Four Forensic Follies

(A Corporate Quartet for the 99%)

"The Prosecution of Judge Waite"

"Mr. Powell Writes a Memo"

"What Corporations Do"

"Marshall Law"

James Allison

2012

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Preface

In 2005 my wife Tomi and I began to think about the history of corporate power in America. The stimulus was a recent study guide prepared by some farsighted members of the U.S. section of Women's International League for Peace and Freedom (founded by Jane Addams in 1915). Our study was revelatory. The expanding horizon drew us on, to the Madison Library of Congress, the Washington and Lee Law Library, and other great national archives.

Many thought the inquiry odd or obsessive. Our attempts at outreach were often rejected, ignored, or poorly attended. The climate suddenly changed in 2010, with the Supreme Court's 5-4 decision in Citizens United v. Federal Election Commission. That shot across the bow awakened the public to an alarming reality:

In the name of free speech, big corporations might dominate federal elections by buying a louder bullhorn than anyone else. In a flood of corporate money, the 2012 elections confirmed that such corporations, left to do what they pleased, would try just that: to dominate our elections with the very loudest bullhorn money could buy.

Opponents of corporate power had best know something of its history. We had written papers and given talks on the subject, always with the sense that we could have done a better job of communication. At last a colleague suggested that I consider another method, and wrap our core content in a dramatic narrative. I thought it was worth a try, and in 2011-2012 wrote four short plays.

The argument for constitutional protection of corporate speech, as equivalent to the personal speech clearly protected by the First Amendment, is often based on the notion of corporate personhood. The judicial precedent for that notion is usually traced to a 19th century Supreme Court decision. In actual fact, Santa Clara v. Southern Pacific (1886) settled no constitutional question at all. Its status as a precedent for corporate personhood is pure myth. "The Prosecution of Judge Waite" tells the story behind the myth by means of Gilded Age characters: Morrison Remick Waite, Chief Justice of the U.S. Supreme Court; J. C. Bancroft Davis, Court Reporter; Associate Justice Stephen Field; and Senator Roscoe Conkling.

Encouraged by audience response to the Waite play, I turned to Associate Justice Lewis Powell. Widely known as mastermind of the powerful counterattack against the regulatory reforms of the 1970s, he should also claim fame as a direct progenitor of Citizens United. The claim rests firmly on his majority 5-4 opinion in Boston v. Bellotti (1978), with his notion that the First Amendment protects corporate speech. In addition to him, the main characters in "Mr. Powell Writes a Memo" are broadcast journalist Edward R. Murrow, an old friend of Powell's; Ralph Nader; and Associate Justice William Rehnquist.

The third play is "What Corporations Do." A familiar conceit of corporate law is that a Michigan Supreme Court decision, Dodge v. Ford (1919), compels corporations to work solely to maximize shareholder profit. Here a professor leads four students to the truth of that decision. The four students are Henry Ford; Adam Smith; Milton Friedman; and James Madison.

The fourth member of the quartet, "Marshall Law," relates the story behind the controversial decision in which the supreme Court, under the leadership of Chief Justice John Marshall, declared itself Supreme (Marbury v. Madison, 1803).

I hope you enjoy these plays.

The Prosecution of Judge Waite
James Allison
June 7, 2011

Author's note: In the summer of 2010 my wife and I spent three days in the Madison Library of Congress among the papers of Morrison Remick Waite that spanned 1884-1888, perhaps his most important years as Chief Justice of the U.S. Supreme Court. Those archives provided the kernel of our subsequent paper, "The Climate of Corporate Personhood." That paper focused on the widespread myth that the Waite Court's famous decision in Santa Clara v. Southern Pacific (1886) established a valid legal precedent for corporate personhood.

Our friend, Marybeth Gardam, suggested that the story might be told more

effectively in brief dramatic form. This play is the result, and it is dedicated to her.

Characters (in order of appearance):
Master of Ceremonies
Prosecutor
Chief Justice Morrison Remick Waite, U.S. Supreme Court
Anonymous offstage voice

Master of Ceremonies: I am _____, your master of ceremonies. Welcome to "The Prosecution of Judge Waite."

Maybe you noticed something funny about the election of November, 2010: Right down your street, the biggest flood of corporate money in American history. And with it, big wins for candidates who favor big money and big corporations over the voices of We The People. Hey, that was nothing: Get ready for a tsunami in 2012. So, what broke the dam?

The answer is: the Supreme Court of the United States. More specifically, its 5-4 decision on January 21, 2010, in the case of Citizens United v. Federal Election Commission.

Here's what happened: In 2008, an issues-based corporation called "Citizens United" wanted to show its anti-Hillary Clinton film, a video-on-demand offering, just before the 2008 primary.

The Federal Election Commission said in effect "Sorry, we have a law against that. The issue is one of timing. The law forbids your spending corporate treasury funds to broadcast an electioneering ad shortly before any federal election." Citizens United sued, and the case worked its way to the U.S. Supreme Court.

Two years later, on January 21, 2010, five of our nine Supremes ruled that a corporation has a First Amendment right to 'speak' through unlimited amounts of monetary contributions--that the Constitution protects the corporate right to monetary speech just as it protects the right of any natural person to speak freely. The floodgates were open. How did this come about, this corporate claim on the rights of natural persons, the rights of we the people, this claim of corporate personhood? And what can we do about it?

[Fade out.]

[Fade in.]

Prosecutor: What was a corporation exactly, back in the days of our founders? To James Madison, John Marshall and other founders, the answer was simple and clear: A corporation was an artificial creature of the law, with no other rights than its charter said it had, or that it required to complete its purpose: to make a road, a bridge, a building. It had special privileges, such as limited liability, but no constitutional rights. Most state charters expired after 10 or 20 years, and had to be renewed. And the state could, and sometimes did, revoke the charter of a corporation found to not be acting in the public interest.

What about those inalienable rights listed in the Bill of Rights? Those were the rights of natural born persons, period: free speech, religion, assembly, and all the others were personal rights, not corporate rights. And if corporations were going to have special privileges that helped make them rich and powerful, then government would have to regulate them with scrupulous care.

Thus, like moth to a flame, the Supreme Court of the United States was drawn into the task of regulation, and began to build a huge body of constitutional case law on corporations. But all of that case law was suddenly overturned with the 1886 Santa Clara decision.

[**Judge Waite** loudly clears his throat and "Harumphs."]

[**Prosecutor** pauses, looks at Waite, and continues:] An early example: In 1839, The Bank of Augusta v. Earle. What did the Supreme Court rule? It ruled that corporations might be treated as "citizens" in federal court, so as to hold them accountable for wrongs, but could not claim the constitutional rights of living persons. And so it went, case after case, decade after decade. As it should have continued, except that corruption changed the game plan in 1886.

Waite [rises]: I must object! [Note: Here a loud bang with a gavel can be very effective.]

[**Waite** turns to the audience.]

My name is Morrison Remick Waite, Chief Justice of the United States Supreme Court, 1874-1888. I was educated at Yale (Phi Beta Kappa, Skull and Bones) and practiced law in Ohio, much in defense of railroads and big corporations. And why not? Railroads in those days were the shapers of cities, bringer of dreams, modernizers and wealth builders. It's true that I had no judicial experience before President Grant appointed me Chief Justice . . . and I was not his first choice. In fact, I was his seventh choice. Many were dubious at first, but I proved them wrong. Soon I became known as a quick study, honest and industrious to a fault. I served until my sudden, unexpected death in 1888. And I can tell you that our ruling in Santa Clara was completely correct and legally unassailable! [**Waite** sits down.]

[Note: The majority ruling was actually written by Associate Justice Harlan, but was joined by a unanimous majority.]

Prosecutor: Thank you for your service, Judge Waite. But I must disagree with you. Let me explain.

So we had all that standing case law, saying that corporations did not deserve the constitutional rights of human persons--from the birth of the republic, right up through 1860 and long beyond.

But then something odd happened in the 1880s. And it happened because of two results of the Civil War. What were they?

First, the Civil War made railroads richer than God. Now they could get the

very best lawyers, rented by the ton, to help them fight the enemy of expediency: government regulation.

[**Judge Waite** stands up pointing a finger.]

Waite: Perfectly legal!

Prosecutor: Of course.

Second, the Civil War inspired Congress to write the 14th Amendment in defense of the human rights of newly freed slaves.

Waite: [Commenting to those immediately around him:]

A good idea . . . but hard as hell to get approved!

[**Waite** sits down.]

Prosecutor: Ratified in 1868, the 14th Amendment was supposed to protect freed slaves from abuse by southern legislatures. This is what it says in Section 1, which speaks famously about due process and equal protection:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Can anyone doubt that the words of the 14th Amendment were meant to protect the recently freed slaves from southern legislatures? Hard to imagine how today's defenders of original intent, like Justice Scalia, claim 14th Amendment protections for corporations.

Quite apart from the plight of freed slaves, those clever corporate railroad lawyers saw the 14th Amendment as simply a handy weapon in the fight against regulation. If they could just persuade the courts to declare that corporations were persons, then corporations could evade state regulation under Fourteenth Amendment protections, the same protections that any natural person . . . except a woman, of course . . . even a freed slave . . . could claim against state laws.

This new kind of legal assault began right away, in 1869. But the Supreme Court continued to reject the corporate claim to Fourteenth Amendment protections. It did so as late as 1880, when it upheld a state's right to ban lotteries in Stone v. Mississippi. Isn't that right, Judge Waite? You became Chief Justice in 1874. So, how did you vote in Stone v. Mississippi?

[**Waite** rises.]

Waite: Yes, but that was an entirely different . . .

Prosecutor: Don't bother. I looked it up. You not only concurred, you wrote the majority opinion. Your opinion even quoted Chief Justice Marshall:

". . . the framers of the Constitution did not intend to restrain states in the regulation of their civil institutions, adopted for internal government, and . . . the instrument they have given us is not to be so construed."

You may sit down, Mr. Waite.

Waite [in protest]: See here, now Prosecutor . . .

Prosecutor: Mr. Waite, this is not your Court. This is the court of public opinion, in _____ (Cedar Rapids, Iowa; Chapel Hill, North Carolina; anywhere). You must wait until we ask you to speak.

[**Waite** sits down with a "Harumph."]

Prosecutor: Now comes the great puzzle. Why did the Court suddenly about-face on the momentous question of corporate personhood? Were **you** culpable, Judge Waite, as Chief Justice?

[**Waite rises** to speak bombastically, but cannot form the words. He sits down.]

About one hundred and twenty five years ago, in 1886, in a simple property tax case, the railroad hired guns got their opportunity in Santa Clara County v. Southern Pacific Railroad.

This simple tax case, about fences the railroad built along its rails, had nothing to do with corporate personhood. And yet, almost any professor of constitutional law will tell you that **this** case was the precedent for corporate personhood.

Ladies and gentlemen, it was that precedent in 1886 that gave corporations **all** the constitutional protections Congress meant for freed slaves when it wrote the Fourteenth Amendment.

All the constitutional rights that were intended by our founders for us, for We The People. Those of us who are human persons, that is.

It was this 1886 precedent that created the legal foundation for rights that enable today's owners of corporations to break free of regulation, avoid the monitoring of environmental protection agencies, and acquire the vast economic power that dominates our government, and permeates our culture.

In 1886 corporations usurped the rights of individual human persons. They have used those rights against us time and again. Indeed, it was that precedent that gave us Citizens United in the year 2010.

And you, Chief Justice Waite, you were part of that theft! Wasn't it your Court's decision in Santa Clara v. Southern Pacific that established the precedent for corporate personhood?

[**Waite** rises and jabs a finger at the Prosecutor.]

Waite: Absolutely not! I did nothing wrong! That was **not** our decision at all!

Go back to school, Prosecutor, and learn a little more Court history before you slander **me**!"

[A stunned silence ensues.]

Prosecutor: Just a moment, your honor! [**Prosecutor** fumbles through some notes.]

What about that famous quote of yours? It's here, in a note to you . . . from John Chandler Bancroft Davis, your Court Reporter in that case.
[To the audience:] It's probably no accident that Davis was a former railroad president.

[To Waite:] Let me refresh your memory, Chief Justice. It's dated May 25, 1886.

