

Summer 2000

## Chief Justice Marshall as Modern, 33 J. Marshall L. Rev. 1145 (2000)

Walter J. Kendall III

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Courts Commons](#), [Judges Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Walter J. Kendall III, Chief Justice Marshall as Modern, 33 J. Marshall L. Rev. 1145 (2000)

<http://repository.jmls.edu/lawreview/vol33/iss4/19>

This Symposium is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

# CHIEF JUSTICE MARSHALL AS MODERN

WALTER J. KENDALL III\*

## INTRODUCTION

Professor Clinton's conclusions about the limited nature of judicial review expressed in his book,<sup>1</sup> and the reinforcing argument in his paper<sup>2</sup> that Chief Justice Marshall's theory of constitutional interpretation was based on the classical legal naturalism of Grotius, bring to the fore both grand theories and local practices that have not received the attention they deserve. The breadth and depth of Clinton's challenge to current views of the Marshall era and to modern interpretive theories and practices can be ignored only at the risk of misunderstanding both. Proper response really requires at least one, if not several, full length essays. Fortunately, the tradition of and constraints on a "commentator" permit me to isolate several points for focus and critique.

First, I want to challenge Clinton's central claim that Grotius was the source of, or model for, Marshall's jurisprudence. Second, accepting the words Clinton refers to as encapsulating Chief Justice Marshall's interpretive approach, I will propose an alternative understanding of those words. This alternative understanding will support an argument that Marshall had a more activist understanding of the role of the Court. Third, I will accept Clinton's arguments in his book *Marbury v. Madison and Judicial Review*<sup>3</sup> about Marshall's understanding and practice of judicial review—that it is limited to threats to the departmental integrity of the Courts and to cases or controversies where there is an unavoidable conflict between a statute and the Constitution; that in the first circumstance, that of threats to the Court's departmental integrity, the findings of the Court are binding on other branches, while

---

\* Professor of Law, The John Marshall Law School. I wish to thank my colleague Professor Samuel Olken for several helpful conversations about these matters and for editorial assistance transforming my oral comments into a written essay.

1. ROBERT L. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989).

2. Robert L. Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935 (2000).

3. CLINTON, *supra* note 1.

in the latter, they are not.<sup>4</sup> I will argue that it is the context of the institutional structure of the times that makes such a limited role for the Court defensible. However, the modern institutional system requires a more active judiciary. And finally, I want to challenge Clinton's assertion that for Marshall and his contemporaries there was a single, correct, "true" meaning of the Constitution: that "the idea that interpretation being called forth by linguistic uncertainties was essentially unknown."

### I. GROTIUS

Is Hugo Grotius a source of Marshall's jurisprudence? Is Grotius a proper lens through which to see Marshall more clearly and accurately? I think it most unlikely both because of the pre-modern views of Grotius, and for a common sense reason: Grotius didn't address the role of a judge in a constitutional court in his treatise.<sup>5</sup> However, it must be said that this conclusion, as all conclusions about Grotius, must be somewhat tentative. It has recently been said that:

To read Grotius comprehensively is far from easy. He is the last great figure in whose thought a unity of theology, law, philology, and history is effective. He was the epitome of late Renaissance man, a polymath who ranged across the boundaries of our modern disciplines, and there are few modern readers, even among the ranks of professional scholars, who can claim the competence to read the whole of his output with understanding. Furthermore, his style of writing sets many traps for the incautious. The page is crowded with quotations—classical, biblical, patristic, occasionally, contemporary—spilled extravagantly across its surface. Only on closer examination do we find that they are quite careless, and often do not support the case that Grotius himself intends to make, but merely illustrate the vast range of commonplace and philosophical opinion through which an encyclopedic discussion has to pick its way. To discover his own views we must isolate the terse dialectical argument, which develops a complex position so economically that crucial moves can very easily be overlooked. Grotius is a dangerous person to quote, at least for those whose taste in quotations, like his own, is confined to single sentences or less.<sup>6</sup>

It is because of these difficulties and the numerous, but often conflicting interpretations of Grotius' views,<sup>7</sup> that I've adopted the

---

4. *Id.* at 81-101.

