, at 32.

[69] *Id.* at 32–33.

[70] *Id.* at 33.

[71] *Id.*

[72] *Id.* at 34.

[73] *Id.*

which is the judgment's *ratio decidendi*, "analyzes the issues of the case and is the most explicitly persuasive" since it "offers argument and evidence in support of the Court's conclusion."[74] Indeed, "[t]his section of the opinion is central to creating and maintaining judicial legitimacy."[75] Finally, the opinion's concluding disposition of the case needs to be "brief but forceful" in its "clarity" so that "lower courts and other legal actors can carry out the court's decision quickly and efficiently."[76] This overall "dissection of an opinion into defined sections creates the appearance of linear and orderly argument," and "illustrates the rhetorical nature of the structure of the opinion, whether intended persuasively or not."[77]

As to strategies of style, Bell notes that "judicial opinions utilize stylistic features like word choice, syntax, and tropes to create a rhetoric that appears impartial"[78] and even "inevitable."[79] There are many she identifies: 1) "use of technical jargon" to give the "impression of objectivity and expertise;"[80] 2) "removing personal pronouns" to "claim super-human authority;"[81] 3) alternating "[s]yntactic strategies" (i.e. alternating between active or passive voices or verbs);[82] 4) "word choice;"[83] 5) "ask[ing] a question and answer[ing] it in the course of the text;"[84] 6) a "declarative tone" in the form of "[h]yperbole and assertions" that "can portray the Court's decisions as obvious or self-evident;"[85] and 7) a "monologic voice," especially when it comes to unanimous or *per curiam* decisions.[86]

Thus, together with the general discourse on constitutional rhetoric as a supreme or constitutional court's operational two-in-one cloaking device or deflector shield, Bell's toolbox of the SCOTUS' main rhetorical devices and techniques shows how judges have multiple options in their modes of persuading their audiences of their reasons in deciding cases.

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[74] *Id.* at 35.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 36.
[78] *Id.* at 37.
[79] *Id.* at 39.
[80] *Id.* at 37.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 39.
[84] *Id.*
[85] *Id.* at 39–40.
[86] *Id.* at 39.

III. *MARBURY*'S CONSTITUTIONAL RHETORIC

First, a brief digest of the seminal case: toward the end of his term in 1801 and having lost his re-election bid, U.S. President John Adams appointed a sizeable number of new magistrates to the federal bench, among them William Marbury, who was to be a justice of the peace in the District of Columbia. The appointment papers, i.e. Marbury's commission under seal and that of others, were signed the night before the inauguration of the new U.S. President (Thomas Jefferson) by Adams and certified by John Marshall, who was concurrently the U.S. Secretary of State and the Chief Justice of the SCOTUS at the time.[87] The commissions were not delivered upon the instructions of the newly inaugurated President Jefferson to his new Secretary of State, James Madison.[88] This prompted Marbury to go to the SCOTUS and move for a writ of mandamus that would compel Madison, as U.S. Secretary of State, to effect the delivery of the appointment papers.

The SCOTUS, under the leadership of Chief Justice Marshall, heard the case in 1803 and in a systematic manner proceeded to determine Marbury's rights to his commission and to the legal remedy for its delivery. Ultimately, the Court's power to issue writs of mandamus in aid of its original jurisdiction, as provided for in Section 13 of the Judiciary Act of 1789, was brought up and declared "not warranted by the Constitution,"[89] and that "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that all courts, as well as other departments, are bound by that instrument."[90] Although he was theoretically entitled to his commission and its delivery, Marbury's prayer for a writ of mandamus was unanimously denied because of the SCOTUS' apparent lack of jurisdiction, and thus the American judiciary's power of judicial review was born.

Much has been written about the dilemma faced by the Court. Notably, Louis Pollak observes that:

> Marshall and his colleagues doubtless recognized that if the Court were to order Madison to produce Marbury's commission, or a copy thereof, Madison would, on Jefferson's instruction, simply disregard the order, thereby confirming, for all to see, the

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[87] SHANE MOUNTJOY, MARBURY V. MADISON: ESTABLISHING SUPREME COURT POWER 45 (2007).

[88] *Id.* at 46.

[89] *Marbury*, 5 U.S. (1 Cranch) 137 (1803).

[90] *Id.* at 180.

> powerlessness of the highest court in the land. Thus, the Court had to devise a scenario that would dismiss the claims advanced by Marbury, the Federalist standard-bearer, but would at the same time appear to bring a measure of balm to the wounds Marbury had suffered at the hands of Jefferson and Madison. Marshall's eleven-thousand-word opinion, announced on 24 February 1803, only thirteen days after the argument, achieved both ends.[91]

Going into the "how" of the matter, Bell summarizes *Marbury*'s organizational disposition and other rhetorical elements as follows:

> The opinion reached a conclusion by answering three questions, each posed in the introduction: 1) did Marbury have a right to the commission, 2) if he had a right, did the law afford him a remedy, and 3) was the Court able to offer that remedy? The opinion argued that Marbury had a right that was violated when the Jefferson administration denied him the commission because Adams had legally completed the commission. In the second section, the opinion argued that Marbury deserved the writ and that there was no legal reason that the Jefferson administration could deny it to him. The third section of the opinion concluded that although Marbury deserved the writ, it was outside the power of the Court to order such a writ in this case. Thus[,] the first two sections of the opinion argued at length in Marbury's favor, creating a surprise for readers when the third section denied the Court's ability to grant Marbury's writ. The rhetoric of the opinion relied upon the appearance of deductive reasoning, appeals to authoritative sources and constitutional interpretation to declare part of the Judiciary Act of 1789 unconstitutional.[92]

Bell's work also identifies *Marbury*'s main *topoi*: the "separation of the realms of law and politics," the "openness to the conclusion dictated by law," the "absolute supremacy of the Constitution because it is a written document," the idea that "the Supreme Court is the sole arbiter of the law," and "the idea that the Constitution is an expression of consent in the Court's rule by law."[93]

Regarding *Marbury*'s first *topos*, Bell notes that in addition to demonstrating law's superior, logical, and deductive nature over that of

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[91] Louis Pollak, *Marbury v. Madison: What Did John Marshall Decide and Why?*, 148 PROCEEDINGS OF THE AM. PHIL. SOC'Y 1, 8–9 (2004). *See also* Christopher Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 439–82.

