

Marshall Law  
James Allison  
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Inscription carved on a marble wall of the U.S. Supreme Court Building: **"It Is Emphatically The Province And Duty Of The Judicial Department To Say What The Law Is. Marbury v. Madison 1803"**

"Nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the Legislative as by the Judicial authority."

James Madison, speech to Congress, June 18, 1789.

Cast: A baker.

A caller.

[Either actor can be male or female.]

The baker, wearing an apron, stands behind a table bearing the raw materials and tools needed to make no-knead bread: a big mixing bowl; a pastry fork; a plate to cover the mixing bowl; six small bowls, each holding one pre-measured ingredient: 3 cups flour; 1/4 teaspoon yeast; 1 1/2 teaspoons salt; 7 oz. water; 3 oz. beer; and 1 tablespoon vinegar. Two books are on the desk, large and small, each with a place marker. The scene opens with the baker arranging the bowls in order of size.

[A knock at the baker's door.]

**Baker:** Come on in, it's not locked.

**Caller:** Well, the Supreme Court has done it again. I've found nobody who thinks this ruling makes any sense. So I thought I'd call you.

**Baker:** Yeah, yeah. But the problem is not a bad decision here and a bad decision there. The real problem is judicial review.

**Caller:** What's that?

**Baker:** Well, it's tradition. Traditionally, the U.S. Supreme Court is the ultimate authority on the law of the land. It's the Supreme Court, and nobody else, that says whether a law is constitutional. If not, the Court strikes it down, and that's the end of it. Short of a reversal by some later bunch of Supremes.

**Caller:** Sort of a strikedown of a strikedown?

**Baker:** Yep. Or, a constitutional amendment, of course. That one is completely out of the hands of the Supreme Court. That's what citizens can do

about Court decisions. It's usually pretty hard to swing. But not always. If an amendment is really popular, it can go through in a few months. Like changing the voting age to 18. Went through in about four months.

**Caller:** Did you say tradition? You make it sound kind of arbitrary.

**Baker:** Well, it **is** pretty arbitrary. It goes back to a Supreme Court decision called Marbury v. Madison, 1803, when John Marshall was Chief Justice. Do you really want to hear about this?

**Caller:** I do.

**Baker:** Well, you know I'm not a lawyer. Or a history professor. But I've studied that decision, and this is how I understand it.

Mr. William Marbury has campaigned hard for President John Adams. But his man has lost. Thomas Jefferson and his Republicans are coming in, and Adams and his Federalists are going out. There's bad blood between the two parties. But Adams wants to reward his loyal supporters. Just before he leaves office he makes a whole raft of them judges--including his wife's nephew.

**Caller:** That doesn't sound too wise.

**Baker:** Maybe not. Critics call them "midnight appointments." And that's what they are--legal, but appointed at the very last minute, and Marbury is one of them. It's not much of an office, Justice of the Peace, and Washington, D.C., has dozens of them. But it means a lot to Marbury, whose ardent electioneering for Adams has really got Jefferson's goat.

Hang on a sec. [Dumps the flour into the mixing bowl.] That's three cups of flour.

**Caller:** Do you sift your flour?

**Baker:** Naw. Waste of time. Just rake a fork through it before I measure. Of course it's a total madhouse the eve of the inauguration. Adams is busy signing commissions for all of his new judges. John Marshall's busy too, the Secretary of State.

**Caller:** I thought he was Chief Justice.

**Baker:** He was. He was both at the same time at the tail end of the Adams administration. But when Adams left office he stopped being Secretary of State. They played a little looser back then.

**Caller:** I get it.

**Baker:** Anyhow, in his ministerial job as Secretary of State Marshall has to

countersign each commission and affix the Great Seal to make it official. And then the commissions have to be delivered to the new appointees.

**Caller:** Sounds like a lot of deliveries. And no help from FedEx!

**Baker:** You got that right. And guess what? There's some kind of mixup, and Marbury's commission does not get delivered to Marbury.

He's not the man to take this kind of slight lying down. So off he goes, looking for his commission. First stop, the Secretary of State's office. Now, Jefferson does not have a proper Secretary of State yet. Only an acting one, a fellow named Levi Lincoln. But Lincoln won't see Marbury. Just refuses.

**Caller:** I'm guessing that Marbury does not give up.

**Baker:** No way. He finds a couple of clerks there--Federalists like him, but they don't make a religion out of it. Civil servants, the docile type. They'd like to help, but know nothing about his commission.

**Caller:** Sounds like our license bureau.

**Baker:** [Nods.] Soon Jefferson gets a proper Secretary of State, James Madison. Madison hears Marbury out, but says he can't do anything unless Marbury can produce the commission. And just to put the frosting on the cake, Madison adds that President Jefferson considers the matter closed.