[**Off Stage Voice** reads:] "Dear Chief Justice, I have a memorandum in the California Cases Santa Clara County v Southern Pacific Railroad Company as follows. 'In opening the Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the judges were of opinion that it does.' Please let me know whether I correctly caught your words and oblige yours truly JCB Davis."
[**Author's note: Some productions dispense with the off stage voice and have Waite read the note from Davis.**]

Waite [defensively]: Yes. . . but that was just my passing comment, **not** part of the **opinion**! You need to hear my complete reply to Court Reporter Davis. I happen to have a copy right here.

[**Waite** pulls a paper out of his pocket.]

I told Davis: "I think your memorandum in the California Railroad Tax Cases expresses with sufficient accuracy what was said before the argument began. I leave it to **you** to determine whether anything need be said about it in the report . . . inasmuch as we **avoided** meeting the constitutional question in the decision."

Prosecutor: You mean to say that your opinion in Santa Clara settled no constitutional question?

Waite: That's exactly what I mean. We ruled in favor of Southern Pacific railroad, but very narrowly . . . on the question of **taxes**.

Justice Harlan wrote the majority opinion. We found that Santa Clara County had made a trivial mistake in figuring the taxes owed by the railroad--it included some fences by mistake--and that was that. We made no ruling on corporate personhood, and we all knew that. Court Reporter Davis knew it too, but he chose to **add** that bit about 14th Amendment protections for corporations into his headnotes on the case.

Prosecutor: Eh, excuse me your honor, could you tell us what headnotes are?

Waite: Headnotes!? Headnotes are . . . well, the Court Reporter writes up a kind of summary that lawyers find handy if they are too busy . . . or too lazy . . . to read the official opinion. The summary is called a headnote. It carries no legal weight whatsoever. It's the work of the Reporter, not the work of the Court. Everybody ought to know that!

Prosecutor: And long after your time, the Court made it official in 1906, when it ruled exactly that: Headnotes were the work of the Court Reporter, and not the Court (United States v. Detroit Timber and Lumber Co.).

Waite: Just so.

Prosecutor: So you are saying that John Davis' headnotes were misleading?

Waite: They **must** have been! They seem to have misled plenty of law professors since then!

Prosecutor: Why do you think he wrote them the way he did?

Waite: Your guess is as good as mine. I had good reason to trust Davis's judgment. Years before, he had been my boss in an important case in an international court in Geneva, where we won a lot of money from the British for their support of the Confederacy during our Civil War.

Prosecutor: How much?

Waite: About 15 million dollars! That's how I came to national attention.

Maybe I should have watched Davis more carefully, but I was so confoundedly busy with cases . . . and his credentials were impeccable. Son of a governor, brother of a Congressman. Harvard College, lawyer, journalist--he once interviewed Karl Marx! He was a diplomat, state legislator, railroad president . . . and related by marriage to a signer of the Constitution.

Prosecutor: A genuine member of the American establishment.

Waite: Yes . . . ! [More hesitantly, considering:] . . . though now you mention it, I had some complaints about his accuracy.

Prosecutor: For example?

Waite: Well . . . Let me see . . . Seems like I remember a commercial publisher of Supreme Court proceedings was worried about its reputation because of discrepancies between Davis' official records and their records. They stood by their

own records.

Prosecutor: Anything else?

Waite: Well, there were several cases missing from the official Court records. The Senate complained about it. I started to look into that one, but shed the mortal coil before I got very far.

Prosecutor: Several?! There were 250 cases missing!!! All right, but there is still another piece of this big puzzle. Why the huge change in Supreme Court sentiment?

Waite: Beg pardon?

Prosecutor: Well, in 1880 you're telling us officially, in a written Court decision, that the Constitution did **not** mean to restrain states in the regulation of corporations.

But just six years later you're all telling us unofficially, in the Santa Clara headnote, that corporations have 14th Amendment personhood protections! What really happened?

And before you answer, let me tell you that some modern scholars think it was Roscoe Conkling who turned you around.

Waite [exasperatedly]: They're still talking about Roscoe Conkling?

Prosecutor: Why not? Lawyer, Congressman, Senator, two-time Supreme Court nominee, Republican Party leader, corner in a scandalous marital triangle--what's not to talk about? You remember the case he argued in 1882?

Waite: San Mateo County v. Southern Pacific Railroad Company!

Prosecutor: Right. The case was a lot like Santa Clara. Remarkably, Conkling was a surviving member of the congressional committee that had **drafted** the 14th Amendment. Fancy that! A living authority on congressional intent! You remember his histrionics?

Waite: Ha! How could I forget? During his argument he flourished that journal of his--he called it a Journal of the Drafting Committee--and claimed that the committee had wavered back and forth in its wording, draft after draft, between "person" and "citizen"--finally choosing "person" as the word more potentially inclusive of corporations.

A fine story, but it went for naught, because the Court made no decision! [**Waite** looks at the audience:] You see, the case was rendered moot when the railroad went ahead and paid some of the taxes San Mateo claimed.

Prosecutor: Tell us honestly, your Honor, was it Conkling's version of history

that turned your Court around?

Waite: [Long pause.] I'd rather not say.

Prosecutor: Do you know that Conkling's story was a complete fraud?

Waite: . . . No, but I'm not surprised. Conkling was a bit of a rascal. And a rich rascal at that. Powerful. There was talk of his turning down the Supreme Court nominations because he could make more money staying in New York!

Prosecutor: Of course you wouldn't know. The 'Conkling Journal' disappeared for a long time, but turned up in the 1930s, when a Stanford law librarian examined it and found none of that switching back and forth between "person" and "citizen." All drafts had used "person." Congress had never meant to protect corporations under the 14th Amendment. Not once!

Do you know how much Southern Pacific paid Conkling for his performance?

Waite: A lot.

Prosecutor: $10,000. The average annual wage was about $500. And worth every single penny to Southern Pacific, if the impact showed up four years later in the Santa Clara headnote. Judge Waite?

Waite: I resent your implication!

Prosecutor: No doubt about it, the railroads knew how to spend their huge Civil War profits to best advantage. They rented the very best lawyers with the very best connections, like Conkling; and they curried favor with the most important judges, such as you.

Waite: No comment.

Prosecutor: Judge Waite, a man like you acquires many important papers in the course of his career. Many of yours are stored in the Library of Congress. I examined yours, dated 1884 through 1888--the year you died.

Waite: Did you indeed?!

Prosecutor: Sir, I did. One thing I learned was how common it was for railroads to provide favors to you and other judges, even as you adjudicated railroad cases. For example, it was customary for railroads, early each year, to send you and other judges a free pass for that year.

You were especially favored: When you took a long trip you often had a private Pullman car at your disposal. And of course you left the travel details to your son, a railroad executive himself.

Waite: What of it? These kinds of considerations are very common. Even in your own time, I should say. I've heard such talk recently about Justices Thomas and Scalia accepting favors from some Oklahoma tycoons . . . the Koch Brothers. No one likes it, but it's a fact of life.

Prosecutor: When word got around, some citizens took it amiss. They complained about conflict of interest. Be that as it may, Congress put an end to the practice when it passed the Interstate Commerce Act in 1887. It was an era of reform, an end to corruption on the bench . . . supposedly.

Waite: We got little notes from the railroads asking us to return our 1887 passes.

Prosecutor: Yes, I saw one among your papers. But let's go back one year, to 1886 . . . before your passes were revoked.

In January, 1886 you received at least three annual passes.

That same month, your court heard arguments in Santa Clara County v. Southern Pacific Railroad Company. The decision came on May 10, 1886. On May 25 Court Reporter Davis wrote his note to you about 14th Amendment protection for corporations.

Waite: Yes. That timing sounds right.

Prosecutor: During that same period, you and your daughter prepared for a trip to Alaska. Your son had been arranging free transportation with various railroads and steamship lines. One of the railroads was Southern Pacific.

[**Waite** looks stricken. He sits down, a little shakily.]

You and your daughter arrived in California in late August. Your host in San Francisco was Mr. Leland Stanford: former governor, U.S. Senator, President of Southern Pacific Railroad. He extended every courtesy: He gave you letters addressed to his railroad employees, directing them to do all they could to make you and your daughter more comfortable in your travels; he even sent muskmelons grown on his ranch.

Stanford arranged an excursion to Monterey for you and several California judges. You wrote a letter home on Sept. 3 that described the excursion; you referred to a private railroad car and abundant Chinese servants everywhere you went.

Another letter on Sept. 15: More railroad travel in California, this time northeast to Truckee, with luminaries of law, government, and the Mormon Church. Finally a steamship to Alaska, where an entrepreneur tried to interest your daughter in a lucrative business venture.

We figure the cost of first class travel alone was over twice the average annual wage . . . at least a thousand dollars! Plus the cost of those private cars, which often came with kitchen, cook and a servant or two. Plus the excursions to Monterey and Truckee.

Judge Waite, allowing that the times were different then, this practice was virtually like giving you justices your own private jet planes, fully staffed!

Waite: All right! We did travel in comfort. But I never allowed any of that to affect my judicial decisions.

Prosecutor: [Pauses, surveys the audience as if to measure its reaction, and continues:] Perhaps not. It's hard to tell. But it didn't look so good. It looked awfully like conflict of interest at best, and graft at worst. And eventually Congress did put an end to such things with the Interstate Commerce Act.

Waite: So they did.

Prosecutor: Let's talk about a fellow Supreme Court Justice, Stephen Field.

Waite: Must we?

Prosecutor: I know you loathed each other, but I need to tell you some things you don't know about the man.

Waite: I think I know enough. Now **there** was a genuine railroad lackey.

We were all favorable to the railroads; most of us had been railroad lawyers! But Field was a complete lickspittle. He was always after me to let him write every opinion that touched on railroad interests. Everything.

I finally had to take him aside and explain how bad it would look for him to write an opinion that dealt directly with his personal railroad friends. The man had no shame at all when it came to railroads. And everybody knew he was in their pocket.

Prosecutor: Judge Waite, you have no idea. He did his worst in 1889, the year after you died. It was another railroad case, Minneapolis & St. Louis Railway Company v. Beckwith.

The Court actually ruled **against** the railroad, saying you railroad guys owe Mr. Beckwith some money because your locomotive killed three of his hogs, plus punitive damages to the state of Iowa.

The case has nothing to do with corporate personhood. But Field is writing the majority opinion, and guess what he does?! He throws in a completely gratuitous citation of Santa Clara as a precedent for corporate personhood.

That first citation in a majority opinion made it official. And he did it knowing full well that Santa Clara was no such thing, that personhood was in the headnote, not the opinion.

How can we say that? For one thing, he was there, just as you were there.

For another thing, he complained at the time that the majority opinion in Santa Clara had settled no constitutional issue. His complaint was even published in a Fresno newspaper!

Waite: Humbug! I have to agree with you. I never would have thought a Supreme Court Justice could sink that low, not even Field. Completely reprehensible!

Prosecutor: But Field was not alone. Sitting with Field on the same Court that disposed of Beckwith's hogs were six fellow veterans of the Santa Clara Court: Miller. Bradley. Harlan. Matthews. Gray. Blatchford.

Waite: My God, what a dark day for the Supreme Court of the United States!

Prosecutor: Justice Waite, it almost seems that--had you been there--maybe you could have kept them on the straight and narrow.

Waite: As God as my witness, yes. I do hope so. But what were they after, Field and his colleagues, that drove them to such an extreme? They were not destitute men and had no pressing debts that I know of. It's hard to fully comprehend that level of corruption.

Prosecutor: I think it had to be more than money. Maybe money, ideology, and fear. Field was no intellectual, but he had a friend who was.

His name was John Norton Pomeroy, a professor at Hastings Law College in San Francisco who had helped Field with briefs. Pomeroy said this about the Fourteenth Amendment:

[**Offstage Voice or Waite** reads:]

"The Fourteenth Amendment may prove to be the only bulwark and safeguard by which to protect the great railroad systems of the country against the spirit of communism which is everywhere threatening their destruction or confiscation."

Prosecutor: Money, ideology, and fear. Even one can move mountains. Think what you can do with all three . . . plus a little luck.

Waite: Seems like that's a lesson for your time as well! Enough greed and ideology and fear to go around, eh?

Prosecutor: Mr. Chief Justice, do you have any advice for the Roberts Court, for the five Supremes who gave us Citizens United in 2010?

