NATIONAL CONSTITUTION CENTER

The Evolution of Judicial Independence in America – Part 1

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall programs. This episode is the first in a three part series exploring the evolution of judicial independence in America, and its critical role in our democracy from the founding to present day. Part one explores the founder's intentions surrounding the establishment of the federal judiciary and the role of the courts during the nation's formative years with award-winning historians Mary Sarah Bilder of Boston College Law School and Jack Rakove of Stanford University. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates. The series is presented in partnership with the Federal Judicial Center and was hosted live on May 15, 2023. Here's Jeff to get the conversation started.

[00:01:05] Jeffrey Rosen: Ladies and gentlemen, welcome to the National Constitution Center. It's so exciting to see you all here in Kirby Theater. Friends, let's begin, as always, by inspiring ourselves for the learning ahead by reciting together the National Constitution Center's mission statement. Here we go. I know some of you know it by heart. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the Constitution among the American people on a nonpartisan basis. Excellent. I knew you could do it.

[00:01:36] Jeffrey Rosen: We are honored to be joined today by members of the Federal Judicial Center, that is the organization that brings together federal judges for learning and education. And I'm so grateful to our friends at the Federal Judicial Center, including John Cooke and Clara Altman, for this great collaboration. We've done it for years and it's marvelous to start it up again and be back in person. Friends, we've got three great panels and we're going to begin with a dream team of Madisonian Scholars, both of whom braved the elements to be

here. And how exciting to be joined by Jack Rakove and Mary Bilder to talk about Madison and judicial review. I just can't imagine a better team to learn from.

[00:02:20] Jeffrey Rosen: Mary Sarah Bilder is the Founders Professor of Law at Boston College Law School. She's the author of three books, including the definitive and wonderfully titled *Madison's Hand: Revising the Constitutional Convention*, *The Transatlantic Constitution: Colonial Legal Culture and The Empire*, and most recently, *Female Genius: Eliza Harriet and George Washington at the Dawn of the Constitution*. And Jack Rakove is William Robertson Coe professor of History and American Studies and professor of Political Science and Law at Stanford. He's the author of many definitive books as well, including the wonderfully titled and invaluable, *Original Meanings: Politics and Ideas in the Making of the Constitution*. Also *Revolutionaries: A New History of the Invention of America*. And most recently, *Beyond Belief, Beyond Conscience: the Radical Significance of the Free Exercise of Religion*.

[00:03:15] Jeffrey Rosen: Mary Sarah Bilder and Jack Rakove, I've learned so much from you. It's really a thrill to be able to talk together. We have a big topic, and we're gonna shed some light on it. And that's the question of judicial independence at the founding. And there are many places we could start but let's start with Madison, because you've both written so powerfully about him and he'll ground things. Jack Rakove, you've talked about Madison's unique theory of judicial review, which changed over time. Tell us about it. How did Madison understand judicial independence?

[00:03:47] Jack Rakove: My starting position for thinking about Madison is first and foremost to think about Madison as the framer of the Constitution. So coming to grips with what was, I think, the most creative period of his political thinking from roughly about December of 1785 down to the Constitutional Convention, and then working his way through the ratification struggle. And if you wanna conceptualize Madison's ideas of judicial independence at that formative moment in the adoption of the Constitution, I think you'd wanna emphasize at least these points. First, Madison's thinking in general was driven by the belief that whichever institutional government represented the people most directly would be the most powerful and the most potent.

[00:04:33] Jack Rakove: So that always meant at the state level, the lower House of Assembly, and with the new Federal Congress, the House of Representatives

was the one institution you'd have to worry the most about. And I think Madison's ideas about judicial power were driven by his concerns with the nature of political power in a modern republic, where the people themselves would be able to express their preferences, their beliefs, and also their prejudices through the political system. So I think when Madison thought about judicial power at the time the Constitution was adopted, his first concern, and this should sound somewhat strange to a modern audience, was that most lawmakers would be amateurs.

[00:05:20] Jack Rakove: They would come and go, they would not be veteran legislators, they would not have much experience, they would not really know how to draft statutes. And so when Madison started setting up his agenda for Philadelphia, he drew upon a curious provision in the New York State Constitution, which had created what was called a council revision, which consisted of the governor who was properly elected, a couple members of his council, and some members of the New York State Supreme Court. And he wanted this body to have a limited veto, a limited negative on legislation.