**Caller:** Actually, it sounds more partisan than the auto license bureau.

**Baker:** Hold on. [Dumps the yeast into the mixing bowl.] 1/4 teaspoon of yeast. That's all you need, because this dough is going to rest for a good long time. Time can substitute for chemicals.

**Caller:** I never knew that. Maybe I did, sort of.

**Baker:** Given the price of yeast, it can save you some money.

Well, Washington's just a dead southern village until Congress comes back. So Marbury has plenty of time--months, actually--to nurse his grudge and decide what to do. And he might have had some help there from angry Federalists. These guys are out on their ears for the first time ever. And they are not above hassling Jefferson's new government. Who knows? Anyhow, he decides to take his case straight to the U.S. Supreme Court.

**Caller:** I didn't know you could do that.

**Baker:** No?

**Caller:** Isn't the U.S. Supreme Court strictly an appellate court? Meaning that first you have to go to some lower court--what they call a court of original jurisdiction? And if you lose there you can appeal to the Supreme Court?

**Baker:** Well, that's mostly how it works. But there are exceptions. And Charles Lee, Marbury's lawyer, thinks his client's case is a slam dunk exception.

**Caller:** How so?

**Baker:** Lee's a good lawyer. He has it all down in black and white. Here's what the Constitution says about the Supreme Court's jurisdiction. "Do read the recipe before you start in to cook."

**Caller:** What?

**Baker:** No, that's Julia Child. Sorry. Wrong book. It's this little one. "In 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 other words, you can take a case like that straight to the Supreme Court. And wasn't Secretary of State James Madison a public minister?

**Caller:** Okay. That seems to fit.

**Baker:** And that's not all, says Lee to his client. In the same breath, says Lee, the Constitution gives Congress a piece of the action too: "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."

Hold on. [Dumps the salt into the mixing bowl.] That's 1 1/2 teaspoons of salt. Not enough to hurt anybody.

**Caller:** This is more complicated than I thought. But not rocket science.

**Baker:** Certainly not.

Well, Congress had gone ahead and actually made such regulations. And some of them were in the Judiciary Act of 1789. Here it is, black and white, Section 13: "The Supreme Court . . . shall have power to issue . . . writs of mandamus [court orders] . . . to any courts appointed, or persons holding office under the authority of the United States."

**Caller:** What are writs of mandamus?

**Baker:** Court orders.

**Caller:** Wow! Point, set, match!

**Baker:** If I had been Charles Lee I might have been thinking: "Holy Saratoga! Sure as God made little green apples, the Supreme Court will surely order James Madison to produce that commission. How can Marbury lose? The Constitution's on his side. The law's on his side. And every man Jack on the Supreme Court is a true blue Federalist, same as Marbury."

**Caller:** I wonder what he told his client.

**Baker:** Don't know, but let's guess. "It looks good, Marbury, but no guarantees."

**Caller:** What lawyers always say.

**Baker:** So, off they go to the Supreme Court. And they **lose**.

**Caller:** They lose? Why in God's name do they lose?

**Baker:** Why do they lose? Because of a very sly dog named John Marshall, Chief Justice. And this makes him far and away the most important Chief we've ever had.

Hold on. [Picks up the pastry fork.] That's all my dry ingredients. Now to stir them up. You'd be surprised how much stirring it takes to get your dry ingredients mixed up real good. [Stirs.] That should do it.

**Caller:** Interesting character, Marshall.

**Baker:** Oh, he's much more than that. He's your public relations dream. Believe it or not, a log-cabin-born Virginian. Good athlete. Nicknamed "Silverheels" for his running and jumping ability. Silverheels John Marshall. Home schooled, and **well** home schooled. Largely self taught in the law. Father's a surveyor, one of those self-made real estate pioneers. Soldiers in the Revolutionary War, father **and** son, both officers, both devoted to George Washington--a good friend of the father.

**Caller:** Those Virginians stick together.

**Baker:** Not always. John Marshall is contemptuous of a distant Virginia cousin. Named Thomas Jefferson. Silverheels called him "The Great Lama of the Mountain." Monticello, you know.

**Caller:** Why? Why contemptuous, I mean.

**Baker:** Well, during the war cousin Tom is not exactly freezing with his comrades-in-arms at Valley Forge. No. He's Governor of Virginia, you see. Now, the army is in desperate need of fresh troops. So John Marshall goes home to Virginia, where he helps to scrape up 1,500 new recruits for the militia. But the Virginia state government refuses to finance their shoes and uniforms. And you know who the

Governor is. No doubt there are other reasons.

**Caller:** No doubt. But let's not get sidetracked.

**Baker:** Anyhow, John Marshall has seen enough war. He resigns his commission. Gets himself a license to practice law. This is about 8 months before final victory at Yorktown.

**Caller:** Where Cornwallis gets caught between the American army on one side, and the French navy on the other, and throws in the towel. The war is over.