Waite [standing tall:] I do. Stop citing our Santa Clara ruling as a ruling for corporate personhood or any of its constitutional protections. Read the full decision, not just the headnote. My comment about the 14th Amendment was only an obiter dictum, a remark in passing, which they know very well is not the same as an opinion.

One reason we made no constitutional ruling on 14th Amendment protections for railroads is that we could not construct a rationale. We were up against seven or eight decades of case law that drew a clear distinction between natural persons

and artificial creations of the government: Constitutional protections were for the former, and not for the latter. Government could regulate corporations any way it pleased, because corporations were the creatures of government. They had no natural rights, unlike people, who enjoyed the natural rights guaranteed by the Constitution. I could never imagine a plausible rationale for overturning those decades of well reasoned case law. Neither could anyone else!

[Turning to address the audience:]

You must understand: The U.S. Supreme Court is not supposed to issue dictates unaccompanied by sound legal argument. But apparently it did in 1889! It did much worse than that: It pretended that our 1886 Court had offered a sound legal rationale for corporate personhood. Despicable. Unforgivable. I'm glad I wasn't around to witness it.

For the Roberts Court to claim any precedent for corporate personhood protections is to sign up with Field and his gang of 1889. How can they claim our respect unless they mend their ways?

Do they think any branch of government can function as it should without the respect of those it governs? Let the members of the judiciary branch say 'Shame on us.'

Let them turn their hands to the reversal of this damnable error, and let them do it **now**. That is my advice to the Roberts Court.

[**Waite** starts to sit down, then rises again:]

Just one more thing . . . to the Roberts Court . . . and every other court!

Next time some mogul invites you to the Bohemian Grove; next time some potentate offers a ride in his private jet for a weekend of duck hunting with his friends at their lodge; think twice. Above all, think: Why me?

[**Waite** gestures with his right hand, as if taking the oath, and sits down.]

Prosecutor: Chief Justice Waite, I thank you. I came here today to hold you to account for this travesty of justice that has corrupted our courts, usurped the rights of the people, drowned out their voice, and now threatens our Republic and its democratic institutions.

But now I find I must thank you. Your honorable example restores some hope that the Court can be worthy of our founders, and one that serves the people.

Do too many of us believe that our history has no connection with problems of today? Do too many Americans have the collective cultural memory of a gnat? Do we imbue our leaders with godlike abilities? Are we too enthralled with our childhood story of democracy?

We must share Jefferson's conviction that a democracy cannot endure without an informed and educated electorate.

I go one step further. We must be informed and educated, yes, but also engaged. Never have we needed so much a participatory democracy. The nation

cannot survive without informed citizens acting for the common good. Remember: We may not have the money, but we still have the numbers, hands down!

With thanks and respect, I rest my case.

Author's note: An optional but highly effective accompaniment is a set of PowerPoint illustrations, by Marybeth Gardam, projected on a screen behind the two actors. For further information, contact mbgardam@gmail.com.

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Mr. Powell Writes a Memo
James Allison
December 8, 2011

Author's note: Edward R. Murrow was the foremost broadcast journalist of his day, and remains even now the most respected one among his kind. He was hailed for his courageous stand against the bully red baiting of Senator Joseph McCarthy; his exposure of the exploitation of migrant farm workers; and his dramatic eyewitness reporting of the Battle of Britain in World War 2, as air raid warnings wailed in the background.

He had faded from the public mind when in 2005 a Hollywood film that featured his fight with McCarthy introduced him to a new generation 40 years after his death. The film title, "Good Night and Good Luck," was his signature broadcast sign-off.

His television broadcasts, especially his celebrity interviews, made his deplorable chain smoking so apparent that his scripted role in this play would have seemed incomplete without it. His friendship with Lewis Powell, however improbable, was real.

I thank Nancy Price for her suggestion that I write a dramatic treatment of the Powell memo as a precursor of the U.S. Supreme Court decision in Citizens United v. Federal Election Commission (2010).

Characters (in order of appearance):

Master of Ceremonies
Edward R. Murrow (nee Egbert Roscoe Murrow)
Lewis F. Powell, Jr.
Offstage voices: TV director; Ralph Nader; Anonymous; William H. Rehnquist
Author's note: The Bloomington production dispensed with the offstage voices, put Ralph Nader on stage and had him read the offstage parts--ostensibly to keep Ralph busy, as he seemed to have little else to do but sit around and complain.

Master of Ceremonies: Welcome to the summer of 1971, a tumultuous year in America.

Republican Richard Nixon is president. His odd recipe for government is a little liberal, a little conservative, a pinch of corruption.

Surveys show that Americans think business is out for itself, the public be damned. Economic stagnation is in the air.

We have troops bogged down in Vietnam. Half a million. Antiwar demonstrations rock our nation's capitol. Riots fire the big cities. Last year, in Ohio, we had National Guard riflemen shooting students on the Kent State campus.

Business sees Nixon as a scary puzzle. He wants to repeal Kennedy's investment tax credit. Raise the tax on capital gains. Put the brake on tax shelters. Stronger regulation of occupational safety, of air pollution. **A Republican president wants stronger regulation!**

Consumer and environmental movements sprout up overnight. Friends of the Earth. Common Cause. Public Citizen. And it wasn't so long ago that Ralph Nader sprang out of the shadows, grabbed General Motors and shook it like a rag doll on the issue of auto safety.

And Congress! Can we believe what Congress just gave us? The Environmental Protection Agency. The Occupational Safety and Health Administration. Clean air legislation. A ban on cigarette ads on radio and TV. Cancellation of funding for the Supersonic Transport.

Well, corporate America is worried. So is a gentleman in Richmond, Virginia. This corporate lawyer, sensing a mortal threat to our whole free enterprise system, dictates a 34-page memo. Double spaced. "Confidential." It is a detailed plan to counterattack this assault on American capitalism. He hands it to a friend and neighbor, who happens to be an official of the U.S. Chamber of Commerce.

Headquartered in Washington, D.C., the Chamber snaps to attention. It prints the memo in the official newsletter for all its members to see. Months later it forms a task force of leaders--business, professional, academic--to review the memo and recommend a course of action. These 46 leaders make a Who's Who of corporate America.1

In November, 1973, the task force reports. It agrees with the memo. It calls for action, but some tycoons have already acted. Joseph Coors, the Colorado beer baron. Coors has given its first quarter million dollars to what becomes the Heritage Foundation, granddaddy of right-wing think tanks.

Corporate warriors beg the memo's author: Won't you take charge? Won't you organize and lead our counterattack? But he politely refuses every request. He's very sorry. It just wouldn't look right. And he explains: Two months after I

wrote that memo, President Nixon nominated me for the U.S. Supreme Court. And here I sit, in my new black robe, adjudicating cases that touch on corporate America. It wouldn't look right.

Today's reader finds the memo strangely familiar. It's like a blueprint of the last 40 years of American history; of corporatism triumphant.

Who was this gentleman of Virginia? Did he quietly watch from the rear as corporate America followed his order of battle? What else might he do to realize his dream of corporate rule in America? And what **did** he do?

[Fade out.]

[Fade in.]

[At center stage we see two chairs angled toward each other and the audience. The chairs are separated by a small table that bears a large, empty ash tray. The stage represents the CBS television studio from which Edward R. Murrow broadcasts his celebrity interview show, "Person to Person."

Murrow strolls in from stage left, an unlit Camel cigarette in one hand, a script of this play in the other. He smiles, waves at the audience, and sits down in the chair at stage left. With the cigarette in his mouth he begins to leaf through the script.]

Offstage TV director: 10 seconds, Mr. Murrow!

[Murrow lays his his cigarette on the edge of the ash tray. From now on the cigarette action is up to the actor. Murrow fixes his gaze on his wrist watch, nods in cadence with the second hand, then looks toward the audience.]

Murrow: Good evening. This is Edward R. Murrow, broadcasting from the CBS television studio, with tonight's edition of "Person to Person," our celebrity interview show. My guest tonight is Lewis F. Powell, Jr., former Associate Justice of the highest court in the land, the U.S. Supreme Court.

[**Powell** strides in from stage right, a thin smile on his face. They shake hands like old friends, which in fact they are. **Powell** takes his seat.]

Murrow: Welcome, Lew. I hope I can call you that.

Powell: Yes, sir. And I think I will call you Ed.

Murrow: Let me explain to our audience. Lew and I met many years ago at a national conference of college students, when we were student body presidents. Lew represented Virginia's Washington and Lee, and I represented Washington State. So we've known each other a long time.

Powell: And pretty well, too. As students we took the grand tour of Europe together.

Murrow: With absurdly youthful photos to prove it.

Powell: And we met much later in London, during World War 2, when I was a lowly Air Corps officer, and Ed was a world famous broadcast journalist. [He mimics Murrow's famous delivery during the Blitz.] "**This** . . . is London."

Murrow: Pretty good imitation. But keep your day job.

Powell: After North Africa I wound up in a hush-hush intelligence group, in Britain and Europe, that decoded secret messages sent out by the German military.
You know something funny about your letters?

Murrow: What might that be?

Powell: They always called me "Dear Judge." When I was in fact, and wanted to be, nothing of the kind.

Murrow: Didn't I always know better? Anyhow, long before the war you got your law degree at Washington and Lee, then went to Harvard for another year and a Master of Laws in 1932. Why study law?

Powell: Like many Southern boys, I was fascinated with history. And the way it was written, lawyers and soldiers made history. I would fantasize about the Civil War. At Chancellorsville I would do some heroic deed to save the life of Stonewall Jackson, and win the war for the south. Or at Gettysburg, I would do something to move General Longstreet sooner into line, and give us victory there.

Murrow: But you pursued law, not the military.

Powell: Well, in Lexington Virginia Military Institute is just down the hill from Washington and Lee. No disrespect, but maybe that was a little nudge toward law.

Murrow: Tell us about your practice.

Powell: Before and after the war, I was partner in a substantial Richmond firm. Mainly corporate law. Mergers and acquisitions. Railway litigation.

Murrow: Some have called you a "rainmaker" in Richmond legal circles.

Powell: I have heard that expression.

Murrow: Of course the big dog in Virginia was tobacco. What about that?

Powell: I litigated many cases for tobacco, and served on the Philip Morris board. I took up smoking, but just for a show of solidarity; I never learned to inhale. My wife, a fine athlete and a doctor's daughter, was always after me to quit, and I did quit.

Murrow: But you thought the New York Times was unfair to big tobacco. Biased. Hypercritical.

Powell: Yes.

[Offstage voice, later revealed to be that of Ralph Nader]: Biased! Hypercritical! Lewis Powell, **science denier**. Lewis Powell, **dancing with the devil**, **for a dollar!**

Offstage TV director: Cut! Go to commercial break!

Powell: Who was that?

Murrow: You agreed to keep quiet until your cue. Now, will you keep your mouth shut until your cue? **Will you?**

[Offstage voice, later revealed to be that of Ralph Nader]: Okay. Sorry.

Murrow: All right.

Offstage TV director: 10 seconds, Mr. Murrow!

Murrow: Back with my guest, Lewis Powell. You had a deep belief in community service.

Powell: And we had some perilous times in the 1950s. I chaired the Richmond School Board during Virginia's campaign to resist desegregation. The state was in flagrant defiance of the Warren Court's famous ruling in Brown v. Board of Education.

Murrow: What position did you take?

Powell: It was a mistake to defy the Supreme Court. Behind the scenes I managed to change some minds. But nothing much happened until some influential businessmen decided that school segregation was bad for business. They saw North Carolina booming right next door, while nobody wanted to invest in Virginia. And that did it. That was the beginning of the end of school segregation in Virginia--with or without the blessing of Virginia's political boss, my friend Senator Harry Byrd.

Murrow: You became well known among your peers, and began to get national

recognition.

Powell: Yes, sir. Elected ABA President in 1964. That was the start. American Bar Association.

Murrow: You have been called a lifelong Democrat. But your correspondence from the late 1930s reveals your disgust with Roosevelt's New Deal. And a southern Democrat attempt to undermine his policies!

Powell: Ed, you've been reading my private letters!

Murrow: **Not** private. One can read them right there, in the Powell Archives at Washington and Lee. And I have a good research staff.