[00:06:04] Jack Rakove: Meaning that while legislation was pending, a joint executive judicial council would be able to review it. His concern here was if you start with the assumption, which empirically was really quite a valid assumption, that most lawmakers would be amateurs, he felt there would be a net improvement in the quality of legislation if you involved judges early in the proceedings, rather than wait for cases to arise under the ordinary rules of jurisprudence. So the cases with constitutional implications would come to them in due course somewhere down the road as controversies arose. Madison in a sense had a kind of trade off theory.

[00:06:44] Jack Rakove: I think if we wanna think broadly and deeply about some initial understanding, at least, initial conception, of judicial independence, Madison here, in a sense, was playing somewhat fast and loose, was playing somewhat liberally, with the ideas of judicial independence that the framers had inherited, both from certain principles of the British Constitution in the 18th century and also from the reading of Montesquieu and particularly chapters in *The Spirit of the Laws*, which discussed the British Constitution.

[00:07:15] Jack Rakove: So I think what Madison wanted to do was to involve judges in the actual business of legislating in an advisory capacity plus ab initio from the beginning, in the hope that you'd preempt or kind of reduce the number of

problems you might encounter later on. He presented this proposal at the convention, and it was discussed quite vigorously on a couple occasions. It has strong support from James Wilson, a Pennsylvanian of some prominence who was also a member of the first Supreme Court under Chief Justice John Jay. Eventually, the measure was defeated, as we all know.

[00:07:53] Jack Rakove: But the comments on it are quite interesting because what the comments demonstrate is that the critics to the proposal said, "This would actually ask judges to act in an improper capacity. And that the best occasion for judges to determine on the basis that the independence that Article Three would eventually give them, whether the laws were constitutional or not, would come to them when cases and controversies properly presented the right set of facts for their review."

[00:08:21] Jack Rakove: Now, there's the strongest statements we have about whether or not the idea of federal judicial review of the constitutionality of both federal and state legislation was part of the original understanding, original intentions of 1787, 1788 really come out of the debate over Madison's council. So Madison's council shows that he was willing to modify in kind of, in curious ways, the idea of strict judicial independence as being wholly separate from the legislative process on the one hand. And then the response to it indicates that other framers of the Constitution felt that the whole purpose of judicial independence would be to lay a foundation for the doctrine we eventually came to call Judicial Review.

[00:09:03] Jeffrey Rosen: So interesting. Mary Sarah Bilder... So Jack Rakove has put on the table this centrality of this Council of Revision. When Madison thought about the Council of Revision and about judicial review, did he see judges as enforcing separation of powers limits or federalism limitations or the Bill of Rights or all of those? And did his views change? In your book, Madison's Hand, you say he didn't talk much about judicial review at the convention. But what precise, what kind of review did he see judges as exercising and how did that change?

[00:09:35] Mary Sarah Bilder: Yeah. I think Jack makes such a great point about how if we take the term judicial independence, we have to figure out who, what do we mean by judges? What's their role in the Constitution as a system of government? And then what does it mean to be independent? Who are you

independent from? And I think what's so interesting about this period is that a set of ideas that had been established in the constitutional history of Great Britain about what judicial independence means has to be completely rethought. Because in Great Britain, a long tradition through the 1600s and 1700s involved the idea of independence of judges.

[00:10:16] Mary Sarah Bilder: But judges aren't separated so they don't have a separated function and they understand independence to be very much independence from the king. And there's a lot of the stories of the constitutional battles in the 1600s around the revolution and then reunderstood in the 1760s when George the Third comes to power involve key moments where judges are not independent. And what they mean by that is that judges before the English Revolution, before the 1701 Act of Settlement, served at the will of the king at the king's pleasure. And so there's a great battle over the 1600s about the idea of judges beginning to serve bene gesserit, on good behavior or as long as they behave. And that's one giant enormous battle that they have.

