# Mr. MADISON'S MOTIONS:

*M 'n' M* at 200 Years Old

For the two hundredth birthday of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) I interviewed Chief Justice John Marshall (1755 – 1835).

A: How does it feel to be two hundred and forty seven years old?

M: It feels great. I just beat out Mel Brooks for the title role in *The Chief and Me*. It's a made for TV movie.

A: Congratulations.

M: Can you believe that Brooks wanted to steal my best line? 'Badges, you don't need no stinkin' badges.'

A: I'm duly impressed, Mr. Chief Justice. But that was *his* line.

M: I was known for my sense of humor.

A: Looking back at the bicentennial of *Marbury v. Madison*, what is there about the decision that is likely to give us the most trouble? When I say us, I mean we here in the twenty first century.

M: The court heard the case and then decided it didn't have the power to hear the case. The court tried it the matter with motions, disputes over the availability of evidence, objections based on executive privilege. You noticed that the Jefferson administration never answered the show cause order?

A: I believe that everyone has noticed that.

M: Anything else?

A: Nobody briefed or argued the constitutionality of Section 13 of the Judiciary Act of 1789, specifically, the grant of original mandamus jurisdiction to the Supreme Court.

M: I suppose you think that the four would-be judges wanted to embarrass the administration by getting us to order that they were judges, with or without commissions.

A: Mr. Chief Justice, they were appointed justice of the peace under an Act of Congress – adopted February 27, 1801, Sec. 11 – in which the President could appoint as many J.P.s as he wanted; they charged the parties by the case, so there was no salary. It wasn't really much of a job.

I always figured that Marbury and his friends thought the lawsuit was going to put Jefferson in a bad light. If he couldn't make an impeachment case against judges appointed by Adams, he'd just withhold their commissions. And more. Federalist pamphleteers could argue that – *by accident or fraud* –

M: "Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office."[1]

A: So the Federalist litigators were seeking to knock the legs out from any attempt by the Jeffersonians at decommissioning judges. This would force the anti-Federalists to take the more difficult road, impeachment. As for Marbury and the other would-be judges: They wouldn't be challenging Section 13, because – in taking that position – the appointees would be arguing the Supreme Court couldn't hear their case.

M: Of course the challenge wouldn't come from that direction. But sooner or later the court was going hold an act of Congress unconstitutional. The scholarship has noted the precedents in play from the organization of the Supreme Court itself, indeed from colonial times.[2] Striking that pose in a case with no briefing by either party and targeting the Judiciary Act struck a good clean blow against the Republicans.

A: I rather enjoyed the blow that the Republicans struck first, the session after The Marbury Four filed suit in December, 1801. I refer to the act

[1] At 160 (all citations are to Marbury, unless otherwise indicated).
[2] Charles Warren, The Supreme Court in United States History I, 65-84, 256-268.

of Congress which repealed their right to charge fees. Act of May 3, 1802, Sec. 8.

M: Yes, and you'll remember that Charles Warren dug out the case in which Judge Cranch and I held that repeal unconstitutional. *United States v. Benjamin More*, decided August, 1803.[3] The Republicans were *indicting* one of the justices for taking fees. So please don't tell me I was paranoid.

A: I wouldn't dream of it. But it does seem strange that William Marbury et al. were scrapping in the Supreme Court to do their J.P. service for free, or for a five year term that would be up before the litigation was over.

M: Now it's my turn. Did you pay attention to what we said, about issuing those commissions? You have read those passages?[4]

A: I've read them. They're not really germane to the constitutional issues. "[D]ictum," Haskins weighs the weight of opinion here in the Oliver Wendell Holmes Devise History of the Supreme Court: "[O]r as an expansive 'excursus' directed primarily at Jefferson."[5]

M: But if I could show you they were, as you say, germane? Indeed, I will show you that the reasoning's the same, the same exertion, if you will, in its working clothes.

A: You're saying that it's a literary puzzle? *Being John Marshall*?