Powell: Very well. But a southern Democrat can be a complicated thing.

Murrow: Lew, you shock me!

Powell: Well now, Ed, **you** surprised **me** a few times. In your toe to toe fight with Senator Joe McCarthy, for instance. You cornered McCarthy and went for the jugular. Quite the relentless killer! Good heaven above!

Murrow: Fair enough. Anyhow, in 1969 the new Republican President, Richard Nixon, offered you a place on the Supreme Court. You were flattered. You heard the national call of duty again.

Powell: Yes, but the sound was faint. Not like 1941, when I dropped everything and ran off to fight World War 2. I was 62, no judicial experience, thought the work would kill me. Life was sweet. Comfortable. My wife was overjoyed when I turned it down.

Murrow: You turned it down. But your friends kept the drum beat going. Friends with connections, writing letters to influential people.

Powell: Their doing, not mine.

Murrow: Hmm. But why would a man like Nixon offer you the job?

Powell: He hated the liberal Warren Court. Probably thought I was a conservative critic of that Court, and I was--but respectful. I thought it went too far in the protection of criminals. Miranda rights and all. He was tired of seeing his nominees shot down by the American Bar Association and the United States Senate. Probably knew I had supported Eisenhower for president, later Nixon over Kennedy, then Nixon over Humphrey. Probably knew I helped him win Virginia.

[Offstage voice, later revealed to be that of Ralph Nader]: That's **it**! What

pussyfooting! You guys are **unbelievable**!

[Offstage TV director]: Hold it, Ralph. That's not your cue.

[Offstage voice, later revealed to be that of Ralph Nader]: Cue, my foot! We're here to explain a huge puzzle, the astounding flop of the Carter administration. A turning point of modern American history! Completely under the radar! Shake a leg, Ed!

Murrow: Let him talk.

[Offstage voice, later revealed to be that of Ralph Nader]: All right. It's 1977, '78. Nixon is gone, slunk off in Watergate disgrace. Democrats control the White House **and** both houses of Congress. High expectations! But what do we get? Tax reform comes up, but goes down in defeat. Ditto a new consumer protection agency. Ditto reform of health care, labor relations laws. A proposal to tie minimum wage to manufacturing wage. Election day voter registration. A **whole string** of liberal policy initiatives, all come up and go down to defeat-- **with Carter in the White House, and Democrats ruling Congress!** Why? What's going on here?

Murrow [to the offstage voice]: Very well. You've made your point. Trust me, we'll get there. Just hold your horses, Ralph.

[To Powell] Now, then. Lew, you had a neighbor in Richmond named Eugene B. Sydnor [pronounced "Sid-ner].

Powell: Yes, sir.

Murrow: Owned a department store.

Powell: Yes, sir.

Murrow: Close ties with the U.S. Chamber of Commerce.

Powell: Yes.

Murrow: In 1971 he chaired its Education Committee.

Powell: I believe so.

Murrow: That August you two had a little talk. Sydnor was impressed. "Write it up," he said. "I'll take it to the U.S. Chamber of Commerce!"

Powell: I think I see what's coming here. But you have to remember the historical context, Ed.

Murrow: Isn't that what they always . . .

Powell [interrupts]: It was a **terrible** time. Dangerous. **Sure** corporate America was alarmed. So was I. So I sat down and wrote Sydnor's memo.

Murrow: Hold on. Letters from Sydnor show that the two of you discussed these matters three months **before** that August conversation. In fact, you had already discussed them in Washington with **Chamber of Commerce executives**.

Powell: Could be. It was a long time ago.

[Offstage voice, later revealed to be that of Ralph Nader]: All of a sudden his memory doesn't serve him so well.

Murrow: Cool it, Ralph. [To Powell]: In fact, you had been railing about the same issues for years.

As the new ABA president you gave a big law and order speech; 3,000 lawyers stood and cheered.

J. Edgar Hoover complimented you for an article called "Civil Liberties Repression: Fact or Fiction?" Your message: Law abiding citizens have nothing to fear. (He even had it reprinted in an FBI journal.)

You spoke to university presidents about "Anarchy on Campus." Your message: Campus rioters should be expelled, and their faculty supporters should be dismissed. Expelled and dismissed!

A pretty hard line, Lew.

Powell: Maybe we should get back to the memo.

Murrow: Here's my copy. [Reads.] "August 23, 1971. To Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce. From Lewis F. Powell, Jr." At the top it says "Confidential Memorandum: Attack of American Free Enterprise System."

"Attack of?" Shouldn't it say "attack on"? Who's attacking whom? And why "confidential"?

Powell: Maybe a habit from my days in military intelligence.

Murrow: Hmmm. Anyhow, about a week later the Chamber sent it around to its members. It's long--over 6,000 words--not a casual essay. But let's take a few high points. After all, it has been called " . . . the seminal plan for one of the most successful political counterattacks in American history."2

Powell: Go ahead.

Murrow: You named several villains who were attacking our economic system.

Powell: Yes.

Murrow: Foremost Ralph Nader. What did you call him?

[Anonymous offstage voice]: ". . . the . . . most effective antagonist of American business . . . idol of millions of Americans."

Murrow: You quoted Fortune magazine:

[Anonymous offstage voice]: "The passion that rules in him . . . is aimed at smashing utterly the target of his hatred, which is corporate power. He . . . says . . . that a great many corporate executives belong in prison--for defrauding the consumer with shoddy merchandise, poisoning the food supply with chemical additives, and willfully manufacturing unsafe products that will maim or kill the buyer. He . . . is not talking . . . about 'fly-by-night hucksters' but the top management of blue chip business." (Fortune, May 1971, p. 145.)

Powell: Yes. But the most disquieting voices came not from the far left--always there, always a small minority--but the center. The universities, the church, the media, intellectual and literary journals, arts and sciences, politics.

Murrow: Speaking of Ralph Nader, the scourge of General Motors . . .

Powell: Yes?

Murrow: You sent your confidential memo to an old college friend.

Powell: Ross Malone. He preceded me as President of the American Bar Association.

Murrow: But what is he in the summer of '71? He's Vice President and General Counsel of **General Motors**. The U. S. Chamber will listen to **him**. You ask him to tell the Chamber to lead the defense of our free enterprise system. Your enclosed memo provides the plan.

Powell: Yes.

Murrow: You named friends, as well as enemies like Nader: Journalist Joseph Alsop. Economist Milton Friedman.

Powell: Yes, but there sat all those others who should have known better, titans of free enterprise watching their own destruction.

Murrow: How so?

Powell: Well, where did the universities get their money? Tax funds, capital

funds--generated or controlled by American business. Who ran the universities? Boards of trustees, leaders of our free enterprise system.

Murrow: I see.

Powell: And what about your CBS? Who owned and controlled the media? Corporations. Corporations that lived off the profits of free enterprise. It was suicide--unless they changed their ways, and fast. They had to fight back. They had to unite, prepare for the long run, put some serious money into the counterattack.

Murrow: You made business sound like a 98-pound weakling.

Powell: When I wrote that memo, it was. It had lost influence at all levels of government. And I said that any businessman who didn't believe me should just try to lobby Congress for the business point of view. The politicians were falling all over themselves to legislate for the benefit of the consumer.

Murrow: But you yourself had lobbied the Virginia legislature. For business! For bank mergers! Successfully!

Powell: Congress was different.

Murrow: And you told us how to change that. But what did you write about the **courts**? Mind you, this is before you became a judge.

[Offstage voice]: Powell wrote: "American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, **especially with an activist-minded Supreme Court,** the judiciary may be the most important instrument for social, economic and political change."

Murrow: Imagine that! But they look so quiet and dignified in those black robes, so distant. Nine umpires, just sitting up there, watching the action, calling the legal balls and strikes. A bunch of activists? Come on, Lew.

Powell: You'd be surprised. At the Supreme Court the ACLU filed dozens of briefs every year, along with labor unions, civil rights groups, public interest law firms. We had to counter that.

Murrow: Can you summarize your premise?

Powell: Yes, sir. Business is in trouble. Corporations. Our American free enterprise system. The attack is on, and the hour is late. That was my fundamental premise.

Murrow: Dated August 23, 1971. And soon after that, here comes Richard Nixon again, same offer as before. His Attorney General, John Mitchell, appeals to your sense of national duty. You say you need to think it over. But some sly devil tells Nixon he should phone you himself. And Nixon does exactly that. How can you refuse a president's personal call to duty? And who knows? Maybe you're thinking about that attack on our system--and that activist-minded Supreme Court.

This time you accept. And on October 22 this Republican president nominates this lifelong Democrat, of sorts, to the Supreme Court--along with William Rehnquist, a hard right-winger from Nixon's Justice Department. The nomination comes two months after your memo.

Powell: Your chronology is correct.

Murrow: You worried about your Senate confirmation.

Powell: Yes. We had a liberal Senate **and** Court, the tag end of the famous Warren Court. It even had one legendary veteran of Roosevelt's New Deal, Justice William O. Douglas. I was supposed to replace another such legend, Justice Hugo Black. Douglas wasn't too thrilled about that. In private he called me "a country-club lawyer to replace a populist."

Murrow: Ironic. Way back, when Roosevelt appointed Black, you villified both him and Roosevelt in a letter you wrote at the time.

Powell: Those letters again.

Murrow: You warned Mitchell about your chumminess with business and corporations, your all-white country club. The slow pace of school desegregation on your watch in Richmond. Your public criticism of Martin Luther King.

Powell: Yes, sir.

Murrow: Did you tell him about your memo to the Chamber of Commerce?

Powell: I don't think so.

Murrow: Why not?

Powell: [Long pause.] I couldn't say.

Murrow: Did anybody on the Senate Judiciary Committee bring it up?

Powell: No, sir.

Murrow: Now, the FBI investigates Supreme Court nominees for the information of the Senate. Did the FBI know about the memo?

Powell: I don't know.

Murrow: Did you tell the FBI about it?

Powell: I don't remember.

[Offstage voice, later revealed to be that of Ralph Nader]: He doesn't remember? **Ha!**

Murrow: Well, there's no evidence that you told. I've read the FBI field report. October 26, 1971. **Not once** did the memo come up. Several black lawyers deplored your nomination, but everything else looked favorable.

So, on to the Senate. Rehnquist expects a hard time, and gets it. Quite a few senators vote against him--26, to be exact. But in he goes. Your memo never comes up, and you sail in with a vote of 89-1.

Powell: To my great relief.

Murrow: The one Senator who voted against you was Fred Harris, Oklahoma. A kind of populist Democrat. He called you an "elitist" with no compassion for "little people."

Powell: His privilege.

Murrow: Can it be that you did not want that memo to come up?

Powell: Why? I had talked about those things before, it was no secret.

Murrow: But you did mark it "confidential," one notch below "secret." And Senator Fred Harris, the populist Democrat: I wonder what he might have done with that memo.

Powell: Who can say?

Murrow: Yes, who can say? But months later, your confirmation safely past, up pops Jack Anderson--the reigning muckraker of the day. Hundreds of newspapers run his column. Well known to the TV crowd. What could he possibly have on you?

Powell: Ed, that's a rhetorical question if ever I heard one!

Murrow: Right. Jack Anderson has dug up your confidential memo, and studied it carefully. It's worth two separate columns! He's worried. Your pro-business attitude might color your judgments on the bench--make you more partial than we

have a right to expect from a judge on our highest court. There's a flurry of media attention, but it soon melts away.

Powell: And some on the right **welcomed** the publicity.

Murrow: No doubt. In fact, the Chamber of Commerce formed that task force just two months later, and published its report the following year. Anyhow, the Anderson flap comes too late to spoil the party. Already sworn in, you are the first Supreme from Virginia since before the Civil War. You serve for 15 years, until 1987. The work is hard, consuming, intrusive, more demanding than you ever imagined.

Powell: No argument there.

Murrow: Getting back to your memo. As we look around us now, things have gone your way. Right wing cadres and think tanks proliferate. All through the land they direct the forces of business, flog the party line, bring law suits, write model bills that grateful or beholden politicians push through their legislatures. Too many to name. ALEC--the American Legislative Exchange Council. The Business Round Table. All pro-corporate, anti-labor, anti-regulation.