**Baker:** Right. In the meantime, Marshall turns out to be a mighty good lawyer. And popular. He's kind of careless about the way he dresses, very laid back. He's a plain, congenial guy who likes a good laugh, likes good food and drink. And he becomes George Washington's personal lawyer.

**Caller:** Talk about a boost!

**Baker:** Like many ambitious young men, he marries above himself: Polly Ambler's father is the Virginia State Treasurer. She gives Marshall another boost, into the Virginia gentry.

George Washington, practically on his death bed, tells Marshall he must run for Congress.

**Caller:** I'm guessing that he runs.

**Baker:** Who could refuse? He runs, he wins. By now he's become a Federalist. He likes a tight ship, strong central government; doesn't like the messy ways of those Jefferson Republicans, those states rights small "dee" democrat types. Thinks they're chaotic, and he doesn't like disorderly government.

**Caller:** It has its place.

**Baker:** Maybe.

Anyhow, Federalist John Adams becomes president, succeeding Washington. He sends Marshall to France on a diplomatic mission that makes Marshall--along with Pinkney and Gerry--a hero of the XYZ affair with Talleyrand, the corrupt French minister who tried to extort them. Adams makes Marshall Secretary of State, and--very late in his presidency--he makes Marshall Chief Justice of the U.S. Supreme Court.

Hold it. Now we start the wet ingredients. [Dumps the water into the mixing bowl.] That's 7 ounces of water. [Stirs it a little with the pastry fork.]

**Caller:** Do you knead it with a dough hook on a stand-up mixer?

**Baker:** You can, but you don't have to. I just stir it a little with a pastry fork.

It's hard for us moderns to imagine, but in those days it was tough to recruit judges to be on the Supreme Court.

**Caller:** Why?

**Baker:** Well, it was just a lousy job. The real action was in the circuit courts. In its early days the Supreme Court had hardly any business. It didn't even have a building, just a basement room in the Capitol. Worse yet, the Supreme Court Justices had to ride circuit in places without roads. And the Constitution didn't even capitalize the word "supreme."

**Caller:** A lousy job in a disrespected branch of government.

**Baker:** But John Marshall took it on. Thanks to the Constitution, it did have some things going for it. It was the one branch of the federal government whose members never had to run for election. Who were appointed for life. Whose salaries could not be reduced. Who could be removed for misbehavior, but only by impeachment. You know how many times we've impeached a Supreme in over 200 years? Once, **way** back when. And that one fell short of conviction and removal.

**Caller:** But there was all of that dreary, back-breaking circuit riding, out in the sticks, staying in crappy inns and eating crappy food.

**Baker:** Yes. But Marshall made the Court a lot more attractive. And he started by making the biggest change in Supreme Court history: He made it Supreme with a capital S. He made his Court the ultimate authority on whether a law was constitutional.

**Caller:** But how could he do that? Didn't the Constitution spell everything out already?

**Baker:** No. Article III sets up the judiciary, but doesn't say that much about the Supreme Court. It does say that the judges will hold office "during good Behaviour," whatever that means. It says they will be paid for their services. It says that their pay cannot be reduced during their term of office. And it defines the Court's original and appellate jurisdiction.

**Caller:** Nothing about judicial review?

**Baker:** Be my guest. Search the Constitution high and low. You will find no hint--none--that the supreme Court has the ultimate say on the constitutionality of any law, with no check on its power from any other branch of government.

**Caller:** Okay. But what about those other things originalists like to cite. You know, to prove founder intent. Like, the founders really wanted us to have a state

religion, and it just happens to be my pet version of Christianity. Like, they wanted us all to carry Glock pistols in the defense of our castles against burglars. What do they call them? Somebody's papers.

**Baker:** I think you mean what we now call the "Federalist Papers." They were published during the ratification debates, when the states were trying to decide whether to adopt the new Constitution. They were trying to persuade readers that the proposed Constitution was a good thing.

**Caller:** What about those? And who wrote them?

**Baker:** They were published in a New York newspaper as 85 articles, each called "The Federalist," and each by an author called "Publius." Publius turned out to be three different guys: Alexander Hamilton and James Madison wrote most of the articles, and John Jay wrote a handful.

**Caller:** So, what did The Federalist say about judicial review?

**Baker:** Practically nothing. The only exception I know is an exchange between Publius and Brutus. Brutus was the pseudonym of an anti-Federalist pamphleteer. The ratification debate in New York was pretty much a war between pamphleteers. In the 15th essay Brutus warns that ". . .the Supreme Court under this constitution would be exalted above all other power in the government, and subject to no control." That's an accurate prediction of the Court's position after John Marshall's seizure of power 15 years later.

**Caller:** Did The Federalist answer?

**Baker:** Oh, yes. Publius Alexander Hamilton had the answer in Federalist 78: Not to worry, he said. The judiciary is the weakest of the three branches of government. He did allow that "The interpretation of the laws is the proper and peculiar province of the courts," and that "A constitution is, in fact, and must be regarded by the judges, as a fundamental law."

