In this episode, Dr. Artello explains how the Supreme Court has become so powerful through judicial review. Dr. Artello and Nia discuss Marbury v. Madison and the brilliance of Chief Justice John Marshall.

Nia: Hello, Dr. Artello.

Dr. Artello: Hi Nia

Nia: I have heard about this concept of Judicial Review. What is up with it?

Dr. Artello: It explains how Supreme Court interprets what the Constitution requires to make sure that statutes do not violate it.

Nia: Wait, what are statutes? How are those different from the Constitution?

Dr. Artello: Great question! Statutes are laws passed by legislatures. These may be on the state laws or federal laws.

Nia: How can the Supreme Court overrule state laws? The Supreme Court is the federal level right?

Dr. Artello: You are right. The Constitution addresses that question directly through the Supremacy Clause.

Nia: Supremacy clause? Like the Supremes? Instead of Stop in the Name of Love; it’s stop in the name of the constitution.

Dr. Artello: That is great and right! Article 6 of the Constitution clearly states the constitution is the law of the land and all judges must abide by it.

Nia: ok. So where in the Constitution is the power of judicial review?

Dr. Artello: It comes from Marbury v. Madison.

Nia: ODr. Artelloy, tell me about the case.
Dr. Artello: So before we get into the case, we need to understand how John Marshall got on the Court and what was happening at the time because the election of 1800. It was as contentious but more momentous as the recent 2016 election was.

Nia: I can’t believe that. We were pretty divided.

Dr. Artello: So we were in 1799 too. You had the Federalists who believed that the only way for the government to work was to have a centralized national government to function, national government would protect the rights of the people, strongly favored the separation of church and state. John Adams, our second president, supported a Federalist view of the Constitution. His opponent and vice president at the time, Thomas Jefferson was an avowed Anti-Federalist. Jefferson strongly opposed a strong central government as it was a threat to states’ rights. Both parties, Federalist and Anti-Federalists now known as Democratic-Republicans believed that the election of the other party would be the downfall of the nation.

Nia: I know that Jefferson won but what else made this election significant for the court?

Dr. Artello: Not only was this election the first time we had a hand off of presidential power from one party to another but also Congress flipped. You had a total sweep of the House of Representatives and Senate to be Anti-Federalists. So the election of 1800 meant a total shift in power.

Nia: That must have been a difficult transition.

Dr. Artello: It was and it was appreciably longer transition then than it is now. The transition was six months. So the lame duck Congress and outgoing president had some time to get things changed.

Nia: What did they do?

Dr. Artello: They appointed John Marshall to be the new Supreme Court Chief Justice. They passed the Judiciary Act of 1801 to reorganize the judiciary, make the Supreme Court five justices; not six and create judges and magistrates in Washington DC and Alexandria VA.

Nia: I bet Jefferson was pretty angry over these actions.

Dr. Artello: He and the rest of the Anti-Federalists were very angry. They came in and repealed the Judiciary Act of 1801. But more importantly, they refused to send the remaining
authorizations for magistrates passed in the last hours of Adams presidency. And this is how we get the Marbury v. Madison case.

Nia: So who is Marbury? Who is Madison? Madison, like, the President? But Jefferson is president at this time, right?

Dr. Artello: Right. Marbury first. Marbury was one of the midnight justices.

Nia: Midnight justices?

Dr. Artello: As Adams was leaving the presidency, he signed these judicial commissions up until the very last minute. John Marshal who was both Chief Justice and Acting Secretary of state was responsible to see the commissions delivered. It is unknown why they were not delivered and what role Marshall played in this blunder.

Nia: If it was his mistake, how did he hear the case?

Dr. Artello: Nowadays, he would probably have to recuse himself, but then...no one paid any mind.

Nia: What happened?

Dr. Artello: Marbury petitions the court to hear his case in 1801. Jefferson tells Madison who is now the Secretary of State to ignore it. He does not want to send the commissions and he does not want to engage with the court. Marshall orders Jefferson to respond in the next court session. Congress did not want to see the showdown, so they passed a law putting the next session of the court some 14 months away.

Nia: I can’t see that working now.

Dr. Artello: I don’t either. But it worked. Jefferson still does not respond in 1803. No one appears for the government but the Court takes testimony. Marshall used the recess to formulate his plan because he saw three potential avenues and none of them lead to his desired destination.

Nia: what were the three options?

Dr. Artello: He could order Jefferson to deliver the commissions. But you know Jefferson is not going to do that.
Nia: I can’t see that.

Dr. Artello: When Jefferson does not deliver them, the court looks very weak.

Nia: Option one will not work. Option two?

Dr. Artello: Jefferson could call for Marshall’s impeachment. This was a real possibility. Jefferson was quite antagonistic towards Marshall.

Nia: Last option:

Dr. Artello: Marshall could dismiss Marbury petition. But against it would simply reinforce the weakness of the branch.

Nia: How does he get out of this?

Dr. Artello: What he does is brilliant. He first ruled the Marbury is entitled to the commissions that were not delivered. If Marbury’s legal rights had been violated, Marshall asserted that he was entitled to some sort of remedy, because “the US is a government of laws; and not of men.” But what type of remedy was he entitled? Marshall says he is entitled to writ of mandamus. This is the remedy Marbury sought. And was authorized under the Judiciary Act of 1789.

Nia: So Marbury wins?

Dr. Artello: No. And now here is Marshall’s genius: Marshall ruled that Congress did not have the power under the Constitution to give the Court that authority under the Judiciary Act of 1789. This authority granted by Congress is “not to be warranted by the constitution.” He goes on to conclude that Congress cannot act outside of the constitution and that law that had given the court the power of mandamus was unconstitutional.

Nia: So Marbury does not win, really. So Madison and Jefferson win.

Dr. Artello: Yes in the short term. They don’t have to deliver the commission to Marbury—but here is Marshall’s win: Marshall just declared an act of Congress as unconstitutional and not a valid law.

Nia: That sounds big. Really big. But you said no one noticed. How is that?
Dr. Artello: What Marshall did was relinquish a power given to the court by Congress. No one cared that the court was not going to issue writs of mandamus beyond Marbury. Everyone was looking at the showdown between Jefferson and Marshall. Jefferson didn’t care if Marshall wanted to exercise less power. Congress ignored the ruling because again, they did not view it as a major issue. It was another 60 years before the court struck down an act of Congress and by then no one disputed the power of judicial review.

Nia: But by giving up a little power, he got the greater power. So can you summarize what the power of judicial review is?

Dr. Artello: The power of judicial review can declare that laws and actions of local, state, or national government are invalid if they conflict with the Constitution. It also gives courts the power to declare an action of the executive or legislative branch to be unconstitutional.

Nia: Thank you, Dr. Artello for breaking things down for us.

Dr. Artello: It was my pleasure.