The unions are whittled down to a sliver. You despise them, call them worse than the old corporate Robber Barons. Ralph Nader and his raiders grow old. Thanks to the new realities of campaign finance--some of which you certainly helped to make--big corporations own the White House, the Congress, the judiciary. And not a peep from the corporate media, of course, so the public sleeps through it all.

Long after you're gone Wall Street brings us to financial disaster. Government bails Wall Street out, then sets it free to bring us some fresh disaster. And no Roosevelt in our hour of need!

Our representative democracy seems to fade and slip away.

[Offstage voice, later revealed to be that of Ralph Nader]: Brother, you can say that again. You know what we have? An imperial plutocracy, with democratic window dressing. Government by and for the wealthy few, the 1%. That's what we have.

[Fade out.]

Anonymous offstage voice: A 3-pack-a-day Camel smoker, Edward R. Murrow died of lung cancer in 1965. That was seven years before Lewis Powell took his seat on the Supreme Court! This means that parts of our story are fanciful, and not strictly factual. Nevertheless, we hope you will find our tale both plausible and informative.

Now for the conclusion of our show, "Mr. Powell Writes a Memo."

[Fade in on Murrow and Powell, seated in their original places.]

Murrow: Welcome back. Edward R. Murrow here. With Lewis Powell, former Associate Justice of the U.S. Supreme Court--an old friend of mine.

Powell: Ed, I hope there's no hard feeling between us. With my being a lawyer for big tobacco. A board member for Philip Morris. Your fatal cigarette addiction and all.

Murrow: Of course not, Lew. And I hope you took no personal offense at "Harvest of Shame"--my famous show on the corporate exploitation of migrant farm workers.

I was thinking during the break: There's been talk about the true importance of your memo. Has the left exaggerated its actual effect on the way the country has gone since 1971?

Powell: Well, there's something to that. The Chamber considered my proposals, but finally decided not to take the lead. Too ambitious, too costly. But now the Chamber is right out there in front, the main lobbyist for business. And it litigates more than before--anti-regulatory litigation.

Murrow: And there was Joseph Coors, and the Heritage Foundation.

Powell: Yes, sir.

Murrow: The national Chamber may have hung back for a while, but the Fortune 500 charged ahead. And the California Chamber, and its Pacific Legal Foundation, which fights environmental legislation.

Powell: Last I heard, there were eight of those Pacific Legal centers.

Murrow: And the Federalist Society, a new force in most of our law schools. All funded by wealthy right-wingers. Drowning us in conservative propaganda.

Powell: Ed, I surely defend your right to say so.

[Offstage voice, later revealed to be that of Ralph Nader]: Unbelievable! Don't you guys know **anything**?

Murrow: All right, what is it this time?

[Offstage voice, later revealed to be that of Ralph Nader]: Listen. In the fall quarter of 2009, the U.S. Chamber broke a record to smithereens. You want to know how?

Powell: No.

Murrow: Yes.

[Offstage voice, later revealed to be that of Ralph Nader]: It spent $79.2 million. That's $880,000 a day. No organization had ever spent anywhere near that much on lobbying.

Powell: Lobbying? Great heaven above! What for?

[Offstage voice, later revealed to be that of Ralph Nader]: What for? You have the gall to ask what **for**? Read your own memo! To defeat health care reform! To defeat financial regulation! To defeat climate change legislation! To **keep** tax cuts for the **rich**!

Powell [pensive]: I see.

Murrow: Getting back to the question of judicial influence. Let's examine a few of your Supreme Court decisions.

Powell: That sounds promising. Good and tangible.

[Offstage voice, later revealed to be that of Ralph Nader]: Tangible! You want **tangible**? How about $880,000 a day for lobbying! Is that tangible enough?

[Murrow and Powell do their best to ignore him.]

Murrow: Let's be clear on what we're doing here. We may never measure your memo's exact influence on the course of our country. But we might take some measure from your judicial decisions and their impact.

Powell: I understand. Which ones do you want to discuss? President Nixon's Watergate tapes?

Murrow: No.

Powell: Abortion, Roe v. Wade? Bakke, affirmative action and racial quotas? The death penalty?

Murrow: No.

Powell: No? Then what?

Murrow: In many ways, the biggest one of all. First National Bank of Boston Et. Al. v. Bellotti, Attorney General of Massachusetts (1978).

Powell [surprised]: You really think so?

Murrow: Yes. But I understand your surprise. Your major biographer knew you and your Court very well, but left it out of a 700-page book. But he wrote years before we began to see its true importance. He also left out Buckley v. Valeo (1976), your Court's "money = speech" decision. That's another one now ranked as a landmark case. No mention of either one.

Powell: Very well. Corporate influence on elections.

Murrow: Much in the news lately, with the Roberts Court decision on Citizens United. A majority opinion that leans on both of your precedents, Buckley and Bellotti.

Powell: All right. In Bellotti, Massachusetts had a law against the use of corporate funds to influence voters in a referendum. But we ruled that corporations had a First Amendment right to try to influence political processes. It was a 5-4 vote.

Murrow: Who wrote the majority opinion?

Powell: I did. I said the Constitution protected corporate speech. I said the Massachusetts law infringed on that speech, as the law served no compelling state interest.

Murrow: But Rehnquist, that consummate conservative, **dissented**!

Powell: Ah, yes. Bill Rehnquist.

Murrow: Let's hear him out. He cites two previous decisions to make an important point: **The Court's thinking has been inconsistent.** In 1898 it thinks corporations have constitutional personhood protections. But eight years later it thinks those protections apply only to natural persons, and not the artificial ones that corporations are.

Powell: The Court **has** gone back and forth on that question.

[Offstage Rehnquist voice:] "The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that **restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible**. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is

entitled to considerable deference from this Court."

Powell: That's Bill Rehnquist. I'd know his style anywhere. He became Chief Justice, you know. Added those crazy chevrons to his Chief Justice sleeves, like a Master Sergeant or something.

Murrow: Justice Powell, are you listening? He's saying you're tossing aside tons of judicial and legislative precedent, and you're just flat wrong. States charter corporations to do business, not politics, and when they step over that line the states--their creators--have the right to rein them in.

Powell: Oh, I'm listening all right. In profound disagreement with him.

Murrow: Legal, or political?

Powell: I'll ignore that. I'll just say that Bill Rehnquist saw the matter as a corporate evasion of state regulation. Whereas I saw it as the Massachusetts legislature's self-serving attempt to silence corporate opposition. Opposition to a questionable referendum. The referendum was for a very unpopular graduated income tax. Incidentally, Justice Stevens, no friend of corporate privilege, saw it that way too.

Murrow: But you could also see it as an appearance of undue corporate influence--big money influence. Couldn't that sour the voters? Make them give up on democratic government? And might that tilt the balance the other way?

Powell: Great heaven above! Spoken like a lawyer! Ed, you missed your calling.

Murrow: Your clerk, Nancy Bregstein, wrote you a detailed memo on the case.

Powell: Yes. Nancy was extremely helpful.

Murrow: You made several comments in the margins. The effect is a kind of socratic dialogue to shape an interpretation highly sympathetic to corporations.

Powell: Interesting.

Murrow: It's long, but you come out here: The First Amendment protects not speakers, but speech, and therefore confers free speech protections on corporations.

The dialogue hints at where you're headed. You say: "The Court has never held [that corporations] are included in 1st [Amendment] freedom--but this has been assumed."

Powell: Yes. I remember that.

Murrow: Nancy says: "The proper inquiry is to focus on the interests served by the 1st Amendment." You underlined that.

Powell: Yes.

Murrow: Nancy says: "Though corporations are not persons, they serve goals sought to be furthered by the amendment." There seems to be some heavy assuming going on here. You both seem to assume that corporate propaganda serves some common good, beyond the narrow corporate interests.

Powell: Nancy was invaluable. We were on the same wave length.

Murrow: You know, in all those reams of legal reasoning nobody noticed that a corporation is completely dumb when it comes to the kind of speech emitted so freely by a three-year-old child.

Powell: That's a layman's argument, Ed.

Murrow: Forgive me. But what about Brother Justice Byron White--an All-American halfback, but no layman. What about his dissent?

Powell: I did not find it persuasive.

Murrow: But Brethren Marshall and Brennan did. And Brother Rehnquist had his own reasons to dissent. Here's Justice White: "It has been long recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."

My god. Where did he get that clear crystal ball?

Powell: I remember that.

Murrow: Do you remember what you wrote in the margin?

Powell: No.

Murrow: A three-letter word: R-o-t, "Rot!" Exclamation point. You thought it "rot" that corporations, unless regulated, might come to dominate our democratic electoral process.

Powell: Not very collegial toward Brother White.

Murrow: And flat wrong, as we see today. Given your lifelong labors in behalf of corporations, did you consider recusing yourself from this case?

Powell: No.

Murrow: Do you have second thoughts about your swing vote in Boston v. Bellotti? That little foot in the door? Where you said it was okay that corporate money be used to sway the vote in a referendum?

Powell: [Long silence.]

Murrow: Lew?

Powell: Yes. Forgive me. I was off in a reverie, thinking about Bill Rehnquist and Byron White. Nixon called Rehnquist "The Clown" because of his flamboyant clothing. Speaking of a foot in the door, I remember his Wallabees.

Murrow: [Mystified.] Wallabees? Those casual shoes with the crepe rubber soles?

Powell: Yes. They show up in photographs--a sartorial dissent from Supreme Court sobriety. **I** should talk. I always changed into Hush Puppies in the office. Of course I was more discreet than Rehnquist. No photos of my Hush Puppies. In the summer break he would go off to some remote town where nobody could find him. He said that if we really needed to get him, we should "call the cops."

Murrow: Lew, you have hidden--I was about to say "depths." Maybe I should say "hidden shallows."

Powell: There's a gymnasium on the fourth floor of the Supreme Court building. The clerks called its basketball court "the highest court in the land." And when Byron White drove to the basket, those young clerks thought twice about stopping him.

Murrow: More than respect for the robe!

[Long pause.]

Powell: Ed, let me tell you something. As a Supreme Court Justice, you cannot hide from your law clerks. And your clerks cannot hide from you. Behind my back, my clerks joked about my pro-business bias. They called it my **corporate dignity doctrine**. My conviction that business could do no wrong. They said that business petitions to the Court might as well be addressed "Dear Lew."

Murrow: Well, that's how clerks talk.

Powell: Of course. And maybe they were **right**. But you asked if I had second thoughts about my swing vote in Boston v. Bellotti. The answer is "yes."

Murrow: Really?

Powell: Maybe you think I would have cheered our national progress since 1971, pretty much down the road laid out in my memo. But I never liked extremes. My way was compromise and moderation. Have we gone too far on the course I urged in 1971? Well, presidents, Congress and the courts have deregulated corporate America, just as it wanted. Look what we got in return. Smart Wall Streeters figured out how to securitize imaginary commodities! Irresponsible risk run amok! The biggest economic debacle since the Great Depression. And no real reform in sight.

Murrow: Lew, you surprise me.

Powell: Well, I was a moderate conservative, but practical. For instance, after I left the Court I turned against the death penalty. It's constitutional, but it just doesn't work. Lord knows we tried to make it work, turning it this way and that. But so many people think it so horrible, they file these incessant appeals that clog the whole criminal justice system. And if so few convicts are actually executed, how can the death penalty be a plausible deterrent to capital crimes anyway? That's my practical side.

Murrow: I see. Do you have any thoughts about the present Supreme Court, the Roberts Court?

Powell: I don't like the way the Roberts Five have usurped the legislative role--inviting plaintiffs to let the Court make bold new law. That's what they did in Citizens United. They've diminished the legislative branch, upset the balance of power. I wish the Roberts Five would pull in their horns and retreat to the safety of narrow rulings for a while. Maybe a long while.

Murrow: And the Citizens United ruling? That in federal elections corporations can spend all they want, electioneering right up to Election Day, and the feds can't do a thing about it.

Powell: I do not admire the majority opinion in Citizens United. I think it's weak. The liberal Justices of my day would have torn it to bits. Their clerks would have made the most appalling jokes about its authors. Indeed, Justice Stevens did tear it to bits in his dissent, a real masterpiece.

Murrow: With that final thought, thank you for sharing your . . .

[Offstage Nader voice:] Not so fast, Powell!

Powell: Who is that?