[00:11:18] Mary Sarah Bilder: And then in the 18th century, that obviously for the American colonists is a huge battle, their judges don't sit basically with good behavior tenure, and also their judges are controlled by salary by the Crown. And so those two elements, which we don't think of... We tend to think of this question in terms of checks and balances, separation of power, judicial review, but that's not how they're thinking about it. The two key provisions for them are, do you have a good behavior tenure, and who's paying your salary and can it be reduced? And those are the two complaints in the Declaration of Independence about the judges are, the judges have been made to be at the will of the Crown because they don't have good behavior tenures and their salaries can be changed.

[00:12:06] Mary Sarah Bilder: And in that sense, if we think about the framing, Madison's just not that interested in the judiciary. He thinks the Council of Revision will pick up a big part of the job with respect to what we would think of review of congressional legislation. And he assumes that the negative Congress will review state legislation. And he actually complains to Jefferson at the end of the convention that one of the biggest problems with the Constitution is the loss of this congressional review of state legislation, which is what the Privy Council had done in the colonies.

[00:12:42] Mary Sarah Bilder: But what they do build into Article Three, which is very under imagined, is those two key provisions. That judges are gonna serve on good behavior, which we come to construe as lifetime tenure, and their salaries can't be reduced in office. And the idea there is therefore judges are gonna be independent. But in the world where what you're being independent of is the Crown, that's one understanding of independence. What does it mean to be independent when power lies in the people? And that, of course, is the whole problem, is when power lies in the people.

[00:13:20] Mary Sarah Bilder: When you understand the constitution to be the will of the people, when you understand all the branches to be of the will of the people, who are you independent of becomes a much more complicated problem. And I think that a lot of the early period is trying to work out what does this tradition of judicial independence look like now that authority is in the people as opposed to the Crown where it's sort of easy. You're either with the Crown or you're against the Crown.

[00:13:48] Jeffrey Rosen: That's so interesting. And framing it that way seems exactly right. And Hamilton says in Federalist #78, a conflict between the statute representing the will of the legislatures and the Constitution representing the will of the people, the judges prefer the principle to the agent. But who's the people? So Jack, you say that the central battles over judicial independence during the Marshall Court weren't focused on Marbury but on McCulloch and on the scope of congressional power. And if you interpret congressional power broadly as Hamilton does, that has a totally different vision of the role of judges than if you interpret it narrowly as Jefferson did. So tell us about the debates between Hamilton on the one hand and Jefferson and Madison on the other about judicial independence during the Marshall Court.

[00:14:35] Jack Rakove: Ooh [laughs]. That's, that's a tall order.

[00:14:38] Jeffrey Rosen: That's why you're here. I'm really eager for you to [inaudible 00:14:40].

[00:14:39] Jack Rakove: Let me back up slightly. So one of Madison's key proposals in 1787 would've been to give Congress, we would say a veto, but the preferred term, a negative on state laws. And that measure was, although

convention continued to discuss that almost down to the end, that measure was eventually killed in mid-July right after the critical vote on giving each state an equal vote in the Senate, in its place, we see the first appearance of the supremacy clause. Which for all intents and purposes, does create judicial review, imposing it explicitly on judges at the state level. And I think most scholars assume, implicitly assuming that, "Well, it has to be applied directly to judges at the state level because you can't be 100% sure of their confidence or the sense of their obligations."

[00:15:31] Jack Rakove: Implicitly, of course, federal judges are gonna have the same power. But the question arises. So one, if you assume that a concept of judicial review was either implicitly or explicitly involved in the supremacy clause and in other discussions, against whom is it most likely to be directed? So everyone who's gone to law school and for all the distinguished brethren in the audience here, I'm sure most of you were taught this at the time, the idea that Marbury versus Madison is the decisive case in terms of "establishing." This is Alexander Bickle's language in his famous book, the Least Dangerous Branch.

[00:16:10] Jack Rakove: In terms of establishing the doctrine of Judicial Review has become kind of, I dunno, a [inaudible 00:16:14] or a high statement of judicial theory. What I've always argued is this story and, because I am actually a Madisonian not just in terms of my interest but really in terms of my philosophy, is that Madison's analysis says that the most serious problems of maintaining the Federal Constitution are gonna arise not in controversies between Congress and the Federal courts, it's gonna involve really the problem of what's gonna go on at the state level, where, what happens if you have...