[92] Bell, *supra* note 59, at 43.

[93] *Id.* at 44.

irrational and biased politics,[94] "[o]ne way in which law and politics were distinguished in the opinion was through the inclusion and exclusion of information about the history of the case," and the opinion "included very little information about the circumstances that led to Marbury's suit, yet it included detailed argument and evidence about the legal issues involved."[95]

As to the second *topos*, Bell notes that "[b]oth the detailed reasoning of the opinion and appearance that conclusions were only reached after significant consideration portrayed the Court's practice as unbiased and rational."[96] Indeed, "[t]he first two sections of the opinion analyzed the legal issues in great detail, and this detail created the appearance that the opinion exhausted all possibilities before drawing a conclusion."[97] The step-by-step deduction of determining Marbury's right and relevant remedy "displayed the decision-making process whereby the Court seemed to apply the law" and also "considered possible counter-arguments" and "displayed caution in drawing only tentative conclusions at the end of each section."[98] Even the "twist" or "surprise" at the end, whereby the SCOTUS denied Marbury's prayer, "created the appearance that Marshall was forced to follow the law against his personal and political beliefs."[99] Thus, "[i]n this way, the law appeared to overcome the biases of judges in order to compel the correct result. This appearance promised objectivity, encouraged audiences' faith in the Court, and faith in the rule of law as different from the rule of men."[100] *Marbury* is thus a perfect application of "stylistic choices that make other laws appear to emanate from an automaton rather than from a human."[101]

As to the third *topos*, Bell notes that *Marbury* "put forth the argument that the Constitution has boundaries and limits that must be preserved *because* they are written."[102] The opinion made it clear that "the people made their Constitution a written one in order to form the fundamental law of the land, meaning that any law that contradicted it must be void," and that "[t]he Constitution, in this argument, was supreme because it was preserved in writing and because it was an expression of the will of the people."[103] This implied that the "written nature of the Constitution preserves the law and

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[94] *Id.* at 45.

[95] *Id.* at 44.

[96] *Id.* at 47.

[97] *Id.* at 45.

[98] *Id.* at 46.

[99] *Id.* at 47.

[100] *Id.*

[101] *Id.* In this Article's view, this is a manifestation of constitutional rhetoric's cloaking device mode.

[102] *Id.* at 48. (Emphasis in the original.)

[103] *Id.*

limits to government power because the text of the Constitution protects the law across time."[104] Specifically, "the opinion argued that the goal of constitutional interpretation should be to put the language into effect, and that the only interpretations that are *legal* are those that are *required* by the language of the document."[105] This is *Marbury*'s emphasis of the "enduring quality of law" that would, across time, "carry out the will of the people" as embodied in the Constitution.[106]

The fourth *topos* relates to the SCOTUS being the "supreme legal authority" in its relationship with other coordinate branches of the U.S. Government, and "[t]o show the Court as the only branch of government with the power to review the constitutionality of laws, the opinion first set out arguments that catered to the executive branch."[107] By beginning with the naturally political "protected sphere" of the executive branch where "the judicial branch could not interfere," it concluded that "[b]y extension, the judicial branch also had a protected sphere of action" that also "originated in the written Constitution," which for the Court "included the power to arbitrate legal disputes," and "that this power is one that is given *only* to the Courts and must be respected by the other branches."[108]

The fifth and final *topos* deals with how "the opinion argued that the extraordinary act of collectively establishing a written Constitution endowed the Constitution with particular authority and supremacy because the will of the people was the absolute authority."[109] And "[i]f the people gave their consent to the Constitution, and the Constitution said that the courts alone must be the ones to interpret and apply [the] law, then any time the Court acted[,] it expressed the will [of] the people."[110] This legitimized the SCOTUS' role "to police the other branches of government on behalf of the people" using "the power to review the constitutionality of the other two branches."[111]

One can also go about a paragraph-by-paragraph or section-by-section approach in parsing and distilling *Marbury*'s rhetorical elements, beginning with the opinion's three succinct and somewhat nonchalantly worded orientation paragraphs:

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[104] *Id.*
[105] *Id.* at 49. (Emphasis in the original.)
[106] *Id.*
[107] *Id.*
[108] *Id.* at 49–50. (Emphasis in the original.)
[109] *Id.* at 51–52.
[110] *Id.* at 52.
[111] *Id.*

> At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.
>
> No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the Court is founded.
>
> These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the Court, there will be some departure in form, though not in substance, from the points stated in that argument.[112]

In just three paragraphs, Marshall framed the opinion to deal strictly with the sole legal question of Marbury's prayer for mandamus without any overt mention of the heated political climate that provided the case's background. Only hints are present, such as in the second paragraph. What is also peculiarly notable is the presaging character of the third paragraph: it already gives a hint as to the "twist" awaiting the reader toward the end of the opinion, i.e. the invocation and nullification of the Court's original jurisdiction over mandamus petitions.

The opinion then seamlessly proceeds to its summary of issues:

> In the order in which the Court has viewed this subject, the following questions have been considered and decided.
>
> 1. Has the applicant a right to the commission he demands?
>
> 2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> 3. If they do afford him a remedy, is it a mandamus issuing from this court?[113]

Immediately, the opinion sets out the step-by-step process in order to determine the answer to the main legal question laid out in the first sentence of the opinion: will the instant prayer of Marbury for mandamus lie? Here,

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[112] *Marbury*, 5 U.S. (1 Cranch) 137, 153–54 (1803).
[113] *Id.* at 154.

one cannot see any preview of the Court's eventual ruling, such that there is no "collapsible syllogism" of the *ratio decidendi*. This seems to be intended, given the Solomonic surprise of the result.