5. HUGO GROTIUS, *THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS)* (Louise Loomis trans., Walter J. Black, Inc. 1949) (1625).

6. O'DONOVAN AND O'DONOVAN, *FROM IRENAEUS TO GROTIUS - A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT* 787 - 88 (1999).

7. *See, e.g.*, RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT 1572 - 1651*, Ch. 5 (1993); and PAULINE C. WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY - AQUINAS TO FINNIS*, Chs. 5 and 6 (1998) (Westerman disagrees with Tuck about the degree of equivocation in Grotius concerning the prece-

strategy used by Michael P. Zuckert in *Natural Rights and the New Republicanism*<sup>8</sup> in an attempt to fix Grotius' place in the history of thought. Zuckert takes five basic points from the Declaration of Independence and fixes a theorist's place in the history of thought, in part by comparing his ideas to five fundamental ones expressed in the Declaration of Independence. I will compare, as does Zuckert, some of Grotius' ideas with those expressed in the Declaration of Independence, a document of both historical and philosophical importance to John Marshall and the other post-Revolutionary jurists.

One fundamental premise of the Declaration of Independence is the notion that government is an artifact instituted among people to serve their ends. Alexander Hamilton and other American revolutionaries ultimately crafted a constitutional system based, in large part, upon this seminal concept. As Hamilton himself explained in *The Federalist No. 1*, the Constitution is all about "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident or force."<sup>9</sup> Grotius, however, assumed "there was no 'state of nature,' no uninformed, pre-social human existence,"<sup>10</sup> and that there was always a society or some form of government.

On the other hand, some scholars suggest that at a certain point Grotius "no longer view[ed] society as a natural association, but as an artificial one."<sup>11</sup> While this statement may be confusing society and the nation-state, it cannot be doubted that Grotius recognized that humans have a "desire for society, that is, for life in a community" that is sufficiently strong that "we should not grant as a universal proposition" that self-interest rules people's actions.<sup>12</sup> This certainly differs from Hobbes' supposition of the natural state of people at war with each other,<sup>13</sup> and from Locke's more pacific state of nature.<sup>14</sup> If this view of Grotius is correct, and he influenced Marshall, then Marshall is less a liberal and more a republi-

---

dence of one's own good over that of another person (*supra* at 135) and about Grotius' views on the alienability of individual rights (*supra* at 172)).

8. (1994).

9. THE FEDERALIST NO. 1 (Alexander Hamilton).

10. O'DONOVAN AND O'DONOVAN, *supra* note 6, at 790.

11. WESTERMAN, *supra* note 7, at 164.

12. GROTIUS, *supra* note 5, Preface at para. 6. The proper or better characterization of Marshall's views is discussed at length by Hobson. Charles Hobson, *The Great Chief Justice: John Marshall and the Rule of Law*, 34 John Marshall Law Review 16-25 and related footnotes (1996).

13. HOBBS, LEVIATHAN (1651).

14. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690).

15. The proper or better characterization of Marshall's views is discussed at length by Hobson. Charles Hobson, *The Great Chief Justice: John Marshall and the Rule of Law*, 34 John Marshall Law Review 16-25 and related footnotes (1996).

can than some argue.<sup>15</sup>

A second point is that the Declaration of Independence set as the end of government the security of life, liberty, and the pursuit of happiness among the individual rights. Grotius, however, did not see rights (*jus*) as fully separate or distinct from law (*lex*) or government. While Grotius did not share Aquinas' notions of the subordination of right to (natural and divine) law, he did retain a positive relational or interpersonal notion as a part of his understanding of right.<sup>16</sup> His theory was thus merely transitional to the more individualistic view of the Declaration.