[00:16:44] Jack Rakove: Madison anticipates a kind of McCulloch versus Maryland kind of situation in which states are gonna act somehow in defiance of some major act of federal legislation. So the way I teach my Stanford undergraduates, and, you know... But I hope you won't mind if I take the liberty with you as well, it's to say if you had a choice when asking which of these two cases is a better indicator of the main purpose of judicial review. And I think that's actually... I think this echoes Justice Holmes as well. That whether or not the Court, Supreme Court or Federal Courts in general, had the power to overrule Congress, that's a secondary consideration.

[00:17:22] Jack Rakove: They don't have the power to overrule the state courts. Then we're in big trouble. And so I think if you have a choice between Marbury, which is 1803, and McCulloch, which is 1819, 1819 is the more important case. And it's more consistent with Madison's theory, which I think remains today an extremely powerful, indeed accurate, theory that the real problem is what do you do about misbehavior, however you want to define that, at the state level. Now to add one footnote here. By the time we got to 1819, which of course is 30 years after the Constitution's been ratified, Madison is much more sympathetic to judicial power, and to its importance 30 years later than he had been, as Mary was suggesting, at the time the Constitution was written.

[00:18:09] Jack Rakove: What he remains nervous about, and Jeff, this will tie in to your question, is he doesn't mind the holding in McCulloch in the abstract, but he doesn't like Marshall's reliance on the broad Hamiltonian reading of the necessary and proper clause. Because in Madison, by Madison's way of analysis, both going back to the late 1780s, early 1791, the famous debate over the bank, if Madison's main concern was to how do you get the legislature to try to limit itself, to teach the legislature the necessary and proper clause is wide open, is really, is essentially an invitation to legislate with as much discretion as you wanna exercise, that would run against Madison's underlying concern that the legislative power remained the most dangerous element of what he called the impetuous vortex in Federalist #48, the impetuous vortex of the legislature remained the most serious source of constitutional imbalance. So he... I think he was amenable to the holding in McCulloch in general, but he didn't like Marshall's reasoning because Marshall was a full-blown Hamiltonian in 1819 as he'd been pretty much in 1789. He didn't want that kind of broad Hamiltonian reading of necessary and proper to prevail.

[00:19:30] Jeffrey Rosen: Fascinating. Can I ask you, Mary, to say more about the difference between Hamilton, Madison and Jefferson? Jefferson and Madison, unlike Hamilton, wanted Bill of Rights and Jefferson says the courts will enforce it. And yet in the Marshall era, Jefferson ends up siding with Spencer Roane about the most radical questioning of judicial power to revisit state court decisions. My broad question is were Madison, Hamilton and Jefferson being opportunistic and basically shifting their views about judicial review based on whether they like the results? Or did they have a different vision of what kinds of rights judges should enforce?

[00:20:11] Mary Sarah Bilder: Yeah. I think, and I'm gonna throw John Adams in 'cause I think Adams, when you talk about the judiciary, is such an important person. He's not at the convention, but his book Defense of the Constitutions was serialized in a paper that summer and he's very influential in the way that the three articles get written. And so I think if you think about what happens in the period between, let's say 1787, 1789 and up through, if you take to 1820, that's almost a 50-year period. And one of the things that happens is the judiciary begins to figure out what should its role be.

[00:21:00] Mary Sarah Bilder: Because again, coming back to Article Three, which is the smallest article. And Article One, Congress has lots of specifics in it. Article Two about the executive has more, has quite a few specifics. Article Three doesn't have a lot of specifics. It just says there's one Supreme Court. And so a lot of what happens in this period is everybody's trying to sort out what should the judiciary do. Particularly what should the judiciary do, the federal judiciary do with respect to the rest of the constitutional system.

[00:21:31] Mary Sarah Bilder: And if you think about Federalist #78, Hamilton's view on that, one of the things that I think is really interesting is if you read Federalist #78 very carefully, Hamilton says the judiciary's not gonna be that dangerous for the political rights in the Constitution. And I think what he means by that is some sense of the political aspects that were written into the Constitution, things like habeas corpus, no titles of nobility, this kind of classic British constitutional rights.