Marshall then hits the ground running by immediately discussing its answer to the first legal issue. It first identifies the law that created the office to which Marbury was appointed (the Judiciary Act of 1801),[114] and then the undisputed fact that a commission for Marbury was properly drawn up but never delivered. Here, the opinion begins its slow deduction concerning Marbury's right to the commission.[115] After enumerating and quoting the U.S. Constitution's provisions on the power of the President to nominate and commission officers of the U.S., as well as the law concerning custody and usage of the seal of the U.S. for attesting to commissions signed by the President, the opinion explains at length the processes of nominating, appointing, and commissioning an officer of the U.S..[116] This includes details of various aspects of American administrative law, such as the distinction between the President's power of appointment and the President's duty to issue commissions,[117] the legal status of a signed commission as conclusive evidence of a presidential appointment,[118] and the actual process of attesting, recording, and sealing the document with the seal of the U.S. by the Secretary of State, all of which are duties explicitly marked out in U.S. federal law.[119] The thoroughness of these paragraphs on what the law actually prescribes for the issuance of a commission seems to be an intended misdirection or a masking of the actual import of the case. It is as if Marshall uses the cloaking device mode of constitutional rhetoric to make an initial reading of the opinion's first paragraphs seem mundane and uninteresting—two adjectives that do not apply at all to *Marbury*.

Next, the opinion considers a major objection to Marbury's right to the commission, whereby "it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential."[120] This is "founded on the supposition that the commission is not

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[114] *Id.* This was passed by the Federalist-controlled U.S. Congress on February 13, 1801 as a move to safeguard their power and influence of the Federalist Party under the Jefferson administration, i.e. by "packing" the federal judiciary with Federalist supporters and sympathizers. These were the posts President Adams tried to fill toward the last hours of his term. *See* MOUNTJOY, *supra* note 87, at 27.

[115] *Id.* at 155.

[116] *Id.* at 155–56.

[117] *Id.* at 156–57.

[118] *Id.* at 157–58.

[119] *Id.*

[120] *Id.* at 159.

merely evidence of an appointment, but is itself the actual appointment[.]"[121] In other words, if the commission is the appointment, the commission was not delivered, and the commission needs delivery for its validity, then there was no appointment to speak of. Marshall dispelled this by simply repeating the distinction between presidential appointments and the duties of the U.S. Secretary of State relative to their documentation, and that said documentation constitutes sufficient solemnities that evidence an appointment.[122] Moreover, Marshall discusses the absurdity that comes along with the notion that "possession of the original commission be indispensably necessary to authorize a person appointed to any office to perform the duties of that office" since "[i]f it was necessary, then a loss of the commission would lose the office," and "[n]ot only negligence, but accident or fraud, fire or theft might deprive an individual of his office."[123] This is why there was legislation relative to commissions of U.S. officers and the validity of their copies in the records of the U.S. Department of State.[124] Alongside this, Marshall places a logical common sense statement: "[a] commission is transmitted to a person already appointed; not to a person to be appointed[.]"[125] After some further elucidation on the details of relative administrative law (such as what information a commission contains), the opinion finally reaches the resolution of its first issue:

> It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.
>
> Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the

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121 *Id.*
122 *Id.* at 160.
123 *Id.*
124 *Id.*
125 *Id.*

> office is *then* in the person appointed, and he has absolute, unconditional power of accepting or rejecting it.
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> Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of the country.
>
> To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.[126]

Toward the end of the resolution of this first issue, one notices a change in the opinion's tone. The generous usage of the passive voice and verb structures as syntactic strategies in discussing and deducting Marbury's right to the commission (with further added distinctions between the nature of Marbury's appointment from those who serve at the pleasure of the Executive) now gives the opinion a more imperious and impartial character—far from the mundane and monotonous tone that characterized the build-up via exhaustive details of early 19th century U.S. administrative law. Here, one can sense that the opinion has "upped the ante," as it were.

The opinion then jumps immediately into the resolution of the second issue by beginning with the origins of the writ of mandamus in the U.S. Interestingly, Marshall cites English common law—particularly Sir William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND—as the opinion builds up to one of its famous lines: "The Government of the United States has been emphatically termed a government of laws, and not of men."[127] It is immediately followed by three important sentences:

> It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.
>
> If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.
>
> It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress.[128]

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[126] *Id.* at 162. (Emphasis in the original.)
[127] *Id.* at 163.
[128] *Id.*

Here, one sees an indirect appeal to the Court's *ethos*. By referring to the sanctity and status of the rule of law in the U.S., the SCOTUS establishes itself as an instrument of a government that aims to give justice to every wronged person. The rule of law also serves as an important *topos* for the opinion.

The opinion then goes to determine the nature of the act complained of—i.e. Madison's refusal to deliver the commission—to delineate between the Court's power over non-political acts that are within its jurisdiction from those purely political acts that lie beyond. Here, constitutional rhetoric is in cloaking device mode for the concept of separation of powers. Marshall does this through a slow build-up: in discussing whether or not the act complained of is a *damnum absque injuria* (loss or damage without injury), two hypothetical scenarios involving two actual laws that concerned individual rights, which a government official can theoretically ignore, were examined—the right to be listed as an invalid veteran to get a pension[129] and the right to a patent evincing title to purchased property in frontier lands.[130] Since "[i]t is not believed that any person whatever would attempt to maintain such a proposition" that "the law furnishes to the injured person no remedy," these scenarios bolster the assertion that "the legality of an act of the head of a department [can] be examinable in a court of justice."[131] This also seems to be a mix of appeals to both *logos* and *pathos*.

But as to which governmental acts are questionable in court, the opinion shifts gear once more by distinguishing between the duties of a U.S. officer that, by statute, "conform [...] to the will of the President" and "can never be examinable [sic] by the Courts," from instances such as:

> [W]hen the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others.[132]

To Marshall, the political nature of a presidential appointment ceases when the appointment is made and a right is vested in the appointee to his office, along with its attendant trappings, such as the commission. Here, the

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[129] *Id.* at 164.
[130] *Id.* at 165.
[131] *Id.*
[132] *Id.* at 166.

opinion finally inserts its presaging collapsible syllogism when it states that "[t]he question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority."[133] The omission here is of the third issue's resolution, which states the reasons why the SCOTUS has supreme authority over all questions of federal law and the U.S. constitutional setup.