[Offstage Nader voice]: You know who I am. The one whose Raiders grow old. Ralph!

Powell: What can I do for you, Mr. Nader?

[Offstage Nader voice]: Powell, I've seen another one of your FBI files. Dated 1964, years before you joined the Supreme Court. The agent was going on about what a staunch friend you had been to the FBI and its Director, J. Edgar Hoover. How you had pushed Hoover's books in the Virginia schools. How you were hell on communism. How you wanted Hoover's ideas on how to conduct your presidency of the American Bar Association.

Powell: Is that all?

[Offstage Nader voice]: Not quite. Some agent made a handwritten note on this report. Do you know what it says? It says, about you, **"He seems to be pretty gullible and I would add naive."**

Powell: [Long pause.] What do you want, Nader?

[Offstage Nader voice]: Your confession. After you've been Mirandized, of course. Will you just think of the harm you did to this nation of ours? I don't care about your motivation. I don't care how well intentioned you might have been, how patriotic, how many medals you brought back from World War 2. It's misguided people like you who sandbagged President Carter with corporate gold lavished on his Democratic Congress. Who deified Reagan with the magic of Madison Avenue. It's people like you who drove us into our latest depression--only this time, God help us: **with no FDR in sight, no New Deal reforms!** All of your neo-lib moderates with their deregulatory zeal. All of your Milton Friedman free-marketeers, your libertarian Alan Greenspans, your Bob Rubin-Larry Summers masters of the Wall Street universe, your hedge fund cowboys. Even the American Civil Liberties Union, which endorses corporate personhood!

Murrow: The ACLU? Corporate personhood? Are you sure?

[Offstage Nader voice]: Don't kid me, Powell. Your decisive vote in Boston v. Bellotti led us straight to Citizens United, to elections flooded with even more corporate money. There was already more than enough! One dollar, one vote! Rehnquist, of all people, got it dead right. And Byron White, and Brennan, and Marshall. And you, Lewis Powell--practical moderate, reasonable compromiser--you got it dead wrong.

Powell: [Long pause.] Perhaps. Maybe even likely. But what about you? If you stay out of the 2000 presidential race, Al Gore wins Florida without dispute, and Bush loses the presidency. No Bush, no Roberts Court, and no Citizens United!

[Offstage Nader voice]: I'm not so sure about that. Given the big money control of our government--thanks so very much to **you**--President Al Gore might

have given us a Roberts Court **by some other name**.

Powell: [Edges forward as if to respond. Hesitates, and relapses in silence.]

[Fade out.]

Anonymous offstage voice: August, 1971: Attorney Lewis Powell writes: "Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."

October, 1971: Lewis Powell is nominated to the U.S. Supreme Court.

January, 1972: Lewis Powell is sworn in as Associate Justice.

1976: With Powell on the bench, the Court rules that money is speech.

1978: The Court rules, 5 to 4, that the First Amendment protects corporate speech. Powell writes the majority opinion.

2010: The Roberts Court rules, 5 to 4, that the Constitution protects the unlimited expenditure of corporate money on political advertising in federal elections.

Attorney Lewis Powell, 1971: " . . . the judiciary may be the most important instrument for social, economic and political change."

[Fade in. Powell sits silent, his head bowed.]

Murrow: Here's Justice Stevens in his Citizens United dissent: ". . . corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."

Stevens was right. But activist Courts have opened our elections to corporate cash under a flimsy pretext of constitutional free speech protection. We can sit by, do nothing, and kiss our government goodbye. We can watch in silence the steady rise of our new masters--a corporate plutocracy crowned by the Courts.

Or, we can insist that corporations are **not** people with constitutional rights. They owe their existence and their special privileges to government--to we the people. They have no legitimate constitutional claim on us. And we the people, through our states, have chartered them to do business. We have not chartered them to govern us by the proxy of public officials beholden to corporations.

But time and again we have seen that we cannot trust the U.S. Supreme Court to distinguish between natural born persons and corporations--the artificial creatures of law. And what does that tell us? It tells us that the time has come once more for the people to amend the Constitution. That is what we do when judicial interpretation subverts the common good. We replace interpretation with plain talk: Interpretation aside, we hereby **abolish** slavery. Interpretation aside, former slaves **can** vote. So can women and 18-year olds, and **nobody** will pay a poll tax. Now we must make it clear: Supreme Court interpretation aside, **money**

is not speech, and corporations are not persons.

Let us move to amend the Constitution.

This is Edward R. Murrow. Good night, and good luck.

1The 46 organizations: U.S. Steel, General Electric, CBS, Phillips Petroleum, Minnesota Mining and Manufacturing, J. C. Penney, Libby-Owens-Ford, the AMA, Kemper Insurance, the N.Y.U. Graduate School of Business Administration, Ford Motor Company, Johnson Wax, Amway, Associated Industries of Massachusetts, Illinois Association of Real Estate Boards, Chicago Association of Commerce & Industry, Georgia Business & Industry Association, Tom's Foods, Ltd., American Broadcasting Companies, National Consumer Finance Association, Associated Equipment Distributors, C. F. Hood and Associates, General Motors, U.S. Independent Telephone Association, Lee, Toomey & Kent (Washington, D.C.), Missouri Chamber of Commerce, Sybron Corporation, Greater Cincinnati Chamber of Commerce, Southern Department Stores, Whitfield, Musgrave, Selvy, Kelly & Eddy (Des Moines), School of Business Administration-Temple University, CPC International, American Iron and Steel Institute, Hill & Knowlton, Compton Advertising, The Travelers, Borg-Warner, Metromedia, Inc., California Chamber of Commerce, Interlake, Inc., Illinois Tool Works, Conahay & Lyon, Inc. (New York, N.Y.), Northern Natural Gas Co., Olin Corporation, and E. W. Scripps Co.

2Nace, Ted (2003). Gangs of America. San Francisco: Berrett-Koehler (p. 138).

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What Corporations Do
James Allison
December 25, 2011

Author's note: "The Prosecution of Judge Waite" was performed twice at the Democracy Convention in Madison, Wisconsin, in August, 2011. After the second performance, as I sat in a downtown church waiting for a plenary session to begin, an unidentified woman leaned over and said "You know, you really should do something with the Dodge v. Ford decision." "Yes," I replied. "A very good suggestion. Thanks." And then she was gone. This play is for her.

Prologue: In one of the longest football rivalries between American universities, Stanford plays the University of California every fall. Since 1933, the winner of the game has been awarded possession of the Stanford Ax. It first appeared at a baseball game between the two schools in 1899.

Characters (in order of appearance):
Four students: Ford, Friedman, Madison, and Smith
Professor

The setting is a Monday morning classroom on a university campus. Neither class nor professor is identified, but each has something to do with corporate law and economics. Eight students are enrolled but only four show up for class, all males. (The professor role can be male or female.)

At stage right are four plain chairs, arranged side by side in a line angled 45 degrees toward the audience. Facing them at stage left is another chair with a table or desk for the professor. Each student carries a pencil and a copy of this manuscript fastened to a clipboard. The professor carries a copy inside a briefcase.

The action begins when the four students enter stage left, more or less at the same time, in no particular order, and take their seats without ado. Ten seconds later the professor enters stage left, opens the briefcase, puts the manuscript on the desk or table, and sits down. The professor proceeds to take attendance by checking names on a class roster.

Professor: Celeri. [No answer.]

Professor: Ford.

Ford: Yup.

Professor: Friedman.

Friedman: Yo!

Professor: Jensen. [No answer.]

Professor: Madison.

Madison: At your service.

Professor: Richter. [No answer.]

Professor: Smith.

Smith: Aye!

Professor: Waldorf. [No answer.] Well. Maybe we should wait a few minutes for the others to show up.

Ford: Not much chance of that. They're probably still recovering from the weekend.

Professor: The weekend? What weekend?

Friedman: Last weekend, the big game weekend.

Smith: We get to keep the ax. Or a bucket? Maybe a jug.

Friedman: No, it's an ax.

Madison [sings a California drinking song, which can be found on the internet]
Oh, it's whiskey, whiskey, whiskey,
That makes you feel so frisky,
On the Farm,
On the Farm,
Oh, it's whiskey, whiskey, whiskey,
That makes you feel so frisky,
On the Leland Stanford Junior Farm.

Friedman [sings]:
Oh, it's cold roast duck,
That makes you . . .

Professor [interrupts]: All **right**! I **get** it.

Ford: I'd fire them all if it were up to me. Hung over sots. Not on **my** assembly line. Not in **my** day.

Professor: Yes, Mr. Ford, we know all about that. But that day is long past, and the present belongs to your grandson, "Henry Deuce," who sent you here to study the **modern** corporation.

Ford: It's all bunk. But here I am, and I hope he's happy now.

Professor: Where did we leave off?

Smith: You were about to talk about legal restraints on corporate charity, when somebody interrupted with a simple question: What do corporations do?

Professor: Maybe not so simple.

Smith: I know one thing they do.

Professor: What's that, Adam?

Smith: As I said in 1776, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices."

[**Madison** raises his hand.]

Professor: James Madison.

Madison: In my day we usually called them monopolies. We founders knew we had to keep a close watch on them, whatever they did. I said it would be well to reserve to the State, a right to terminate the monopoly by paying some reasonable sum. This would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them.

Professor: Inconvenient restrictions?

Madison: Had you been a colonial tea merchant in the heyday of the British East India Company, you would know the meaning of an inconvenient restriction.

Professor: I see.

[**Friedman** raises his hand.]

Professor: Milton Friedman.

Friedman: Yes. That's part of the truth, but you're nibbling around the edges.

Professor: Let me guess. "The social responsibility of business is to increase its profits." The title of your article in the New York Times Magazine, September 13, 1970.

Madison: That could never have passed muster with the founding fathers.

Friedman: Probably not. But they would have found more favor with the whole quote, from my book: " . . . in a free society . . . there is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."

Madison: That sounds very grand indeed. But how much injury may accrue during the pursuit of redress? A lot of mischief can be done while the authorities track down that deception or fraud--if they ever do.

Professor: All good observations. But listen: This is what professors of corporate law usually say when students ask them what corporations do. They say: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."

Madison: Outrageous! That would never have got past me, Jefferson, or even Hamilton.

Professor: Who knows where it comes from? Mr. Ford?

Ford [with reluctance]: Well, in a way it comes from me and the two Dodge brothers, John and Horace.

Professor: I thought you made cars.

Ford: If you sell enough Model Ts, you can make **law** too.

Professor: Tell us more.

Friedman, Madison, and Smith: "More," "Proceed," and "Aye!"

Ford: My first two ventures flopped. I knew all about how to design a car, but not how to make one. By the time I started my third venture, I knew enough to outsource the manufacturing to the real experts. Mine were two crackerjack machinists named John and Horace Dodge.

Professor: And what did they get in return?

Ford: By 1908, each of them had 50 shares--together, about 10% of the ownership. A big chunk. But I had 585, about 59% ownership.

Professor: So, what you said went.

Ford: Yes. Or so I thought. And I could never abide being told what to do by a bunch of money men, Wall Street banker types with no practical skills. The Dodges at least were car men.

Professor: If I recall my Ford history correctly, your first masterpiece came the following year: 1909, the Model T. A big success.

Ford: You said it.

Professor: And your second masterpiece came in 1913. There was some irony there. Although you say your strength was design, your second masterpiece came in manufacturing: The assembly line.

Ford: Exactly as you say.

Professor: And the results were astonishing. A few numbers help to tell that story. In 1905 you produced 2,000 cars; in 1923, two million. When it first came in, in 1913, the assembly line raised production 700%.

Ford: All true.

Professor: You got huge economies of scale: They enabled you to improve the car enormously while cutting its retail price in half. By 1923 half the cars on the road were Fords.

Ford: And we all got filthy rich. Take the two Dodge brothers. On their **$10,000 investment**, in a period of 13 years Ford returned over **$35 million**--nearly **100% annual return!**

Professor: Another irony there. They made enough money to start their own car manufacturing business. They started the Dodge marque that continued in the Chrysler company.

Friedman: They became your competitors. Always a good thing.

Ford: That's what you think.

Smith: What a twist! Contriving to reduce your price! And I thought they always contrived to **raise** prices.

Ford: More than one way to skin a cat!