[00:22:04] Mary Sarah Bilder: And then he goes on to say there's other things that... He uses the word independent, that an independent judiciary can do. And this is where I think he does tie a little bit to the concerns that Madison has because he says the people or legislation can go through too fast. It can kinda be a product of a moment or the, they're often worried about sort of partisan conniving, demagogues pushing legislation through. And one of the things that the judiciary can do is almost like slow that down. And so that's one of the things he says in Federal #78, is the judiciary can sort of help balance the impulsiveness of legislation.

[00:22:46] Mary Sarah Bilder: And then he goes on to say, another problem with legislation, and again, I think he's thinking at the federal level, but also at the state level, is that legislation can be overly severe with respect to private individuals.

And one of the things the judiciary can do is help mitigate that severity. And he says if the judiciary sort of slows things down, mitigates the severity, pulls things in, that will actually in turn encourage legislation to be more careful and more specific. And so in some ways, he's seen it as a sort of back and forth in what Adams would've assumed was the more important thing, a sort of checks and balance kind of way.

[00:23:25] Mary Sarah Bilder: And so I think that one of the interesting things if we think about that aspect of this topic of judicial independence, what sort of the role of judges is, the Supreme Court justices in this period are trying to figure out what does it look like for their role. And under the first Judiciary Act, there are no circuit court judges, there's only district court judges, and the Supreme Court judges. There are six of them. My students are always like, "How did that work?" I'm a big fan of an even number of justices on the Supreme Court, but because you don't have a like majority rules situation. But they're trying to figure out what does it mean to be a judge.

[00:24:06] Mary Sarah Bilder: And one of the things they begin to do over this period is try and focus on how does judging look different than ordinary politics. And so a lot of what they do in this period that begins to establish this idea of judicial independence is they turn work down. So, you know, can you give advisory opinions? No, you can't give advisory opinions. Uh, how about you solve all the problems of who gets pensions? No, we're not gonna do that. You know, literally, the beginning of the court is like, "Yeah, no, we're not doing that, we're not doing that, we're not doing that. And that, also we're not gonna do." And Washington keeps speaking of like, "How about you guys do this?" "No, we're not gonna do that."

[00:24:46] Mary Sarah Bilder: But what they do do in that space, and Marshall's a very important aspect of this, is they begin to develop this idea that judging is its own important task. And it’s its own important task in thinking about what it means to be judges for the people interpreting a people's constitution. But even in this period, judging, federal... The federal judiciary looks very different than we do today. Because I think today, if we think about what being an independent judiciary looks like, we often think of the Supreme Court and we think of the Supreme Court's big building but they don't have that building until the 20th century, right? I mean, that building is a product of when you get a president who

decides to be a Supreme Court justice and then decides, "Wait, well how come, uh, we don't have a building?"

[00:25:37] Mary Sarah Bilder: The judiciary is embedded in some ways inside Congress. So all through the 19th century, the judiciary is sitting, the federal judiciary, the Supreme Court is sitting inside of Congress. And so there's a way in which our understanding of this very clear separation is I think much more a product of the 20th century than it is in this early period. And that's why I think sort of, they assume there will be judicial review powers. Everybody gets that there's judicial review powers. The Privy Council had always bounded what the colonial legislatures and colonial courts could do. But what that means in a world where everybody, every branch is claiming to be interpreting on the side of the people feels different.

[00:26:28] Mary Sarah Bilder: And so what happens for the federal judiciary that's just incredibly difficult is trying to figure out how do you not become the king in the room, right? How do you not insist that we're just doing this and we're really the ultimate will? But how do you work in a checks way to interpret the will of the people? How do you make judicial review be meaningful in terms of protecting the rights of the people and the constitution, enforcing the limits in the Constitution without becoming a new kind of king, without insisting that you're the ultimate and only decision makers? And I think that's the great problem for the judiciary throughout this whole period.

[00:27:10] Jack Rakove: Jeff, I just want to add one point to this. And this may seem a little anomalous to the audience, but I think one way to buttress or, you know, deepen Mary's point is to say that the question of who are the real decision makers within the judiciary branch coming out of the revolutionary period, are they judges or is it actually the jury? I mean, if you go back to John Adams in the 1760s, and I quote him at some point in my work, says juries should be perfectly competent to decide matters of law and fact alike. And so I think when you start having the Supreme Court Justices riding circuit, from the start, often they give, addresses to the grand juries who are supposed to be pursuing whatever charges are gonna be brought under federal law.