After a brief "recap" of the Court's resolution of the first and second issues, Marshall divides his discussion of the third issue into two sub-issues: the nature of the writ prayed for (mandamus), and the court's jurisdiction.[134] These are the critical sections of *Marbury* and where Marshall's rhetoric shines brightest. The opinion goes into deductive detail once more in its discussion of English common law (here, Lord Mansfield is the main citation) regarding the nature of the writ of mandamus[135]—an intended misdirection, or constitutional rhetoric in cloaking device mode. Yet again, Marshall shifts gears to address the contrarian assertion that the Court's cognizance of the case was "an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the Executive,"[136] through stating that:

> It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion.[137]

After reiterating again the difference between acts at an official's discretion and acts commanded by law,[138] the opinion does another presaging: one of the laws it cited as an example in its resolution of the second issue (the law concerning invalid veteran pension lists) was "deemed unconstitutional" because of its imposition of a duty upon U.S. Circuit Courts.[139] This is actually not critical to its discussion of Marbury's prayer for mandamus, which the Court compared with a favorable judgment "in *detinue*"[140] since "[t]he act of [C]ongress does not, indeed, order the Secretary of State to send [the commission] to [Marbury], but it is placed in his hands for the person entitled

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[133] *Id.* at 167.
[134] *Id.* at 168.
[135] *Id.* at 168–70.
[136] *Id.* at 170.
[137] *Id.*
[138] *Id.* at 170–71.
[139] *Id.* at 171.
[140] *Id.* at 173. (Emphasis in the original.)

to it, and cannot be more lawfully withheld by him[ ] than by another person."[141]

After taking his time, Marshall finally reaches the second sub-issue: whether the SCOTUS can issue the mandamus writ. The resolution of this second sub-issue is the opinion's *coup de grâce* and bears most of the opinion's powerful rhetoric (i.e. constitutional rhetoric's deflector shield mode). It begins by citing Section 13 of the Judiciary Act of 1789, which authorizes the Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[142] However, it then almost immediately cites the wording of Article III, Section 2, Paragraph 2 of the U.S. Constitution: "[t]he Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."[143] Marshall then takes issue with "the power [that] remains to the Legislature to assign original jurisdiction to [the] Court in other cases than those specified in the article which has been recited."[144] The opinion somehow forgets that it left out the last part of the constitutional provision's paragraph, but calls it "mere surplussage [sic]" anyway by arguing that:

> If Congress remains at liberty to give this Court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction made in the Constitution, is form without substance.[145]

To Marshall, there is a self-evident reason for the U.S. Constitution's obvious and plain delineation between the SCOTUS' original and appellate jurisdiction, and that "[i]f any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction,

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[141] *Id.*

[142] *Id.*

[143] *Id.* at 174. Note that this is not the full and actual wording of the paragraph, which properly reads as: "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" This implies that technically, Congress *could* validly legislate for an exception to SCOTUS's appellate jurisdiction, or in other words, Section 13 of the Judiciary Act of 1789 *could* be seen as valid. (Emphasis supplied.)

[144] *Id.*

[145] *Id.*

and for adhering to the obvious meaning."[146] The opinion thus deduces that "[t]o enable this Court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction."[147] Finally, Marshall opens up with the opinion's broadside:

> The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.[148]

The opinion then refers to the *topoi* of the Constitution's character as both the people's "original and supreme will" and a written charter.[149] The U.S. Constitution, because of these two crucial characteristics, "organizes the government and assigns to different departments their respective powers," and its wording "establish[es] certain limits not to be transcended by those departments."[150] This leaves constitutional interpretation at a crossroads between two notions: "that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act," or in other words, either "[t]he Constitution is [...] a superior, paramount law," or "written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable."[151]

To solve this, more deductive reasoning is utilized: because the U.S. Constitution is written, attached to it is the theory that legislation repugnant to it is void.[152] And to identify whose job it is to rule on a law's validity and voidness, Marshall gives the opinion's most famous paragraph:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases[ ] must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operations of each.[153]

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[146] *Id.* at 175.
[147] *Id.*
[148] *Id.* at 176.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 177.
[152] *Id.*
[153] *Id.*

But here, the opinion hints that this is essentially a neutral power of the judiciary. Without including the theory of constitutional supremacy over void laws, this has the potential to "subvert the very foundation of all written constitutions" because it would "be giving to the Legislature a practical and real omnipotence[.]"[154] This is likely a jab at the British doctrine of parliamentary sovereignty.

The remaining paragraphs of the opinion simply give examples of instances where the Court should apply the U.S. Constitution's supremacy should other branches of government overstep their limits, but another rhetorical device can be seen: the emphasis on a federal judge's oath of office that mandates him or her to uphold the Constitution.[155] This is clearly an appeal to the Court's authority and character (*ethos*). *Marbury* ends with a particularly subtle enthymematic conclusion that invites the reader to spell out in his or her mind the decision's immediate result (i.e. the dismissal of the case without any affirmative relief, and the voiding of Section 13 of the Judiciary Act of 1789):

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that *courts*, as well as other departments, are bound by that instrument.
>
> The rule must be discharged.[156]

Overall, the composition of *Marbury* as a judicial opinion is genius. After carving up the legal issues into three easily identifiable and logically interconnected parts (probably an intentional rule of three) that seamlessly transition into the next one's resolution, Marshall uses a standard formula when he tackles them one by one: first, he states the law, statute, or legal concept involved, then he proceeds to exhaustively build up a thorough and intentionally mundane deduction of the relevant legal implications, peppered with legal distinctions and delineations, and seemingly irrelevant provisions and particulars. Marshall thereafter does his *ratio decidendi* by addressing the main counterarguments or objections to what should be the rule, and works his way back to said rule on the law or legal concept involved by combining the appropriate *pistis* (either *logos*, *pathos*, *ethos*, or a combination) with the right *topos* for the matter—which are, using Greene's list, either a reference to the constitutional structure (relationships immanent within the constitutional

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[154] *Id.* at 178.
[155] *Id.* at 180.
[156] *Id.* (Emphasis in the original.)

architecture) or the consequences for the institutional legitimacy of the judiciary and the effective functioning of governmental institutions. Add to this some self-evidence, enthymematic reasoning, presaging examples, a constant discussion of the implications of using the wrong view (either absurdity or grim alternatives) to present the soundness of one's view (value choice), as well as a collapsible syllogism or two, and one has the makings of a legitimately convincing judgment on a constitutional controversy.