**Caller:** Well, that seems pretty clear.

**Baker:** Not so fast. He added a not so famous qualification. Namely, he thought the courts were not supposed to substitute their own "pleasure," as he called it, for the intentions of the legislature.

**Caller:** That makes it not so clear.

**Baker:** We should also keep in mind that Hamilton didn't spend that much time at the Constitutional Convention. He was in and out. And he wasn't there when the Convention designed the judiciary.



**Caller:** So he was no eyewitness expert on founder intent.

**Baker:** Right. So, here's how I would summarize the Federalist Papers on this question. They offer no support for judicial review, aside from Hamilton's opinion in Federalist 78, if you can **call** it support. He thinks the courts are supposed to interpret the Constitution--but are not to mess with legislative judgment. Hardly a ringing endorsement of judicial review.

**Caller:** All right. So much for the Federalist Papers. What about the state ratifying conventions? Was judicial review a big deal there?

**Baker:** You tell me. Ratification begins when the Constitutional Convention ends on September 17, 1787. In less than four months five states have ratified the Constitution, and in none of those states do the delegates assert the power of judicial review.

**Caller:** Not even one?

**Baker:** Not Delaware. Not Pennsylvania. Not Georgia, Connecticut or New Jersey. And not Massachusetts, Maryland or South Carolina, which had all ratified by May 23, 1788, with nary a mandate for judicial review. Not one. I should mention New York delegate Samuel Jones, of Queens, who had big doubts about judicial review. Get this: Jones wanted to amend Article III so as to allow appeals from Supreme Court decisions. So we could actually appeal those decisions to special commissions appointed by the president. But the Jones amendment never got into the Constitution. (Maier, 2010, p. 371.)

**Caller:** Maybe it it should have. HmMMM. Delaware through South Carolina. That's eight states.

**Baker:** Ratification requires one more, nine states in total, and New Hampshire becomes that ninth state on June 21, 1788. Sluggish communications leave Virginians in the dark about New Hampshire. So they proceed to conduct **their** debate as if ratification depends on Virginia. That's where judicial review comes in for serious debate.

**Caller:** They had some great speakers in Virginia. Patrick Henry. I'll bet he opposed ratification.

**Baker:** Right you are. Came close to winning, too. But can you guess the name of the Virginia delegate whose one big speech features judicial review? Initials JM?

**Caller:** That has to be Silverheels John Marshall.

**Baker:** None other. He is **for** ratification. The Virginia delegates talk a lot

about Article III in terms of states rights. George Mason speaks against: Under Article III, he says, federal courts would overwhelm the state courts.

Federalist Marshall disagrees: The federal courts will **not** have unlimited jurisdiction. If federal courts do go beyond their delegated powers, "the judges"-- Marshall's words--"the judges" will declare such laws void as an infringement of the Constitution.

**Caller:** Which judges does Marshall have in mind?

**Baker:** Good question. Maybe the answer is in Marbury v. Madison, 15 years later.

Anyhow, Marshall's big speech provides the only reference to judicial review in that whole Virginia ratifying convention. But it makes pretty clear where Marshall stands on the question of judicial review.

It's a dogfight, but Virginia does ratify the Constitution. And the Federalists hold power in these new United States of America until 1800, when Jefferson's Republicans take over.

**Caller:** Okay. That takes care of the Federalist Papers and the ratification debates. There was no big push for judicial review. In fact, it hardly came up at all. But what about the Constitutional Convention in Philadelphia? When the founders were busy drafting the Constitution, did they say anything about judicial review?

**Baker:** No.

**Caller:** No?

**Baker:** No. In the Constitutional Convention the modern notion of judicial review never came up.

The founders' thinking focused on the notion of a **council of revision**. This council would consist of the Executive, plus some number of the "National Judiciary." This council would have the authority to reject, for any reason it pleased, any act of the National Legislature before it became law, and send it back to the legislature.

**Caller:** Isn't this pretty much what our president does now, with the presidential veto?

**Baker:** I think so. Now, they did discuss, very briefly, whether the judiciary could refuse to **enforce** a law it thought to be unconstitutional.

**Caller:** Wow! There it is! Judicial review!

**Baker:** Hold your horses. That is not even close to judicial review. "Refusal to enforce" is not the same thing as to "strike down." And in those less hierarchical days--meaning the days when states could get away with a lot more than they can

now--refusal to enforce might not go beyond one's own little neighborhood. As in, for example: "Well, that's not how we're going to do things down here in Georgia."

**Caller:** States rights, and all that.

**Baker:** And all that. No, as far as we know there was no real discussion of judicial review during the Constitutional Convention. Which was about five months long, ending on September 17, 1787. But the founders made one thing clear: They disliked any hint that one branch of government might be able to stymie the other two branches.