[00:27:56] Jack Rakove: That's an effort to kind of bring the jurors up to the emerging judiciary's own level of expertise and knowledge. But it also says they see they have a kind of obligation or also an opportunity to kind of start playing a

much more creative directive role in terms of every law. So how the judiciary defined itself institutionally, in a period where the tradition of thinking juries were competent to decide both matters of law and fact alike, it's another one of those kind of mysterious historical changes, which may seem somewhat obscure, kind of antiquarian today, but which 18th century scholars like Mary and I–you have to worry about it actively.

[00:28:38] Jeffrey Rosen: You've both identified a shared concern among Adams and Hamilton on the one hand and Jefferson and Madison on the other with faction and with separation of powers and maintaining those boundaries. And I wanna ask, was there a partisan valence to conceptions of the judiciary of the founding? On the one hand, the Federalists under Hamilton favor broad congressional power and loose construction and fear of the mob, and the Jeffersonians want strict construction and constrained power and fear aristocracy? Did that affect their vision of what judges should do or not?

[00:29:14] Mary Sarah Bilder: And I think one of the things when you talk about independence of the judges, and you think about what that meant in the British constitutional system, it was understood to be a political question. What they meant by that was it was understood to be what independent judges did was they stood up to the king. And so I'm working on a biography of the great constitutional historian, Catherine Macaulay, and she tells a story that was widely reproduced and was very influential on John Adams. And he writes a long set of newspaper editorials about judicial independence.

[00:29:56] Mary Sarah Bilder: And there is a very famous case involving ship money. The King's sort of like, "I'm gonna tax everybody." And it goes to the court, can the King tax everybody instead of parliament? That's the short version. And seven judges say yes and five judges say no. And there's a very key judge, George Crook. And George Crook, according to the histories and Macaulay and what Adams and the founders read, said, "I'm scared of the king and I don't want the king mad at me and I don't want my salary cut and so I'm gonna vote in favor of the king's side."

[00:30:30] Mary Sarah Bilder: And George Crook's wife goes to him and says, "I don't care about poverty, I don't care about misery. You should do the honorable thing." And so he votes against the king. And then at the time of the English Revolution, all the judges who voted for the king were impeached. And this

becomes a key story about what it means to be, what judicial independence looks like. And what that story comes down as is a story about what does it mean to stand up to political partisan power that is against the people. And that's the narrative that really comes down. And so when you think about is it the Jeffersonians or the Adams, right, the tension there is once you develop a political system that the framers didn't anticipate, which has established political parties, and you amend the Constitution with the 12th Amendment to institutionalize those political parties into the election system, that's what the 12th Amendment does, is it basically makes sure that having a political party is the way to gain power, then this question of how does the judiciary fit into the very, in some ways globally unusual two-party American political system, becomes very complicated. Before the 12th Amendment, it's not that there aren't parties going back and forth, but it doesn't necessarily look like they're gonna be institutionalized forever. And then I think that's a really hard question for the judiciary. And for what it means to be nonpartisan is once you have a very strong two-party system, where does the judiciary fit in that?

[00:32:15] Jack Rakove: I think I would add to Mary's point to maybe shift it a bit by saying, I... To my way of thinking the critical moment historically comes between the passage of the Alien and Sedition Acts in 1798, and then Marbury versus Madison, not for its own sake but just as an outcome of that struggle in 1803. And the reason I say that is it's a wonderful... For those seriously in the history, there's a wonderful book by a guy named Wendell Bird called Criminal Dissent, which is part of a series of books he's doing on the act of prosecution of the sedition at cases at the very end of the 1790s during the so-called quasi war with France.

[00:32:57] Jack Rakove: Where the, the amount of collaboration, one could say collusion, between Secretary of State Timothy Pickering, who was the main player here in the administration, and some of the federal judges, led I think by Samuel Chase, who's also from Maryland as a Supreme Court justice, in terms of arbitrarily prosecuting their Republican, meaning Jeffersonian, Madisonian opponents on the one hand, and protecting Federalists on the other, even when they say things critical of John Adams as president, becomes quite significant.