The overall flow is also naturally the result of the intentional limiting of the issues to strictly what the law requires, and of the fact that there is no distinct section for the facts of the case—not even in the procedural antecedents mentioned before Marshall's main opinion. These are scattered and incorporated all throughout the opinion, especially in the identification of the issues (i.e. a facts-in-issue framing). The flow follows Marshall's strategy for addressing the legal issues because it always starts from the law or a legal concept, slowly builds up with misdirecting doctrinal details (cloaking device mode), and then shifts to the imperious and impartial tone when it comes to the judicial reasoning (deflector shield mode). And on top of all this, the judgment is pithy with subtlety from the orientation paragraphs to the concluding disposition. It spells out the immediate issues and outcomes, but not the ultimate constitutional quandaries and results. The opinion's final Solomonic surprise is probably the Court's cleverest value choice: choosing to strategically retreat from a headlong confrontation with the executive branch; and it gets there through constitutional rhetoric's gadgets.

IV. THE *PROROGATION CASE*'S CONSTITUTIONAL RHETORIC

The first paragraph of the unanimous decision penned jointly by Lady Hale of Richmond and Lord Reed of Allermuir (President and Deputy President of the UKSC at the time) starts off with a caveat: it "emphasise[s] that the issue in these appeals is not when and on what terms the U.K. is to leave the European Union," but "whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful."[157] It immediately characterizes the case as a "one off" since it "arises in circumstances which have never arisen before and are unlikely ever to rise again."[158] The paragraph then ends on an encouraging note: "our law is used to rising to such challenges and supplies us with the

[157] *Prorogation Case*, 2019 UKSC 41, ¶ 1.
[158] *Id.*

legal tools to enable us to reason to a solution."[159] Compared with the orientation paragraphs of *Marbury*, this is actually a more succinct and overt description of the importance of the issues, and in a more confident tone.

The case then goes immediately into a discussion on the nature of the act of proroguing Parliament. Importantly, it mentions from the start (and in a hintingly presaging manner) the political effects of a prorogation:

> While Parliament is prorogued, neither House can meet, debate[,] and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in committees.[160]

After a few more paragraphs on the history of prorogation in Britain—including even the actual step-by-step procedure, similar to the administrative details in *Marbury* and its difference from parliamentary dissolution and recess,[161] the case then goes into its factual antecedents. It does mention the first *Miller* in passing,[162] but quite unlike *Marbury*, it also includes a comprehensive summary of all political developments and government positions and policies leading up to the prorogation in question.[163] As to the prorogation, the case does a narrowing of the facts that are known and thus, which facts are materially relevant to the UKSC's decision:

> We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.[164]

But the UKSC did "know the contents of three documents leading up to that advice"[165] given to the Queen for her approval of the prorogation, which were: 1) a memorandum for the Prime Minister dated August 15, 2019 from his office's Director of Legislative Affairs saying that the proposed prorogation dates (September 9, 2019 to October 14, 2019) "sought to

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[159] *Id.*
[160] *Id.*, ¶ 2.
[161] *Id.*, ¶¶ 3–6.
[162] *Id.*, ¶ 9.
[163] *Id.*, ¶¶ 7–14.
[164] *Id.*, ¶ 15.
[165] *Id.*, ¶ 16.

provide reassurance" against the notion that the prorogation was "a potential tool to prevent MPs intervening prior to the U.K.'s departure from the EU on 31st October;"[166] 2) the Prime Minister's handwritten comments on the said memorandum dated August 16, 2019 that labelled the upcoming session in September as a "rigmarole" that would "show the public that MPs were earning their crust" and that the Prime Minister did not "see anything especially shocking about this prorogation;"[167] and 3) a second memorandum from the Prime Minister's Director of Legislative Affairs dated August 23, 2019 that set the schedule to start the prorogation process.[168] The UKSC was also in possession of Cabinet meeting minutes from August 28, 2019 (after the advice for prorogation had been given), which indicate that for the U.K. Government, it was "important to emphasise that this decision to prorogue Parliament for a Queen's Speech was not driven by Brexit considerations," and that "[a]ny suggestion that the Government was using this as a tactic to frustrate Parliament should be rebutted."[169]

After a recital of the procedural antecedents, i.e. how the case was elevated from England and Scotland,[170] the UKSC identifies four issues for its resolution:

1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

2) If it is, by what standard is its lawfulness to be judged?

3) By that standard, was it lawful?

4) If it was not, what remedy should the court grant?[171]

Although strictly not on all fours with *Marbury*'s right-remedy-propriety rule of three when it comes to carving out the issues, this enumeration does have a logical flow similar to Marshall's method.

Before going to the resolution of the first issue, the UKSC clarifies the following from the outset:

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[166] *Id.*, ¶ 17.
[167] *Id.*, ¶ 18.
[168] *Id.*, ¶ 19.
[169] *Id.*, ¶ 20.
[170] *Id.*, ¶¶ 23–26.
[171] *Id.*, ¶ 27.

1) The case notes that prorogation is a prerogative power of the Crown, and that modern practice has given the Prime Minister the "constitutional responsibility" to initiate the prorogation process with his advice to the monarch, "hav[ing] regard to all relevant interests, including the interests of Parliament."[172]

2) "[A]lthough the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."[173]

3) The UKSC notes that "the courts have a duty to give effect to the law, irrespective of [the prime] minister's political accountability to Parliament," and that the same accountability "does not mean that he is therefore immune from legal accountability to the courts."[174]

4) Most importantly, "by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers."[175]

This enumeration shows a slant towards the *topoi* of the rule of law, the separation of powers, and more specifically, the separation between law and politics.

Turning to the case's justiciability, the UKSC subdivides this first issue into two: the existence and extent of a prerogative power, and the openness of said power's exercise to judicial scrutiny. The first is undisputed in the case, while the second depends on the nature of the power involved.[176] Like *Marbury*'s method of addressing the main counterarguments or objections to what should be the rule in a particular issue, the case makes its starting point at the contention it seeks to debunk. In this case, it is the contention that prorogation is a power "excluded" from judicial scrutiny.[177]

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[172] *Id.*, ¶ 30.

[173] *Id.*, ¶ 31. In the next paragraph, the case uses two examples: case of Proclamations 12 Co. Rep. 74 (1611); and Entick v. Carrington 19 State Tr. 1029, 2 Wils. KB 275 (1765). These references to times when either royal or ministerial powers were being subjected for the first time to court scrutiny are definitely important rhetorical devices for the case.

[174] *Id.*, ¶ 33.

[175] *Id.*, ¶ 34.

[176] *Id.*, ¶ 35.

[177] *Id.*, ¶ 36.