M: When Adams lost the election of 1800—it can take time to sort these things out—Jefferson consoled Adams with an observation to this effect: "Were we both to die to-day to-morrow two other names would be in the place of ours, without any change in the motion of the machinery." Jefferson continues: "Its motion is from its principle, not from you or myself."[6]

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[3] Warren at I, 255-56.
[4] At 153-167.
[5] Haskins at 203.
[6] Letter to Dr. Benjamin Rush, January 16, 1811; Jefferson, *Writings* 1234, at 1237.

A: That's an interesting insight, given the context, I should say.

M: Of course. How is a judge made in America?

A: May I rely on the opinion?

M: Be my guest.

A: I believe I can spell out six motions in the machinery of appointing judges. Let's take Candidate A. The president considers the candidates, decides, and nominates. The Senate advises and consents. The president's clerk prepares a commission; the president signs it—I'm way over six—the Secretary of State records it, seals it and delivers it. And the new justice of the peace takes the oath.

M: By my count, twelve steps.

A: Did I get it right? I mean, the oath is a part of getting vested as the statute provides: "such justices, having taken an oath … shall, in all matters civil and criminal, and in whatever relates to the conservation of the peace, have the powers vested in, and shall perform all the duties required of, justice of the peace … ."[7] You skipped that part in *Marbury*.

A: Yes, there's one point at which the opinion lists three different ways in which judges can prove that they're judges. One is by having a commission, another is by substitute commission, and the third is by being able to locate a public record of the commission.[8]

M: And did the court reach any particular conclusion?

A: No, not at all. Or rather all three were accepted by the court. I may interject: Haven't we changed our focus from (1) a system by which presidents appoint judges to (2) the court system's involvement with the issues involved when a litigant challenges a judge to prove she's a judge?

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[7] Act of February 27, 1801, sec. 11.

[8] From "After searching anxiously … " (at 159) to the paragraph beginning "Such a copy would, equally with the original .. ". (at 161)

M: Would there be value in comparing what functionaries do in two systems?

A: Well the discussion has certainly moved into the court system. "If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority."[9]

M: "It is important to the citizens of this district that the justices should be independent," Marbury's counsel Lee argued. "[A]lmost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state."[10]

A: Why can't a Republican who doesn't like a Federalist judge go into the judge's chambers or into the courtroom, and destroy his certificate? And our Republican could then say, *You don't have a certificate*. And the Federalist judge could say – on your account – *Well, I can get another certificate*. But this judge goes around and discovers that people won't give him a certificate. Now what would you have? Unless a court had a method to sort back through the steps, to a point of no return, then that court couldn't protect the men and women who are on the bench; those thinking-they-are-judges can get un-appointed as soon as their certificates are destroyed.

M: Excellent. Now how many different ways could a judge show he's a judge?

A: Judge A can show all twelve steps, less the delivered commission; that was Candidate A from above. Judge B can show that he got a substitute commission. Judge C can show that he *can* get a substitute commission.

[9] At 167.
[10] At 152.

M: By pointing to the record of his commission being received by the Secretary of State for the purpose of recording it.

A: Judge D can show he was nominated and confirmed and there is a record of his commission being signed by the President, but that's –

M: As far as the paper trail goes. We'll skip the rest for now. So why not describe (describe is all I ask) *all* of these methods as *in* a works, a machinery.

A: Newton's clock?

M: More Madison than anyone else. He defaulted and I argued the clock works with or without him.

(The Chief Justice, post-interview, allowed that he was the one didn't arrange for the delivery of the commissions on midnight March 3, 1801.[11] "Now that would hardly look good," he told me, "Marbury v. Marshall, opinion for the court by Marshall, C.J." I was going to ask about his being a witness in the case, but the Chief Justice interrupted me. "Madison didn't know anything about the commissions.[12] He wasn't even back in the District until May, 1801. I was the only one who did know what happened, in the sense that my opinion made perfectly clear, since I was responsible for operations at the State department while getting up to speed at the Supreme Court, where I had just been sworn in. It was tough," he confided. "Working in the District has always been a hell of a commute.")