[00:33:32] Jack Rakove: So there is a deeply partisan moment at the very end of the 1790s where the question actually thinking politically of the relationship between judiciary and the executive is becoming problematic, or at least becoming,

particularly as Republicans see it–as Jefferson, Madison and their supporters see it–is becoming quite problematic. That's all the background to Marbury versus Madison, because then you got the Judiciary Act of 1801, which most historians still see, I think correctly, as a kind of final effort by the Federalists to lock them, to retain influence or potentially control over the one institution that they can still dominate through the appointment of the so-called midnight judges and the kinda last minute Judiciary Act of 1801.

[00:34:18] Jack Rakove: The party, it's about to go out of power but they wanna let themselves into... At least get themselves some deeply entrenched stake in national government through the judiciary. I mean, that's how the political background to Marbury. So Marbury becomes an interesting case, not I think because of its great doctrinal significance, not because of the way it's still taught in many law schools, but as a consequence and an illustration of how deeply entrenched. And of course it's, I mean, it's... The partisan relationship was. It is also worth going back and saying in 1789 when Washington starts making nominations for both the Supreme Court and the federal district courts, the question of loyalty to the new regime became a major factor.

[00:35:01] Jack Rakove: That's to say you would expect the preponderance of judges, appointed, nominated and confirmed in 1789, 1790, to be federalist partisans in the sense of enthusiastic supporters of ratification of the Constitution. The problem that arises then is once political parties start forming in the middle, seriously, in the mid-1790s, then the depth of partisan passion is ratcheted up. And the question of what does independence mean when the partisan forces are running so strong, you know, and I shouldn't go too far in this, but it's not, in some ways it's not unlike the situation we're confronting today.

[00:35:43] Jeffrey Rosen: Fascinating. Well, we've worked our way up to Marbury. And Mary, do you agree with Jack that this is the time when all the partisan forces you've mentioned are coming to a head? The Alien and Sedition Acts prompt the impeachment of Justice Chase and the effort to change the size of the court? And how would you see Marbury? Was the assertion of judicial review controversial or not? And to what degree did it presage our current battles?

[00:36:11] Mary Sarah Bilder: Yeah, no. I think the... I mean, I think the sort of current scholarship here is pretty clear that everybody assumes there's judicial review... Nobody's interested in that part of the opinion. And in some ways that's

not even really what Marshall's talking about. The part of the opinion that at the time is very dramatic and controversial is the notion that there are aspects of the executive branch power that are not completely political and partisan. That there's parts of the government that have to run regardless of which political parties, so to speak, are in power. And there's sort of some things that you get to do when, because it's your party, but then there's a whole lot of other stuff that is sort of part of the fabric of the way the Constitution runs. And Marshall's very clear that you have to insist on this.

[00:37:09] Mary Sarah Bilder: And then the part that's the judicial review piece, that sort of part of the opinion, if you go back and read that, one of the things that Marshall says over and over here then is we have a written constitution. And what he means by that is we have a form of government that is written down on paper. And there's something about that that changes the way that we have traditionally understood government to work. And that puts the judiciary in a new role. And he's sort of almost in some ways... You know, he doesn't know he's gonna be on the court at that point as long as he is. But there's ways in which what you can really understand the very long period of Marshall's tenure to be about is sort of working out what does it mean to be a branch of the government interpreting a written form of government.

[00:38:06] Mary Sarah Bilder: And be respectful of the fact that there are other branches, but also understand yourself in some way to be representing the people ultimately. And you know, I don't... I, I think Marshall very much understands that position. One of the things that a sort of curious note in terms of the, of the pieces, you know, Marshall gets the position, but one of the people that Washington had wanted to give the chief justiceship to was Patrick Henry. And Patrick Henry turns it down, he's older, he doesn't wanna do it. But there's a way in which it... He, he-

[00:38:44] Jeffrey Rosen: He's lazy.

[00:38:44] Mary Sarah Bilder: Yeah. Well, he's... I'm gonna give him credit for being sort of done there, been there, done that. Gonna, gonna be quiet and retire. But that tells us something about how... Certainly, during Washington's time, the question was were you favoring a sort of broad constitutional forward-leaning understanding of the government? And he actually sees Henry who had been the great anti-federalist as at that point willing, willing to do that. And then by the time you get to the Marshall years and you get the development of two political parties,

then it becomes harder to imagine putting the other political party on the bench. But, so I think Marbury's just incredibly important as the sort of turning point moment but not because it announces something completely new.