Here then is another point where the case differs from *Marbury*—it already puts forward its equivalent to *Marbury*'s "emphatically-the-province" or "say-what-the-law-is" paragraph:

> As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.[178]

This is as opposed to issues regarding the lawfulness of a prerogative power's exercise, which may entertain questions of justiciability. The case then jumps into the second issue before resolving the first, since the UKSC needed to determine the relevant standard for a proper exercise of prorogation before saying that it had jurisdiction over the subject matter.[179] In a way, then, the case is similar to *Marbury* because the latter also suspended discussion on its jurisdiction over Marbury's suit until the resolution of its third and last issue.

As to the second issue, the UKSC begins with a statement of the limitations of British constitutional law, and a reiteration of its power to determine the limits of constitutionally recognized powers: "[s]ince a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie."[180]

Here the case emphasizes a distinctive *topos* that seems to be *Marbury*'s equivalent and antithesis at the same time: the fact that the U.K. "does not have a single document entitled 'The Constitution.'"[181] But this is actually the source of the *Prorogation Case*'s strength: the fact that the U.K. Constitution "developed pragmatically, and remains sufficiently flexible to be capable of further development" despite "not [having] been codified."[182] It is the compound nature of the U.K. Constitution, i.e. its being composed of "numerous principles of law" and "values" ("common law, statutes, conventions[,] and practice[s]") that will be the UKSC's unique compass.[183]

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[178] *Id.*
[179] *Id.*, ¶ 37.
[180] *Id.*, ¶ 38.
[181] *Id.*, ¶ 39.
[182] *Id.*
[183] *Id.*

The first of two constitutional principles (and thus two additional *topoi*) is that of parliamentary sovereignty, which would "be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased."[184] Similar to *Marbury*, the UKSC does discuss the implications of the wrong view of characterizing prorogation as unreviewable,[185] and to bolster its discussion further, it cites past legislation as confirmation of the need to limit prorogation.[186] But to explain the compatibility of said limits to parliamentary sovereignty, the second *topos* or constitutional principle is needed: parliamentary accountability.[187] Thus, "the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government."[188]

The UKSC finally defines the standard to be used to determine a prorogation's limit for it to be "compatible with the ability of Parliament to carry out its constitutional function [ ] [.]"[189] This would be, as U.K. courts have done in the past *vis-à-vis* statutory powers, "by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification."[190] Thus, "a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions," and "[i]n such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course."[191] With this, the UKSC declares and concludes that the case is indeed justiciable.[192]

Going now to the third issue (i.e. the lawfulness of the prorogation in question), the case goes into full-on appeals-to-*ethos* mode: "[l]et us remind ourselves of the foundations of our constitution. We live in a representative democracy."[193] Since the U.K. Government "exists because it has the confidence of the House of Commons," it must be that "it is accountable to the House of Commons,"[194] and to the question of whether the Prime Minister's action violated this accountability:

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[184] *Id.*, ¶ 42.
[185] *Id.*, ¶ 43.
[186] *Id.*, ¶ 44.
[187] *Id.*, ¶¶ 46–47.
[188] *Id.*, ¶ 48.
[189] *Id.*
[190] *Id.*, ¶ 49.
[191] *Id.*, ¶ 50.
[192] *Id.*, ¶ 52.
[193] *Id.*, ¶ 55.
[194] *Id.*

> The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October.[195]

This hinges on the crucial choice of Parliament at the time: to either "go into recess for the party conferences during some of that period," or, "given the extraordinary situation in which the [U.K. found] itself," for MPs to conduct parliamentary scrutiny.[196] The prorogation in question would indeed have prevented the latter, and given the exceptional context of the "fundamental change" that "was due to take place in the Constitution of the [U.K.] on 31st October 2019,"[197] this was enough justification for the UKSC to take the case.

Going now to the reasonable justification for the prorogation, the UKSC made it clear that it was "not concerned with the Prime Minister's *motive*" but with his reasons.[198] From the documents in the record, "no reason was given for closing down Parliament for five weeks,"[199] and expert evidence shows that to craft the Queen's Speech, "a typical time is four to six days."[200] The case does peruse the relevant documents again, but finds no reason for the action.[201] The only reasonable conclusion would be that "in the absence of further evidence, upon what such reasons might have been," the prorogation was "unlawful."[202]

Going to the fourth and final issue (the nature of the UKSC's remedy), the case frames the issue with a very hinting tone that focuses on the immediate effect of the Court's likely declaration: "is Parliament prorogued or is it not?"[203] The case again begins from the starting point of the proposition that is to be disproven: prorogation is a Parliamentary proceeding that cannot be subject to judicial scrutiny. After a discussion on the nature of the term "proceedings in Parliament" with extensive citations of relevant U.K. jurisprudence and even legal commentaries,[204] the case finally reaches its

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[195] *Id.*, ¶ 56.
[196] *Id.*
[197] *Id.*, ¶ 57.
[198] *Id.*, ¶ 58. (Emphasis in the original.)
[199] *Id.*
[200] *Id.*, ¶ 59.
[201] *Id.*, ¶ 60.
[202] *Id.*, ¶ 61.
[203] *Id.*, ¶ 62.
[204] *Id.*, ¶¶ 65–67.

immediate legal conclusion: prorogation "cannot sensibly be described as a 'proceeding in Parliament.' It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside."[205] The UKSC then recaps the logical flow of its judgment, saying that since the advice given for the prorogation was unlawful, it was an *ultra vires* act of the Prime Minister that was "null and of no effect," which makes the Order in Council for the prorogation also "unlawful, null[,] and of no effect and should be quashed."[206] Thus, it was as if the commission under seal evincing the Order in Council—again, a case about a commission under seal—that was delivered to Parliament was a "blank piece of paper."[207]

The opinion's second-to-the-last paragraph is mostly in a declaratory form with a strange but effective mix of hints and bluntness. It first states that "Parliament has not been prorogued and that this court should make declarations to that effect."[208] It then pays deference to parliamentary sovereignty by stating that in terms of the UKSC's decision, "it is for Parliament to decide what to do next,"[209] but it gives suggestions anyway for what the heads of both Houses could do thenceforth, and it smartly labels these as proceedings in Parliament "which could not be called in question in this or any other court."[210] The concluding paragraph also ironically does a *Marbury* by going for enthymeme despite the explicit bluntness in the previous paragraph: "[t]hus, the Advocate General's appeal in the case of *Cherry* is dismissed and Mrs. Miller's appeal is allowed. The same declarations and orders should be made in each case."[211]