**Caller:** For example?

**Baker:** Well, there were plenty of votes during the convention to that effect. For example, they affirmed unanimously an executive veto--but a veto that could be **overridden** by a 2/3 majority in each house of the legislature. And they never suggested that the judiciary would have any hand in the business of legislative veto. It was the **executive** that exercised the veto, and the **legislature** that could override it.

**Caller:** I'm running out of options here.

**Baker:** The Constitutional Convention provides no evidence that the founders wanted a Supreme Court that could void acts of Congress. Do you know what it means to "void" an act of Congress? It means to nullify, to annul. No. There is no evidence that the founders wanted a Supreme Court empowered to hand out irrevocable rulings against acts of Congress.

**Caller:** I just thought of another one. What about Congress? Didn't that early Congress, crammed full of founding fathers, have some ideas about judicial review?

**Baker:** Sure. Jefferson's new Congress is about to repeal the Judiciary Act of 1801, a Federalist measure to greatly expand the federal courts--their number and power. As they debate the repeal, a question comes up about the constitutionality of the Act. Someone hints that the Supreme Court might actually have the power to annul Congressional action.

**Caller:** There it is. Judicial review.

**Baker:** There it is. And in the wee hours of February 2, 1802, John Breckenridge speaks up. Senator from Kentucky. He simply cannot not fathom how anyone can take that possibility seriously. If the Court had that power, where had it found it? And if **courts** were to violate the Constitution, who would check **them**? This is Breckenridge speaking: "But I deny the power which is so pretended. If it is derived from the Constitution, I ask the gentlemen to point out the cause (sic) that

grants it." (Goldman, pp. 185-186.)

**Caller:** Now, there's a direct challenge.

**Baker:** Couldn't be more plain. And Gouverneur Morris answers.

Now, Morris was a drafter of the Constitution. He had attended the debates in Philadelphia. He was supposed to be the best writer there, and was chosen to give the Constitution its final stylistic touches. He knows his Constitution very well indeed.

**Caller:** This should be good.

**Baker:** Yes, it should be very good.

Morris turns to the Breckenridge question. Just where did the judges get this power to decide the constitutionality of laws? Here are Morris' words: "If it be in the Constitution (says he) let it be pointed out. I answer, they derived that power from authority higher than this Constitution. They derive it from the constitution of man, from the nature of things, from the necessary progress of human affairs." (Goldman, p. 196.)

**Caller:** That's the best he could do?

**Baker:** So it seems. Morris goes on with over an hour's worth of these vague meanderings, but offers no textual basis for judicial review. Nothing in the Constitution to give the Court that power.

**Caller:** So, how did the Court get that power of judicial review?

**Baker:** The short answer is that John Marshall seized it. It was probably the biggest power grab in American history, and it went almost unnoticed. Here's how he did it.

The 1800 election is the biggest mess you ever saw. With Jefferson and Burr tied in the electoral college vote, it takes a long time and a lot of horse trading to sort it all out and put Jefferson in the White House. So it only slowly dawns on the Federalists that it is well and truly game over for them, and high time to play damage control. So, with Congress and the White House lost, the Federalists pin their hopes for survival on the judiciary. They will appoint as many new Federalist judges as the law allows. That purpose sets the stage for Marbury v. Madison.

**Caller:** That's why Adams made all of those midnight appointments.

**Baker:** That's one big reason. And you know about the delivery mixup. What you don't know is that Jefferson actually did appoint 25 of Adams' 42 nominees for D.C. justice of the peace. The other 17 were rabid Federalists or personal anathema

to Jefferson. And Marbury was both.

**Caller:** So Marbury took his case directly to the Supreme Court. You've talked about the Chief. What about the other Justices?

**Baker:** They were all Federalists, and they all lived together.

**Caller:** They actually lived together?

**Baker:** Marshall had herded them all into the same boarding house. Conrad & McMunn's--the best hotel and the best food and wine in town. If you could call it a town. Accommodations of any kind were scarce in early D.C.

**Caller:** Communal living.

**Baker:** Very nearly. It was thought to engender teamwork, and suppress the play of independent egos.

**Caller:** Hmmmm. Clever fellow.

**Baker:** That wasn't all. Marshall had scrapped the "seriatim" tradition.

**Caller:** Seriatim? What's that?

**Baker:** That's where the different Justices would read their opinions one after another, and pretty much independently of one another. He replaced it with the tradition we know today, a majority opinion voiced by one member. This gave the Court both a single unified voice and the tradition of prior conference on the various opinions.

**Caller:** I see the drift. But who are they, these independent egos that need to be molded to Marshall's will?

**Baker:** The oldest member, 70, is a frail Yankee named William Cushing. The youngest, 38, is the small, genteel Bushrod Washington, George Washington's favorite nephew. Alfred Moore is a Revolutionary War veteran from North Carolina. Samuel Chase is a zealous enforcer of the Sedition Act; he had openly campaigned for Adams against Jefferson, and likes to bully defendants from the bench.