[00:39:35] Jeffrey Rosen: So interesting. Time for closing thoughts in this wonderful discussion. I hear both of you saying... Jack, sum up if you can, what was agreed and what wasn't agreed about judicial independence at the founding? [laughing] I, I hear you say that there was-

[00:39:50] Mary Sarah Bilder: In 30 seconds.

[00:39:51] Jeffrey Rosen: The... Well, you can do it. I know. That's why you've come all the way from California.

[00:39:55] Jack Rakove: Uh, yeah. Well, I just flew in from the coast and I'm flying back this afternoon [laughs].

[00:40:00] Jeffrey Rosen: Yeah.

[00:40:01] Jack Rakove: Uh, yeah, it's a tough one, Jeff. I mean, I think I would echo the point that Mary just made that there's, I was just reading Keith Whittington, one of his books out. He's a very distinguished scholar at Princeton on this. I think the novelty of the acceptance that the Constitution was law not just in the new American sense of the term, that's as a supreme fundamental law, which regulates everything government could do thereafter under his directions. But it was also law in a more conventional sense. The document was there, it had to be interpreted, you had to know... You had to develop rules for its interpretation. That became the foundation for the development of a distinctively American conception of the judicial function.

[00:40:52] Jack Rakove: I happen to think and, you know, this would be my last provocation, it, it's helpful for us to think... And Mary might disagree with this, I'm not sure, based on what you said about Macaulay. But it seems to me that the idea of constitutional law, per se, is an American invention. The term would not have meant anything certainly before 17- perhaps before 1776. But almost certainly before 1787, 1789. That there are constitutional norms, the judges could occa- in,

in the British tradition, the judges could occasionally invoke. But the idea of having the Constitutions, texts against which other texts would be read and interpreted, that it seems to me is a major American innovation and departure.

[00:41:33] Jack Rakove: And if you go back and read Federalist #78, it's the first mature statement of a theory of the judicial function. The real purpose of Federalist #78 is not to justify judicial review, it's really to justify the idea of an independent judiciary. And judicial review becomes the byproduct, or the consequence, of that argument. I mean, the larger part of the essay is really a discussion of judicial independence, per se. Judicial review is an illustration of what that concept of independence is, you know, may come to mean.

[00:42:05] Jeffrey Rosen: Fascinating. Last words to you, what was agreed and what was not agreed about judicial independence?

[00:42:10] Mary Sarah Bilder: Yeah. I mean, I think what was agreed at the federal level was what's in the Constitution. Pretty minimal requirements but on good behavior, lifetime tenure friends, and your salary can't be reduced in office. And then everything else was a little bit up for grabs. And I think in that sense, Jack's point about the sort of, one of the things the court will do, the federal courts will do over time, is develop a body around interpreting this new written instrument, the Constitution. And that's very new. We will come to be known as constitutional law, but that sort of separated law doesn't exist in the British tradition, and that’s a very important thing. And how one understands that changing over time becomes a very important thing.

[00:42:56] Mary Sarah Bilder: And Hamilton, in some ways, in Federalist #78, prefigures this. 'Cause the very last thing he says about why should you have an independent judiciary is he says, "Basically, that's gonna be really hard. And it's gonna involve reading lots of stuff and precedents." And he said the precedents over time, and the sort of history of the own interpretation of this, will become more and more complicated. And it will require people to sort of be willing to devote a lot of study and time to this. And that's in part why we give judges sort of lifetime tenure, is to be super thoughtful and careful about what it means to be interpreting a constitution on behalf of the people.

[00:43:41] Jeffrey Rosen: For illuminating our understanding of judicial independence at the founding, please join me in thanking Jack Rakove and Mary Sarah Bilder.

[00:43:57] Tanaya Tauber: This episode was produced by John Guerra, Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Research was provided by Lana Ulrich. Join us next week for part two of this series, where we explore judicial independence in the 20th century and some key Supreme Court rulings from that period. Visit us online for a full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast so stay tuned here as well. Or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.