A: I would put it this way. As a would-be judge, I can speak of how I'm going to get to be a judge without having to talk about changing the system of making judges. There are different ways in which a grievant can get to where he wants to go without having to change the system, however one does that.

M: If there are errors when functionaries in a system call functions, we may ask ourselves, *What are they going to do with error? It's their system.*

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[11] Haskins at 184.
[12] At 145.

The answer is this: functionaries who work in the system should ensure that their system has functions available to fix error. Or someone else will.

A: Perhaps this is something like what you're driving at. Take a mistake that Congress could have made in prescribing the appointment process.[13]

M: They can make mistakes in input. There is a bare possibility that Congress, in creating justices of the peace for the District of Columbia in 1801, might have made these at will functionaries.

M: One expects that most systems can correct their own input mistakes, or more precisely have functions available to be called if a system acts on non-conforming input. Such as an assumption that a judge of five years' term can also be at will functionary.

A: I suppose Congress may be said to have, perhaps by funding the federal judiciary, made the judiciary a correcting system, adjoined to its own efforts.

M: You're beginning to sound like one of us.

A: I might say with Jeremy Bentham: "There must be therefore, not one system only, but two parallel and connected systems, running on together, the one of legislative provisions, the other of political reasons, each affording to the other correction and support."[14]

M: So in each system a person would be an observer of the other.

A: He was speaking of how legislators, not judges, write better laws.

M: But any two systems would provide an opportunity for the observer's effort.

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[13] At 162 – 63.

[14] Jeremy Bentham, The Principles of Morals and Legislation (Prometheus Books, 1988)(1789).

A: "Reasons," Bentham described his program, "must be marshalled _ "[15]

M: "And put under subordination … " and that is your poor excuse to quote Bentham on marshalling. Here's one for you. "From the first moment that my mind was capable of contemplating political subjects, I never, till this moment, ceased wishing success to a well regulated republican government."[16]

A: James Madison at the Virginia ratifying convention, 1788. So if law is made, but the legislators are under a misunderstanding or assumption that something is the case when it's not, and if some (other) system can take responsibility for fixing the situation, then there isn't a flaw in the design of the system under consideration.

A: But what about the Supreme Court hearing a case and then deciding that it can't hear the case?

M: One solution is to assign types to functions. For example, a worker using a rule would be at one level. Another level might be another functionary –

A: Another kind of functionary would be one who designs functions. She says how functions are going to be used by the function user at the first level. On this account I can say, *All Cretans are liars*, and be telling the truth, when I screen witnesses, lawyers –

M: or judges -

A: to participate in trial.

M: So the constitution is a law like any other; judges have to work a constitutional rule marshalling all of their lawyerly doctrine. And we also said the constitution may not make sense, no matter what effort is brought to bear. "It cannot be presumed that any clause in the constitution is intended to be

[15] *Id*.
[16] James Madison, Writings 385, 386 (New York: Literary Classics, 1999)(addressing the Virginia ratifying convention in 1788).

without effect; and, therefore, such a construction is inadmissible unless the words require it."[17]

A: But the designers have made it higher law, that's what I thought. But it's not when it's used in a court system.

M: "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 operation of each."[18] And you'll remember we said the constitution was "superior" and "paramount" but we still said it was "law".[19]

A: Certainly that's what judges do for a living, looking at one rule of law and another one, and working with two (or more) rules. If one body wrote code law in the past, some living judges –however they go about fixing the muffed, the clumsy and the inconsistent effort – will have the opportunity to fix these laws. And that's ordinary or first level effort.

M: Design flaw or input mistake. There are only two choices. When the Judiciary Act of 1789 conferred too much original jurisdiction on the Supreme Court, was that a design flaw?

A: From your perspective what looks like a design flaw is operator error. Hence your decision emphasizes the perspective *we shouldn't be doing this in the first place*. That's you, the court. You are forced to retread the same path, the same assumption, as laid down by the first federal congress and repeated by the plaintiffs. And you're not ashamed to expose that mistaken assumption even if it takes an entire discourse on all the issues.