Madison: But a truly dangerous accretion of wealth. We've not heard the end of **this** tale.

Ford: You said a mouthful there.

Professor: And all the while, you massaged your public image as the folksy friend of the common working man. You made a big deal about raising your workers' wages, and cutting prices so all your workers could afford to buy a Ford.

Ford: That wouldn't have fooled you. But it did make a big splash: Doubling their wages; the Five-Dollar Day.

Professor: Tell us the real reason.

Ford: Well, I did want them to buy more Fords. But the real reason was competition for labor. You see, that new assembly line did make us more efficient than anyone. But it had unintended consequences. It made workers miserable. The job became repetitive and boring. I'll never forget that worker whose job was to install Nut 86. He said that if he kept putting on Nut 86, he would soon become Nut 86 in the Pontiac bug house.

Professor: Like Charlie Chaplin in his film "Modern Times."

Ford: So I hear. Anyhow, employee turnover and absenteeism just went right through the roof. I **had** to double their wages just to keep them on the job, making Fords. And it worked. It was just about the best cost-cutting move we ever made.

Professor: And the wage raise was not automatic. That is not widely known.

Ford: No. You had to work at least 6 months. And your life style had to meet the approval of a Ford social worker. You couldn't be a drinker, had to save your money, keep a tidy household, and so forth.

Madison: And so forth. Just as the founders feared.

Smith: More connivance than I ever imagined!

Professor: But it worked so well. Mr. Ford's photo appeared in Soviet factories, right next to Lenin. A Socialist worker's hero!

Friedman: But tell us more about those Dodge brothers, those salubrious competitors of yours.

Ford: They didn't look so salubrious to me, if you mean wholesome and beneficial.

Friedman: I do indeed.

Ford: Well, let numbers do the talking. Between 1915 and 1916 Ford revenues went from $121 million to $207 million. Profit went from $27 million to $60 million. But dividends **dropped** from $16 million to $3 million. And the percentage of profits distributed **dropped**--get ready--from 66% to 5%. From a record high to a record low.

Professor: And how did the Dodges respond?

Ford: They sued me. They thought the shareholders should have a bigger share of those enormous 1916 profits. But that wasn't all.

Professor: No?

Ford: No. You see, the reason I gave was that I wanted the extra cash to expand production. I wanted to build the River Rouge plant. It would be the biggest factory ever built anywhere, for anything. I even wanted to build my own smelters for steel production. We had silos full of ready cash, yes, but I wanted to use it to build a bigger plant: more jobs, lower prices, higher wages.

Professor: And why did that bother the Dodge brothers?

Ford: They thought it would put the other car companies--including theirs--out of business, give Ford a monopoly.

Madison: Please expatiate.

Ford: Sure. If nobody else could afford that kind of scale, nobody else could achieve our economies of scale--which Ford just might use to price them right out of business.

Madison: I see.

Ford: So the Dodge brothers asked the court for more money--which I knew they would use to build up their own car business. And on top of that, they asked the court to enjoin us from building the River Rouge plant--so as not to drive everyone else out of business.

Professor: And what did the court do?

Ford: The court ordered us to pay our stockholders another $19.3 million. And the court enjoined us not to build the River Rouge plant.

Professor: You lost.

Ford: Yes, but we appealed to the Michigan Supreme Court.

Professor: And the case became known as Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919). More commonly, Dodge v. Ford (1919). One of the most famous cases in corporate law, even today.

Ford: But not for the actual decision. I wonder how many corporate law professors could tell you the actual decision.

Professor: Me too.

Ford: It was really pretty simple. Each side got something. The Michigan Supreme Court agreed that we had to pay the $19.3 million. Much more important to me, the court also refused to keep us from building the River Rouge plant.

Professor: That plant had a lot of steel magnates worried.

Ford: You can say that again. They did not like our having our own smelters. Not one bit. And the federal government! By then I was kind of in bad with them, for my opposition to our entry into World War 1. Heavens, they sent poor old Eugene Debs to prison! He had told our boys to resist the military draft. Lucky I was an important industrialist. Poor Debs was only a Socialist politician, with 20 million votes for president.

Professor: The Russian Revolution had the government pretty nervous too. It was two competing economic systems, American capitalism vs. the Soviet experiment in socialism.

Ford: That too. Some folks had taken my socialistic posturing a little too seriously. I did it mainly to sell more cars. And we did build River Rouge, and it worked just fine. But the whole thing got so big, it wasn't so much fun any more.

Professor: All right. But if Dodge v. Ford is not famous for the decision, why is it famous?

Ford: For what the judge said about the decision. What do they call it? Dicta. Not law, but remarks in passing about the law. Idle chit chat, commentary. Say, read it again!

Professor: Chief Justice Strander's opinion included this statement: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."

Friedman: Well, it sure sounds like law.

Professor: Maybe so, but it was not the basis of the court's decision. The court actually ruled on very narrow grounds.

Madison: And what were those very narrow grounds?

Professor: That Henry Ford, as the controlling shareholder, had breached his trust, his fiduciary duty of good faith to his minority investors.

Friedman: That's it?

Professor: That's it. You see, any court that knows its stuff will begin a case like this with the business judgment rule.

Smith: The business judgment rule?

Professor: Yes. No court will substitute its own judgment for the careful, unconflicted decision of a board of directors. What was the business decision at issue? It was Ford's refusal to pay a special dividend after its most profitable year. The business judgment rule says that this decision is none of the court's business, as long as the decision can be tied to some rational business purpose.

Ford: So, why did the court put its oar in here? Remind me.

Professor: Because it thought you were going to run the business as a semi-charitable institution. After all, you had said you were going to reduce your selling price from $440 to $360. And your folksy pose had you running off at the mouth about Ford making too much money and other such nonsense. To the court, this looked like a quite unnecessary reduction in net profits--not a rational business purpose.

Ford: Ridiculous. We could always compensate the lower price with higher volume.

Professor: Of course. And this kind of second guessing, even if it were sensible, is completely foreign to modern corporate law. But that was the reasoning of the Michigan Supreme Court. You'd have been better off in Delaware, where they really know their corporate law. So many corporations are chartered there, corporate law is practically the state industry.

Smith: Michigan makes cars, Delaware makes corporate law. Specialization strikes again!

Madison: It seems, then, that Dodge v. Ford deals not with directors' duties to

maximize shareholder wealth. Instead, it deals with the duty of controlling shareholders not to oppress minority shareholders.

Professor: Exactly. In the last 30 years there has been only one case in Delaware law that cited Dodge v. Ford. And it did so on that very point, the fiduciary duty of controlling shareholders to look out for minority shareholders. Nothing about maximizing shareholder wealth.

Madison: Mere dicta, not law.

Professor: And mealy-mouthed dicta at that. Look carefully at the wording. The Michigan court described profit seeking as the "primary" goal, not the exclusive goal. And at a later point in its opinion the court even acknowledged that corporate directors retained--get this-- ". . . implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation."

Smith: So much for shareholder wealth maximization. It's old, it's Michigan--not Delaware, the gold standard of corporate law--and it's not even law, just dicta. So, can we just let it rest in peace?

Professor: Not quite. What if we could show that it's a brilliant anticipation of a modern legal principle?

Smith: And by what magical trickery might that be done?

Professor: Well, where does legal principle come from? It does not come from the unsupported bloviating of journalists, economists, pundits or law professors. No disrespect to you, Mr. Smith, or you, Mr. Friedman.

Madison: I was beginning to wonder. Where **does** it come from these days?

Professor: Corporate law comes from three main sources. First, internal requirements set out in actual corporate charters and bylaws. Second, corporate codes set out by the states. Third, corporate case law.

Ford, Smith, and Friedman: Hmmmmm.

Madison: Wait, gentlemen. This sounds most promising.

Professor: First. If the corporate founders want to, they are perfectly free to put Dodge v. Ford right into the charter, a bald statement that this here corporation is carried on primarily for the benefit of the stockholders. But is that common practice? Most emphatically not. The typical charter defines the corporate purpose as anything "lawful." Period.

Friedman: Well, what about that second one, state codes? Do any of them limit corporate purpose to the maximization of shareholder wealth?

Professor: No. In fact, the great majority of state codes expressly authorize corporations, in making business decisions, to consider the interests not only of shareholders, but also the interests of employees, creditors, and the community.

Friedman: Good god!

Madison: Wait, sir. We come now to the third source, case law.

Professor: Yes. Does case law positively require that corporate directors maximize shareholder wealth? Well, here and there you can find a modern case with dicta that seem to echo Dodge v. Ford. Here's one: "... directors [are obliged] to attempt, within the law, to maximize the long-run interests of the corporation's stockholders. . . . "

Madison: Long-run interests? Are those the same thing as shareholder wealth? If we foul our water and land in the pursuit of shareholder wealth, do we serve anyone's long-run interests?

Professor: Precisely.

Smith: Aye, there's the rub.

Ford: You've got a point there.

Professor: And plenty of modern cases contain contrary dicta, in favor of duties beyond the duties owed to shareholders.

Friedman: For example?

Professor: There's a famous Delaware decision in an oil company case. The court remarked that corporate directors could consider the impact of their decisions on constituencies other than shareholders--creditors, customers, employees, the general community.

Smith: And have we now, at long last, driven a fatal stake through the heart of that great horrid beast, Dodge v. Ford?

Professor: Alas, not quite. Many legal instructors teach Dodge v. Ford, not to show that the law compels corporations to behave like selfish, irresponsible psychopaths obsessed with shareholder profit--an outright falsehood, as you now know--but as a lesson on how corporations **ought** to behave.

Madison: What **wonderful** things you have done with the mother tongue.

Selfish, irresponsible psychopaths obsessed with shareholder profit. Marvelous!

Professor: Scholars call this the **normative** vision of corporate purpose. The **right and proper** purpose of the well tuned corporation.

Madison: But why on earth would anyone think that corporations should maximize shareholder wealth?

Friedman: I can answer that one. Economic theory. Specifically, the theory that shareholders are entitled to all of the corporation's residual profits.

Smith: And what exactly are residual profits?

Friedman: All of the profits left over after the firm has met its fixed contractual obligations--its obligations to employees, customers, and creditors. Those obligations are fixed. But the rest is variable. And if you maximize that variable rest, you maximize the total social value of the firm. Q.E.D.

Smith: And what's wrong with that theory?

Professor: What's wrong is that we now know that shareholders are not the sole residual claimants. For one thing, there's the idea of **externalities.** Those are costs imposed on third parties--customers, employees, the environment--costs forced upon innocent bystanders by somebody else's single-minded pursuit of shareholder profit. For another thing, we now know all too well that a **business risk** that's good for the shareholder can do great harm to the creditor. The shareholder can run off with millions, with the creditor holding the bag.

Madison: Does it not seem evident that the moment the firm acquires more than one shareholder, it also acquires a multiplicity of shareholder interests? Does it make any sense to speak of shareholder interest as a simple unity?

Professor: No, it does not. Different shareholders have different time horizons, different tax concerns, different tolerance for risk. And their other investments will respond idiosyncratically to the decisions of any one firm they hold in common. Some of those other investments may profit, some may not. And different shareholders will surely differ in their willingness to sacrifice profit for a clean environment. To sacrifice profit for good worker wages, for other social interests. Clearly, the normative view of Dodge v. Ford simply ignores individual differences in shareholder values.

Ford: So why does it hang on? I had to change my Model T. Don't professors ever have to change their case books?

Professor: We've changed our case books many times, but Dodge v. Ford alone hangs on, revision after revision. Nobody really knows why. We really should stop

teaching it. It isn't law at all. At the very best, it's the very worst law I can imagine.

Smith: You say that nobody knows why it hangs on. Could its persistence simply reflect a human law of least effort?

Professor: One serious scholar has suggested that very explanation. Laziness.

Friedman: Laziness?

Professor: Well, a corporation can be a supremely intricate thing. Many directors, dozens of executives, thousands of employees and shareholders, millions of customers, dispersed all over the world, several decades old. Economic power? The biggest corporations have more economic power than lots of nation states.

Friedman: A real can of worms.

Professor: Exactly. You almost hope that nobody will ask that dynamite question: "What do corporations do?" But somebody always does. So you have to be ready with something quick, something easy, something that won't take up the rest of the semester. Something that satisfies. You know what that something is?