**Caller:** That's only five, counting Marshall.

**Baker:** At that particular time there were only six. The size of the Court has gone up and down; it's only in the last several decades that it's held steady at nine.

**Caller:** Okay.

**Baker:** The sixth one is William Paterson, from New Jersey. Another big fan of the Sedition Act. Why do I save him for last? Because Paterson, an acknowledged expert on the U.S. Constitution, has co-authored an act of Congress that Marshall is about to strike down as unconstitutional.

**Caller:** My, how this plot does thicken!

**Baker:** You think so? Well, here's another pinch of corn starch. Paterson had thought **he** was in line to be Chief Justice. Before Adams punctured that balloon by choosing John Marshall instead.

**Caller:** I wish I'd heard some of the dinner conversations at that boarding house.

**Baker:** Here's another twist. The Court convenes on Monday, February 7, 1803--without Madison.

**Caller:** Without the defendant?

**Baker:** Without the defendant, James Madison, Jefferson's Secretary of State. In fact, the defendant never appears and is never represented. So, it's hard to call *Marbury v. Madison* a trial. More of an inquest. With plenty of subtle political currents, and paths not taken.

**Caller:** Paths . . . not . . . taken.

**Baker:** Yes. For example, why did *Marbury's* attorney, Charles Lee, not ask Marshall to recuse himself? He could have, because Marshall was Secretary of State at the time in question, responsible to co-sign and seal the commissions. With Marshall recused, Lee could have called him as a witness to the facts of signing and sealing the commissions.

**Caller:** Why not recuse Marshall?

**Baker:** Political hardball. Because the political point of the suit--brought by a Federalist--was to force Marshall, as presiding Chief Justice, to do one of two things. He can find against Jefferson's side, and show that the Federalists were not about to play dead. Or, he can find in favor of Jefferson's side, and thereby confirm the suspicions of many of Marshall's fellow Federalists--the diehard wing, led by Alexander Hamilton--that Marshall was not a true blue Federalist.

**Caller:** Very political. And very hardball.

**Baker:** Marshall is on the spot, and knows it. He knows that Jefferson is itching to get him off the Court, and looking for any reason to do it. He knows that Hamilton's super-Federalists would be happy to prove his insufficient devotion to

their cause.

Marshall surprises them all. It never occurs to anybody that Marshall will find both for and against Jefferson's side: He will give that wretched cousin Tom both an obvious minor victory, and a subtle major defeat.

**Caller:** But how **does** Lee proceed?

**Baker:** Lee proceeds to ask the two State Department clerks what they know.

**Caller:** Lots of luck there.

**Baker:** It's pretty much a dry well. Neither can say which commissions had been signed and sealed, and which had not. But one of them is pretty sure that Marbury's commission had not been made out. Neither can say what had happened to the commissions after Jefferson took office.

**Caller:** What about the Acting Secretary of State? Lincoln?

**Baker:** Yes, Levi Lincoln testifies too. He had seen a stack of commissions, signed and sealed. But he can offer no names, and knows naught of their delivery or whether Madison ever saw them. He prefers not to say what was done with them.

**Caller:** Marshall lets him get away with that?

**Baker:** Yes, Marshall gives Lincoln a pass on that one. Says it was immaterial.

**Caller:** Was that it?

**Baker:** By no means. Lee sharpens his questions. Can the U.S. Supreme Court issue a writ of mandamus?

**Caller:** That's a good one.

**Baker:** Can it issue a writ of mandamus to a Secretary of State?

**Caller:** Even better.

**Baker:** To James Madison, the present Secretary of State?

**Caller:** Take that, Mr. Jefferson!

**Baker:** Lee cites Blackstone. He cites The Federalist. He cites the Judiciary Act of 1789, Article 13. He thinks a writ of mandamus can be issued to a Secretary of State acting as a public minister.

**Caller:** And Madison's not there to challenge him.

**Baker:** It's rather embarrassing. Marshall casts about for someone--anyone--to present the defense, but nobody comes forward.

**Caller:** Madison's absence looks like a dare.

**Baker:** Exactly. I dare you to enter a default judgment for Marbury, **on the grounds of my absence**. Marshall could have accepted Madison's dare.

**Caller:** But couldn't he rule in favor of Madison? Because Lee had produced no evidence of undelivered commissions?

**Baker:** Not in the testimony. But Marshall, in his opinion, refers to affidavits of the signing and sealing of Marbury's commission.

**Caller:** Oh. So there's not much doubt about that.

**Baker:** Wait till you hear what he does. The decision comes two weeks later, in the parlor of a hotel.

**Caller:** A hotel parlor?

**Baker:** Yes. Justice Chase is sick, so the Court has moved from the Capitol to a hotel. In those days, the Court had no ceremony to stand on.

**Caller:** How times have changed.

**Baker:** Anyhow, what does Marshall find? First, he finds that the commission was signed and sealed, but not delivered.