M: That's the one way to hammer the message at the reader. A system (here we may say constitutional in the largest sense) can baseline operator mistake. Such a system – or grouping of systems – takes responsibility for these errors by assuring us that what could be seen as a serious design flaw can be corrected by treating it as an operator reaching by mistake for the wrong input.

[17] At 174.
[18] At 177.
[19] *Id.*

A: And the dividing line between deciding cases for parties by applying rules and making law for nonparties? You underline in your passage: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[20]

M: Of course we can do more than one thing at the same time. Those plaintiffs make a mistake in forum choice – they stand before us as a party – and we use the opportunity to correct the operations of a system. I am speaking of legislative activity that occurred more than thirteen years before our decision.

A: Socialized justice?

M: Exactly. The parties offer a particular case and we are obliged "to say what the law is." Even if the parties don't ask for it; we do it anyway. That's MveeM.

A: But in performing your duty, how do you stand back from that effort? Surely it must be more than imagining in the future what functions might be available *then* to correct any error which you make *now*. I suppose the best you can do is to hope that your mistake today is one that will be (to some future observer or court) your input mistake. Else, again on your account, your effort will have exposed a designed-in flaw requiring a rebuilding of the system(s), especially if it is a flaw that implicates the system's ability to fix itself.

M: Now isn't that what MveeM is all about? If you backed up far enough to get a good look at Newton's clock you'd have a quite a view, wouldn't you? And a turn of phrase to match. And in any event the business of higher and fundamental law is not the hierarchy that counts. Functions matter.

A: You're referring to the Constitution being both "fundamental and paramount law".[21] So which is it? The basement or the roof? I can see by your reaction that I've missed the point again. If the constitution is both "superior"

[20] At 177.
[21] At 177.

and "paramount law"[22] *and* if legislative supremacy would subvert the "very foundation of all written constitutions"[23] then the architectural or static metaphor is of limited value.

M: Still less useful is "law of laws", a phrase actually in use in the 1790s.

A: And you have your own explanation – or justification– for style?

M: "This original and supreme will organizes the government, and assigns, to different department, their respective powers."[24] I rather like that. How you think it felt to be in touch with this "will"?

A: Granting your out-of-system perspective of the constitution-at-work or one far enough from the center, your perspective would strike you with "so much reverence".[25] I admit that you are compelling me to see that only systems are objects. I think. But what do you see when you are out there, looking at Madison's machine?

M: First, we know the systems we see. We are able to describe what it is that we observe. Second, we see how functions may be called in sequence. What you and I have called the critical path. Third, we see how systems institutionalize error correction; it happens and the system expects itself (or a follow on system) to fix operator mistake and design flaw.

A: Fourth, I accept that a design flaw may be considered more serious than an operator mistake; after all, the operator may be expected to err. But the system may not be expected to anticipate all of its own flaws. A design flaw inhibiting error correction would be very troubling. The institution would have to take responsibility for its own failure to fix itself in a serious way.

M: Applying a rule (as I said before) in a case is much less of a job than managing on-going error prevention. A hierarchy's worth of difference in

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[22] At 178.
[23] *Id*.
[24] At 176.
[25] At 178.

types of effort, I would say. Not just seeing that mistakes are fixed, but more importantly seeing that systems are prepared to fix mistakes and redesign flaws; in short, to assure quality through error prevention rather than rely on error correction.

A: But you can only do these four functions when taking a perspective outside the lawsuit-as-an-excuse-to-apply-a-rule-for-the-parties.

M: *Marbury v. Madison* is justly famous for this. We are not just judging Marbury's entitlement and in doing more than that task, we can be self-conscious without our natural principles getting in the way.

A: And perhaps we don't understand how the clock works, but it's more important that we know that there is a clock at work. You've graciously allowed me the last word.

M: Only for today.

*Apparatus*

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