Comparing the case to Marshall's opinion from two centuries ago, one can see many similarities. Like *Marbury*, the case was written by the UKSC's leadership at the time, though in this instance jointly between the President and Deputy President. Like *Marbury*, the case has a method of using the losing or wrong argument or objection as the staging point for beginning discussions of the issues. Like *Marbury*, it uses multiple distinctions in its prose, especially between politically untouchable and legally justiciable matters, as well as the implications if the wrong jurisprudential path is chosen. Like *Marbury*, there is a logical flow in carving up the main issues, and a constant use of language to describe legal and factual bases in a presaging manner. Like *Marbury*, there is a suspended discussion of jurisdiction,

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[205] *Id.*, ¶ 68.
[206] *Id.*, ¶ 69.
[207] *Id.*
[208] *Id.*, ¶ 70.
[209] *Id.*
[210] *Id.*
[211] *Id.*, ¶ 71.

justiciability, and the relevant remedy. Like *Marbury*, it has simple yet effective twists toward the end (i.e. the UKSC's surprisingly uncomplicated and self-evident legal conclusion that the documents made in preparation for the advice to call for prorogation actually contained no reasonable justification in their contents at all, and the easy inference that prorogation is not a "proceeding of Parliament" and is therefore capable of being subject to judicial scrutiny). Like *Marbury*, the paragraphs discussing the UKSC's power are pithy with minimal or no references or footnotes to case precedent. Instead, one could see a similarity of inventiveness, evidenced by the presence of likely original constitutional language reaffirming centuries-old British constitutional concepts. And like *Marbury*, the case is ultimately about what was to be done with a commission under seal.

But unlike *Marbury*, the case has more explicit caveats and qualifiers, such as the constant assertion that the UKSC was not dipping into political matters, and that it was speaking with deference to parliamentary sovereignty. Unlike *Marbury*, the case is blunt with not much pretense or extensive rigmarole of misdirection, and possesses a very confident and eager tone that emphasizes the UKSC's constitutional function and authority (*ethos*) in a more overt and straightforward way. It is as if the UKSC's *ethos* is presumed, whereas that of the SCOTUS in *Marbury* was only being bolstered for the first time. Unlike *Marbury*, its discussion is more upfront and fact-based, and sets out the bottom-line dispositive conclusion before discussing the "why." In other words, there is no complicated route with misdirecting details and intentionally mundane deductions. Unlike *Marbury*, it is explicit in its discussion of the legal and long-term constitutional effects of the judgment despite the ironic use of enthymeme in the last paragraph. Unlike *Marbury*, its "say-what-the-law-is" paragraph has a more confident tone due likely to the fact that the ideas of separation of powers and judicial review had been around for 200 years already. Unlike *Marbury*, which was a slow broil resulting in a sidestep of the SCOTUS' jurisdiction, the case has the intensity of a pressure cooker that resulted in an unqualified affirmation of the UKSC's checking power towards the executive branch. Unlike *Marbury*, there is an emphasis on constitutional conventions rather than on constitutional text due to the nature of the British Constitution, which likely means that the UKSC had to slightly compensate for this want of a written organic document. Unlike *Marbury*, the case showed the UKSC not as an automaton, but as an active and mindful participant in the constitutional setup as it handled an unwritten or uncodified constitution—and indeed, it handled the latter well. And unlike *Marbury*, the case does not use the cloaking device mode of constitutional rhetoric, but is actually on deflector shield mode all throughout. Overall, one appreciates in the bluntly subtle tannins of the *Prorogation Case* a younger and bolder vintage of constitutional rhetoric.

V. GOOD *TERROIR* AND A GOOD YEAR FOR MAKING BOLD CONSTITUTIONAL RHETORIC

As can be seen above, the UKSC, on its own, through the *Prorogation Case* has set out terms of a more impactful, relevant, and assertive tone of constitutional rhetoric that seems to fit the needs of a modern world that values constitutional democracy. Indeed, it may logically be the next stage in the development of constitutional rhetoric that builds upon the legacy of *Marbury*. With constitutional principles such as the rule of law, government accountability, the separation of powers, and judicial review figuring prominently in the discourse of modern law over the past two centuries, it should be no surprise that the monument that is *Marbury* might eventually be just that: a monument.

The world has changed significantly since 1803, and with said change came the need for adjustments to national constitutions (both written and unwritten) to reflect and embed new and enlightened values. In Britain, the UKSC stands as the most concrete of these changes, thanks to the Constitutional Reform Act 2005, which "was intended to 'put the relationship between the executive, the legislature[,] and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system,'" and "was driven by 'a desire to update intergovernmental relationships regulated by practice, convention, and informal, though largely political, checks and balances with more defined structures, in order to increase confidence in the British constitutional system in line with a more modern understanding of basic governmental principles.'"[212] And even then, at its creation, there have been predictions that judicial review would be "gaining some ground with the new constitutional reforms."[213] This increased visibility and relevance would ultimately depend on the outcome of the UKSC's operationalization of its own role as a reviewer of governmental action, or its *Marbury* moment in the form of an influential judgment, since the Constitutional Reform Act 2005 does not spell out any

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[212] Monica Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEMP. INT'L & COMP. L.J. 279, 281 (2008), *citing* DEP'T OF CONST. AFF., CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM (2003), *and* Peter Fitzgerald, *Constitutional Crisis Over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233, 244 (2004).

[213] *Id.* at 295.

words relating to judicial review when mentioning the UKSC's jurisdiction[214]—just like the U.S. Constitution.

This begs a return to the fundamental question: what is the U.K.'s true *Marbury* moment? The first *Miller* was just too complicated and divisive to deserve the title. A perusal of its paragraphs would indicate a somewhat too cautious tone when the UKSC ruled that the U.K. Government, through mere ministerial action, could not withdraw from the EU without following the requirements for notification of withdrawal under the Treaty of Rome (which was given the force and effect of law in the U.K. through the European Communities Act 1972), and without affecting substantive rights (especially those relating to EU citizenship). In the process of stating that an Act of Parliament was required to solve both quandaries, it did not seem to help the UKSC's authority when Lord Reed put forth his eloquent dissent that, when read on its own, seemed to hold an equally convincing argument to that of the majority. There were also just too many crucial facts in dispute,[215] too many legal sub-issues, and a more controversial political atmosphere at the time with the 2016 Brexit referendum still fresh in the minds of the British people.