**Caller:** Those affidavits.

**Baker:** He also finds that the signing and sealing ended the president's role in the process. That Marbury must have his commission. That Marbury had suffered a wrong, for which there must be a remedy, in the hands of the new administration.

**Caller:** And what about the court order?

**Baker:** Marshall finds that because the Secretary of State was acting ministerially, he can be served with a writ of mandamus. Now comes the big one. Can **this** Court issue such a writ?

**Caller:** I thought that was already down in black and white.



**Baker:** Aha! **Marshall** sees things **differently**. If the Court **cannot** issue such a writ, says Marshall, it must be because the Judiciary Act of 1789, which had allowed Marbury to bring his case directly to the Supreme Court, is **unconstitutional**.

**Caller:** Unconstitutional? But how could that be?

**Baker:** Marshall's declaration must have caused a lot of head scratching. As in: "What's this business about the Judiciary Act of 1789? It is not even at issue here. Furthermore, its constitutionality has **never** been challenged!"

**Caller:** Let me have a crack at it. "Look at Justice Paterson! He co-authored that act. He's a respected constitutional scholar. Would he write an act that's unconstitutional? Yet, he sits right there, on the same bench as Marshall, silent as the grave! What's going on here?"

**Baker:** I think you've caught the spirit of the occasion in that hotel parlor. But Marshall explains. He thinks that the Judicial Act of 1789, which brought Marbury here, extended the Court's original jurisdiction beyond the bounds allowed by the Constitution.

**Caller:** Article III?

**Baker:** Yes, Article III. And he gives a reading of Article III that supports his conclusion.

**Caller:** You mean he misquotes Article III?

**Baker:** Indeed he does. Wha Article III actually says is that the Supreme Court "shall have appellate jurisdiction . . . with such exceptions . . . as the Congress shall make." It's the famous exceptions clause of Article III. Only Marshall leaves that little clause out as he recites Article III.

**Caller:** Marshall just leaves it out? The man was built like a brass monkey!

**Baker:** You might say that. And he did have his reasons.

**Caller:** Let me make sure I have this right. So Marbury loses, because the Court says he's come to the wrong court after all. Because the Judicial Act of 1789, Section 13, which helped him think that this was the right court, is actually unconstitutional. Only it isn't really unconstitutional. Or even relevant, because Madison is actually a minister, which brings him under the Court's original jurisdiction, according to Article 3.

**Baker:** Exactly. And this decision—sloppy as it may seem to you and me—establishes our tradition of judicial review. Which empowers a simple majority of

Supreme Court Justices--these days, 5 out of 9--to say, on the highest judicial authority, whether any act of Congress is constitutional.

And the Justices who vote, Paterson included, go right along with that in a vote of four to nothing. (Cushing and Moore did not take part.)

**Caller:** But is the decision correct?

**Baker:** Maybe yes, maybe no. Your guess is as good as mine.

**Caller:** I can't believe that.

**Baker:** Well, it's true. This decision has created tons of expert legal commentary--mostly for, but much against. Judges and lawyers tend to favor it, of course.

**Caller:** That stands to reason. Judges and future judges.

**Baker:** It may be less admired by constitutional scholars, who say things like: What's Marbury doing in federal court? Article III applies to federal judges, who serve for life subject to good behavior. But Marbury's appointment was for a 5-year term. So how can he be a federal judge, governed by Article III?

**Caller:** Anything else?

**Baker:** How much time do you have?

**Caller:** Go on.

**Baker:** If Marbury is here because of a law the Court already agrees to be unconstitutional, why not simply send Marbury to a proper court, right off the reel, and be done with it? And why didn't Marbury do that himself, after he lost?

**Caller:** It looks kind of fishy. Like they were ready to cut a few corners so they could make new law.

**Baker:** And how could Marshall, the responsible minister who had failed to deliver the plaintiff's commission, have the brass to not recuse himself?

But, having decided for whatever mysterious reason to take this case, the Court should have decided it on the narrowest possible grounds, instead of using it to make new law. As some critics have charged, almost all of Marshall's opinion seems obiter dictum. Passing remarks. It has a lot to do with the Constitution, and very little to do with the fact that poor Marbury is in the wrong court.

**Caller:** Maybe I should read some of this stuff myself.

**Baker:** I sincerely hope you do. But let me warn you what you will find. You

will scarcely believe how this case has been parsed, over and over again, nearly to death. You can find discussions in the law journals of the significance of a semicolon, or the meaning of the word "exception," and whether a word means the same thing now that it did in 1803, and whether Marshall's selective editing of the language of Article III was tendentious or not.

**Caller:** Tendentious?

**Baker:** Tending to promote a particular point of view.

**Caller:** Good word. Seems to me that everything he did was tendentious.

But I've been thinking about what you said before. It seems so odd that they start off as if they had original jurisdiction: They find that Marbury has been wronged, and that the remedy lies in Madison's hands. But then they reject Marbury's request for mandamus because they lack original jurisdiction after all. I think a straight court would have confessed its impotence and sent him on his way right off--and without first inventing a dictatorial kind of judicial review that courts might like, but the founders would absolutely despise.