Ford: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." Dodge v. Ford, 1919.

Professor: None other. But you know what? I'm taking the oath right now. I'm swearing off Dodge v. Ford. No more pat, comfortable myths. No more pretty stories about storks delivering babies. From now on I'm doing it the hard way, come what may.

[**Madison, Smith, Ford and Friedman** stand and applaud the professor.]

Ford: Let's give the professor a prize!

Madison: Something more tangible than applause!

Ford: Something to look at!

Madison: Something to grasp!

Smith: Something hefty!

Friedman: I know just the thing! Here, gather around.

[They huddle and confer. **Madison** writes something on a piece of paper, which they all sign.]

Madison [Stands to address the professor and reads the paper, as follows]: "An IOU for our learned professor, the bearer of this note. This note is good for one ax, to be purchased at Berkeley Hardware in commemoration of a great victory for our beloved university. (signed) Adam Smith, James Madison, Henry Ford, Milton Friedman."

Ford [aside, to Adam Smith]: Say, I have a question about this Madison fellow. Didn't he have something to do with our Constitution?

Smith: He did indeed. He wrote most of it. **And** he signed it.

Ford: That's what I thought.

Friedman [to Madison]: Madison, that is a significant scrap of paper. You won't believe how much pleasure it gives me to put my name to such an important document.

Madison: Oh, my dear Friedman. You have no idea.

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James Allison
May 3, 2012

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"**

Cast: A baker
A phone 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.

[The baker's phone rings.]

Baker: Hi. Can you make it quick? I'm kind of busy here. [Pause while caller speaks.] Oh, sure. I'm always up for that. But say, can I put you on speaker phone? I need both hands free.

[Baker adjusts the phone, whereupon Caller's voice becomes audible to the audience.]

Caller: Like I said, 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--or a change of heart by one or two of the present bunch.

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, whether the Court likes it or not. 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. Which 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 Jefferson's 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. [Picks up the bigger book, opens it, and reads.] "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. Hmmm. "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. It's debatable.

Anyhow, Federalist John Adams becomes president after Washington. And Adams sends Marshall to France on a diplomatic mission that makes Marshall--along with Pinkney and Gerry--a hero of the famous XYZ affair with Talleyrand, the corrupt French minister who tried to extort them.

Caller: So now he's well known.

Baker: Very. Next, Adams makes Marshall Secretary of State. But most important--and very late in his presidency--he makes him 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 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 an afterthought 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.

Caller: No? Really?

Baker: No. Really. 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: Hmmm. Okay. But what about those other things originalists like to cite. You know, to prove founder intent.

Baker: Founder intent?

Caller: You know, 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."

Caller: Right.

Baker: They were published during the ratification debates, when the states were trying to decide whether to adopt the new Constitution. The Federalist Papers tried 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 has the answer in Federalist 78: Not to worry, he says. The judiciary is the weakest of the three branches of government. He does 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: Yes. It's mixed. 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? Lots of good talkers, guys with strong opinions, arguing back and forth about the Constitution.

Baker: You tell me. Ratification begins when the Constitutional Convention ends on September 17, 1787. In less than four months five states ratify 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 all ratifiy by May 23, 1788, with nary a mandate for judicial review. Not one.

Caller: That's eight states.

Baker: Ratification requires one more, nine states in total. **New Hampshire** becomes that ninth state on June 21, 1788. Now, in 1788 communications run

like cold molasses. And those sluggish communications leave Virginians completely 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: Hmmm. 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 comes up.

The founders' focus instead 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? Congress passes some legislation, and sends it to the president. If the president likes it, he signs it. If not, he vetoes it and sends it back to Congress?

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 is no real discussion of judicial review during the Constitutional Convention. Which is about five months long. But the founders make one thing clear: **They dislike any hint that one branch of government might be able to stymie the other two branches**.

Caller: For example?

Baker: Well, there are plenty of votes during the convention to that effect. For example, they affirm unanimously an executive veto--but a veto that can be **overridden** by a 2/3 majority in each house of the legislature. And they never suggest that the judiciary would have any hand in the business of legislative veto. It is the **executive** that exercises the veto, and the **legislature** that can 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. For example. Jefferson's new Congress repeals the Judiciary Act of 1801. That Act was a Federalist measure meant to expand the federal courts--their number and power. But as they debate the move to repeal, a question comes up about the constitutionality of the Act. And 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. Sure enough. 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 has 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." (Goldstone, pp. 195-196.)

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." (Goldstone, p. 196.)

Caller: That's the best he could do? It's fluff!

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. Thomas Jefferson and Aaron Burr are actually tied in the electoral college vote. An exact dead heat. It takes a long time and a lot of horsetrading to sort it all out and put Jefferson in the White House. And it only very 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 John Adams makes 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: No wonder Marbury was sore. So he takes his case directly to the Supreme Court. You've talked about the Chief. What about the other Justices on that Court?

Baker: They are all Federalists, and they all live together.

Caller: They actually live together?

Baker: Yep. Marshall has 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 isn't all. Marshall has 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 he 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 wavered 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 acknowleged 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: But 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 are not about to roll over and 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 is 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 surpises 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's 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 clincher, the Judiciary Act of 1789, Article 13. Which says, very plainly, that the Supreme Court shall have power to issue writs of mandamus. 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 embarassing. 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. A whole building all to itself, with a self-glorification carved in marble.

Baker: Just so. 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 has 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. The Judiciary Act of 1789.

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: 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 made him think that this was the right court, is actually unconstitutional.

Baker: Exactly. And this decision 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: Okay. 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 decide it on the narrowest possible grounds, not use it to make new law. Critics say that most or even 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 has come to 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: Selective editing? Tendentious?

Baker: Tending to promote a particular point of view.

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

Baker: His version of Article III has come in for a lot of critical attention. It's probably the keystone of his opinion. Without it, he may not get to declare Section 13 unconstitutional. Without it, he may not get to make his Court "capital S" Supreme.

Caller: Tell me more.

Baker: Here's his first quote of the key sentence from Article III : "The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." Sounds final, doesn't it?

Caller: Sure does.

Baker: But it isn't quite complete. He left something out. Here's how that last sentence actually reads, in the Constitution: "In all other cases before mentioned, the supreme Court (small s) shall have appellate Jurisdiction, both as to Law and Fact, **with such Exceptions, and under such Regulations as the Congress shall make**."

Caller: Such as Section 13, which he wants to declare unconstitutional. But it's right there in the Constitution, a regulation such as the Congress shall make!

Baker: Lots of scholars think so. But look at his clever editing. About 300 words later, he does put in a reference to the missing part, "such exceptions as Congress might make." That belated reference makes it hard to accuse him of simply ignoring its apparent constitutional empowerment of Congress. But he has left it out at the decisive place in his argument: That **dangerous** place where it might scream "foul" against his precious declaration **that Congress has violated the Constitution**.

Caller: Wow. I see.

But I've been thinking about what you said before. It seems so odd that they start off as if they had orginal 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: Amen.

Another word of warning: You will find no reading of Marbury v. Madison that commands universal approval. What you will find is a 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.

A great judge? Not so great as I used to think. But very likely the master politician of his day.

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: Settled law. 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 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 out of kilter. 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 stiff 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.

Caller: I see.

Baker: So in 1805, as Chase awaits trial, the Federalists are getting nervous. And guess what? John Marshall quietly proposes that it might be a good thing if Congress could override judicial decisions on constitutional matters.

Caller: Just opposite to the judicial review he engineered in Marbury v. Madison! Two years ago! But why?

Baker: I would say "fear." You see, if the Senate does convict Chase, the conviction might so embolden Jefferson's happy crew that they might go ahead and impeach the whole Court. Then they could use the impeachment threat to keep the judiciary in line with Congress and the White House.

Well, they do have the numbers to convict. But not the votes. The Jeffersonians do not stick together. So Chase stays on the bench, and that's the end of Supreme Court impeachment. I think too many of those Jeffersonian Senators scared themselves at the prospect of the possible consequences. A terrifying political landmine.

Caller: That **is** funny. Ironic is more like it. Marshall's quiet proposal was right after all. Maybe he thought he'd gone too far with judicial review. That the judicary, like any other branch, needed some outside constraints. Yes, a little more check and balance would have been a good thing. 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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Note

1The Marshall style stood out in the very first case in the docket of the Marshall Court. Talbot v. Seeman (1801) clearly foreshadowed many future decisions, where he made law from the bench on dubious legal grounds while taking care to avoid any threat of impeachment.

In 1799 the ship Amelia, owned by a German named Hans Seeman, sailed

from Calcutta, bound for Hamburg, with an exotic Indian cargo. Seized in the Atlantic by a French warship, it was re-directed to the West Indies for condemnation and sale, valued around $190,000.

Before it got there it was seized again, this time by a now famous American warship, the USS Constitution ("Old Ironsides"). Captain Talbot took Amelia to New York, where he claimed from owner Seeman half the value of the ship and its cargo for himself and his crew for having rescued Amelia from the French. But Seeman thought he owed no salvage money: As his German ship was neutral in the French-British war, he thought the French court in the West Indies would have freed the ship and returned it to him. He proceeded to sue Captain Talbot in federal district court.

Talbot claimed that as Amelia was flying a French flag, she was a U.S. combatant as defined by Congress and President Adams under the fuzzy concept of "imperfect war"--a conflict with many of the trappings of war, but lacking complete national engagement or a declaration by Congress. The war in Talbot's claim was our maritime "quasi-war" with France at the time. In the politics of the case, Adams' Federalists favored Talbot, and Jefferson's Francophile Republicans favored Seeman.

The basic question was whether the U.S. was at war with France at the time of the seizure, and how that was or was not so. The district court agreed with Talbot. Although Congress had not declared war, nor had Adams so requested, Adams had as commander-in-chief issued various war-like directions whose constitutionality was far from clear.

Seeman appealed to the New York Circuit Court, where Aaron Burr represented him, and Alexander Hamilton represented Talbot. Judge Bushrod Washington ruled in favor of Seeman on narrow grounds: Under international law Amelia was a neutral vessel, immune to seizure by an American warship. He assumed--dubiously--that a French court would have ruled in favor of Seeman.

In 1801 the case reached the U.S. Supreme Court, where the two sides repeated the circuit court arguments. Marshall delivered the opinion of the Court. The Constitution, he said, vests Congress with the whole powers of war (chalk one up for the Republicans: Federalist Adams was wrong, as he had exceeded his constitutional authority). But Talbot's seizure was justified, because the real intent of Congress was that American naval vessels protect American commerce (Marshall did not say how he knew this real intent). And as Amelia was armed, and commanded and sailed by Frenchmen, Talbot had "probable cause" to bring her to New York.

So as not to enrage the Republicans, Marshall continued: Was Captain Talbot entitled to salvage? Maybe so. Because she was carrying goods loaded in a port of the British Empire, a French court would have condemned Amelia (he does not say how he knows this, but feels free to contradict New York Circuit Court Judge Bushrod Washington, his fellow Justice on the U.S. Supreme Court). On the other hand, although Amelia looked very like a combatant, she was actually neutral in the eyes of the law, and should have been restored without salvage fee. So she was both things at once, neutral and hostile. Therefore, $95,000 was more than Talbot deserved for saving a part-neutral ship, but $31,500 seemed fair (he did not

explain why). However, as owner Seeman deserved to recover his costs, Talbot would get only $26,405.77, and would pay his own costs as well. The Marshall style was compromise: Each side gives, each side takes, and neither gets mad enough to call for his impeachment.

Goldstone (2008) thinks Marshall would have been impeached for this decision had Congress been in town, and invites us to push aside the details to see the Marshall principles at work, pre-Marbury v. Madison. Marshall simply declares, although nobody had asked him, that only Congress has the constitutional power to make war. This is called "legislating from the bench." As Jefferson wrote in 1823: "The practice of Judge Marshall of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and censurable." But Marshall got away with it, both here and elsewhere, by something close to pure magicianship.

About the Author

James Allison attended public schools in Fresno, and holds a B.A. degree from

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He and his wife, Tomi, are Life Members of WILPF--Women's International League for Peace & Freedom, founded by Jane Addams of Chicago's Hull House. They began their study of corporations through WILPF, which pioneered research on the history and impact of corporate power and corporate personhood.