Still, due credit must be given to the first *Miller* for paving the way for the bold confidence of the *Prorogation Case*, and despite the former's lingering influence and that of the Brexit referendum in general, the UKSC found its voice and asserted itself more successfully against executive power. The Court learned its lesson in 2017, and rightly saw the *Prorogation Case* in 2019 for what it was: the right moment to speak up because of the simplicity of issues and the easily discernible and desirable result on the constitutional setup. Suffice it to say that the first *Miller*'s *terroir* was just not right, and that 2017 was just not a good year for the UKSC to plant and harvest its judicial review grapes. Combine this "when or where" with the "how" of the UKSC's boldly confident constitutional rhetoric, and one can see the strength of the *Prorogation Case*'s claim to the title of "U.K.'s *Marbury*."

But to push the wine analogy to its inevitable conclusion, one arrives at another basic question: *why use the term "Marbury moment" at all?* Why uproot an appellation of a specific region or country to describe the vintages of another jurisdiction, when the grape varieties and viticultural methods (in the

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[214] Constitutional Reform Act 2005, ch. 4, § 40, ¶ 5. "The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

[215] Among these was the real effect of the U.K. Government's notification to withdraw from the EU, i.e. whether it was the point of no return or just the beginning of a process that did not have too sudden immediate legal effects yet.

form of the tools and methods of constitutional rhetoric) are arguably more or less the same? Just imagine reading and hearing the phrases "French Napa" or "American Bordeaux." The metaphorical differences in climate and soil, which represent the differences in political circumstances and constitutional paths faced, most definitely contribute to the distinctness in the resulting libation despite the basic ingredients and distilling process being more or less standardized. It would be impractical to devise and utilize nomenclatures for all the varieties of constitutional rhetoric's tools and methods, as opposed to the easily identifiable varieties of grapes. Would it then not be better to refer to "*Marbury* moments" of other jurisdictions by their own appropriate "regional or national" appellations?

CONCLUDING ANALYSIS

This necessitates a mention of the basic feature of rhetoric: its requirement of situational context. Rhetoric in general (and thus constitutional rhetoric in particular) neither exists nor operates *ex nihilo*, or even in a vacuum. James Boyd White noted that "[r]hetoric always takes place with given materials," and this creates a "condition of radical uncertainty" for the rhetorician and the lawyer.[216] "The law is [...] a community of speakers of a certain kind: a culture of argument, perpetually remade by its participants" in both "culturally-specific" and "socially specific" contexts.[217] This means that:

> Law always operates through speakers located in particular times and places speaking to actual audiences about real people; its language is continuous with ordinary language; it always operates by narrative; it is not conceptual in its structure; it is perpetually reaffirmed or rejected in a social process; and it contains a system of internal translation by which it can reach a range of hearers. All these things mark it as a rhetorical system.[218]

Relative to rhetoric's focus on particularity, John Harrington, Lucy Series, and Alexander Ruck-Keene have recently stated that this makes rhetoric "suitable as a means of taking seriously the interdependent cultural and political nature of law."[219] This is because rhetoric, when used critically,

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[216] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural & Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985).

[217] *Id.* at 691.

[218] *Id.* at 692.

[219] John Harrington, Lucy Series, & Alexander Ruck-Keene, *Law and Rhetoric: Critical Possibilities*, 46 J. L. & SOC'Y 302, 307 (2019).

"draws us into the particular time and place of these moments of persuasion" and "encourages us to take seriously the contingency of the outcome, the crafting of arguments, and the pressure of cultural and social forces upon them."[220] Rhetorical analysis is thus better than "orthodox doctrinal analysis" which:

> [C]ultivates a certain blindness as to the identity of the speaker and as to the constitution and location of her audience, and which aims to condense the actual words of the judge or parliamentarian into a kernel of rules and principles, with much of what was actually said cast off as mere interpretive chaff.[221]

In other words, rhetoric through its tools alone cannot be seen properly and independently without the surrounding circumstances and environment of the particular legal rhetorician. The "how" alone does not determine the rhetorical flavor. One needs all aspects: the "who," the "what," and especially the "when" and "where."

In line with this, perhaps *Marbury* is *the only Marbury moment*—rhetorically speaking. While both *Marbury* and the *Prorogation Case* carved out for themselves constitutional niches in their respective jurisdictions for judicial review 200 odd years apart using *some* similar identifiable means, their respective constitutional rhetoric can, ultimately and strictly speaking, never be the proper objects of comparison. The *Prorogation Case* is bolder and more confident precisely because its constitutional rhetoric was apt for the situational context the UKSC faced in 2019, and the style of Chief Justice Marshall properly belongs to the nascent era of America's constitutional principles in the early 19th century.

This, however, should not be seen as a prohibition towards such an attempt at comparison. Instead, like wine tasting, it becomes more of an *appreciation* of rhetoric's tools and methods in specific situational contexts. It also makes one realize that while jurisprudential monuments like *Marbury* are there for posterity and appreciation, it would do legal rhetoricians well to give more credit to more recent landmark cases such as the *Prorogation Case*. In reality, decisions like the *Prorogation Case* have a bigger and more immediate impact compared to the remoteness of case law two centuries old.

So, while it may seem convenient and somewhat useful to call the *Prorogation Case* the U.K.'s *Marbury*, it is not ultimately advisable. Still, it is a

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[220] *Id.* at 308.

[221] *Id.*

good starting point toward a more fulfilling path of inquiry. Comparing rhetorical grapes to ultimately compare jurisprudential wines coming from different jurisdictions and eras may be an exercise in futility, but one is still the wiser for it. One eventually realizes that it is not a question of which bottle of constitutional rhetoric meets the standard (if any or at all). Instead, it is a question of which bottled rhetoric is best to be opened for the appropriate moment.

Thus, both cases should be rightly appreciated in their respective situational contexts, and one can see the operation and operationalization of constitutional rhetoric over the ages. This seems to be an arguably fragile "same-same-but-different" conclusion, but if the mind can be convinced to hold in balance such fragility, then constitutional rhetoric's job here is done.

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