**Baker:** Another word of warning: You will find no reading of Marbury v. Madison that commands universal approval. What you will find is an impenetrable thicket of conflicting opinion, parsing, and hair-splitting--enough hair to braid a rope from here to the moon and back.

What does seem certain is that the judiciary branch has shown us too often that we cannot let it continue--as it has since 1803--as the sole branch of federal government without real check or balance by another branch.

Hold it. [Dumps the beer bowl.] That's 3 ounces of beer. [Stirs it a little.]

**Caller:** Dark beer?

**Baker:** Light. I like it light.

So, Marshall makes Madison and Jefferson look bad. He makes Marbury look good. But his Court can't do anything to remedy the wrong that Marbury has suffered at the hands of these scofflaws Madison and Jefferson. Because Marbury has come to the wrong court. Why is it the wrong court? Because the Congressional legislation that brought him here is unconstitutional. And we're the ones that get to say so. No questions, please. We're adjourned.

**Caller:** So he just seized that power--the power of judicial review.

**Baker:** That's what I think. I'm not the only one. And nobody took it back. Do you know what lawyers call that?

**Caller:** What?

**Baker:** They call it "settled law."

**Caller:** Is settled law irrevocable?

**Baker:** Of course not. Settled law gets unsettled all the time. Once it was settled law that you couldn't vote unless you paid a poll tax. That slavery was legal. That women could not vote. That trade unions were illegal. That presidents had no term limits. That government could limit corporate campaign spending without violating any person's constitutional protections. I could go on and on.

Hold it. [Dumps the vinegar bowl.] That's one tablespoon of white vinegar. [Stirs it a little.]

**Caller:** Okay. So, what if we don't like this dictatorial version of judicial review. For whatever reason. It's thrown things all out of balance. It has given too much of our government to plutocratic control. It has offered government for sale to the highest bidder. It is most certainly **not** what the founders had in mind-- for good reason, as it turns out. What can we do?

**Baker:** [Stirs.] We can read Article 5 of the Constitution. It tells us how the people can amend the Constitution when they think they see a way to approach the more perfect Union the founders had in mind.

**Caller:** Be specific.

**Baker:** [Stirs.] I would favor an amendment to reform judicial review. The amendment would check and balance Supreme Court power. It would provide that Congress could override a Supreme Court ruling by a 75% vote in both House and Senate. I might also discard lifetime appointments to the Supreme Court in favor of term limits, maybe 12 years.

**Caller:** But so many people seem scared to death of any new constitutional amendment.

**Baker:** There's really not much reason to be. Not with our 96% success rate.

**Caller:** 96%? How do you get that?

**Baker:** Well, we've already had 27 amendments to the U.S. Constitution. Only one of them went sour, the 19th--Prohibition, in 1919. We saw it was bad, so we repealed it with the 21st amendment, in 1933. That's 26 out of 27, or 96%. Can you think of any other part of government with a success rate better than that?

[Stirs.]

Want to hear a funny story?

**Caller:** I wouldn't mind. If it's really funny.

**Baker:** It's a story told by Chief Justice Rehnquist in his history of the

Supreme Court. Remember that Justice on the Marshall Court, Samuel Chase, the one who was so fond of the Sedition Act?

**Caller:** The one who liked to hector witnesses from the bench. Sure.

**Baker:** Well, the House impeached him because the Jeffersonians thought some of his judgments and jury instructions showed political partisanship.

**Caller:** The House of Representatives impeached him?

**Baker:** Yes. That's the job of the House. After the House impeached him, the case went to the Senate for trial. That's the job of the Senate. In 1805, as Chase awaits trial, the Federalists are getting nervous. John Marshall quietly proposes that it might be a good thing if Congress could override judicial decisions on constitutional matters. You see, if the Senate does convict Chase, Jefferson's happy crew just might go on and impeach the entire Court. Then they could use the impeachment threat to keep the judiciary in line with Congress and the White House. Well, they have the numbers to convict, but not the votes. Chase stayed on the bench, and that was that. I think they all scared themselves at the prospect of the possible consequences.

**Caller:** That **is** funny. Ironic is more like it. Marshall's quiet proposal was right after all. We can see that now.

**Baker:** [Stirs the dough. Pokes a finger into it. Covers it with a plate.] Well, the dough's all done. Let it rise for 12 hours, sprinkle it with flour, slash it across the top, and bake it in a hot Dutch oven with the lid on.

**Caller:** Where did you get that recipe?

**Baker:** From a guy who tried it X [pronounced "ex," not "ten"] different ways before he gave it to me.

I think you'll like it a lot.

But he's still working on it. Stay tuned for X + 1.

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