The Declaration of Independence also addresses the question of consent. The Declaration says "governments . . . deriv(e) their just powers from the consent of the governed." Grotius focused in his book on war and peace. He believed that agreements between States are essential for peace, so he gave consent or agreement as the source of right or obligation more meaningfulness than prior thinkers. Grotius did speak of a majority as possessing the rights of a whole,<sup>17</sup> but he allowed that the original political contract, so to speak, could provide for an absolutist regime.<sup>18</sup>

Equality is the fourth basic idea from the Declaration. Yet Grotius dismissed the notion of distributive justice. He was moving away from the wars of Protestantism (he almost lost his life in one such dispute), and thereby its focus on equality. In fact, he dedicated his book to King Louis of France!

Finally, the Declaration refers to the right of revolution. "Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it." Grotius recognized no such natural right of resistance. However, he developed a long list of circumstances in which resistance in some form or another, usually other than outright abolition, was justified.<sup>19</sup>

For the foregoing reasons, Zuckert concludes that Grotius was the link between medieval views and those of John Locke. Locke, of course, was the enlightenment political philosopher whose ideas about consent and the body politic significantly influenced the author of the Declaration, Thomas Jefferson. Zuckert also suggests that Trenchard and Gordon, the writers of *Cato's Letters*, were the link between Locke and the future.<sup>20</sup>

Consequently, it is most unlikely that Grotius was of direct influence on Marshall's jurisprudence, especially as he said little

---

15. The proper or better characterization of Marshall's views is discussed at length by Hobson. CHARLES HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 16-25 and related footnotes (1996).

16. See MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 139-42 (1994).

17. GROTIUS, *supra* note 5, at Book 2, Ch. 5, para. 17.

18. See generally, ZUCKERT, *supra* note 16, at 258-59, 368 n. 36.

19. GROTIUS, *supra* note 5, at Book 1, Ch. 4, para. 2.

20. See ZUCKERT, *supra* note 16, at 297-319.

or nothing specific about the role of judges on a constitutional court. As will be developed below, Chief Justice Marshall was more a "modern" than either Grotius or Blackstone, the eighteenth-century British jurist who adopted many of Grotius' ideas. Marshall's views, as were those of Madison and other early American constitutional thinkers, were sufficiently creative and experimental, that it is a distortion to attribute their origins too much to Grotius or any other pre-modern political philosopher.

## II. THE MEANING OF JOHN MARSHALL'S DISSENT IN *OGDEN V. SAUNDERS*

Professor Clinton offers as a brief summary of Marshall's approach to and support for limited judicial review the following passage from *Ogden v. Saunders*.<sup>21</sup>

The principles of construction which ought to be applied to the Constitution of the United states [are well known] . . . To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.<sup>22</sup>

I accept this as a summary of the Chief Justice's approach, but I offer an alternative understanding of Marshall's constitutional interpretation that makes him a much more activist jurist than Clinton argues he is.

### A. "Those for whom the instrument was intended"<sup>23</sup>

This phrase does not refer to the drafters of the instrument but rather to the people who live under the Constitution. For James Madison, those who ratified the Constitution in the state conventions were of particular relevance. As Madison dramatically said during the debate in the House of Representatives on the Jay Treaty in 1796:

Whatever veneration might be entertained for the body of men who formed the Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and vitality were breathed into it by the voice of the people, speaking through the several state conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not

21. 25 U.S. (12 Wheat.) 213 (1827).

22. *Id.* at 232.

23. *Id.*

in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.<sup>24</sup>

Those for whom the instrument was intended also are future generations. Hamilton made this explicitly clear, especially in the opening paragraph of the first of the *Federalist Papers*.<sup>25</sup> Marshall himself not only recognized this, he used it as a major premise for his interpretive approach to delineating the powers of the national government. In 1819, long before it was a reality, he wrote of "this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific . . .," and of the government having the necessary powers to meet the "exigencies of the nation . . ."<sup>26</sup>

### B. *The Nature of the Instrument*

Charles Hobson, in discussing the significance of Marshall's famous line "we must never forget, that it is a constitution we are expounding,"<sup>27</sup> says Marshall "meant only that the Constitution should not be read as a detailed blueprint for governing; it did not signify approval of the idea of an evolving Constitution."<sup>28</sup> Yet he cited in a footnote a statement of Marshall's in an earlier opinion, *Bank of the U.S. v. Deveaux*,<sup>29</sup> which suggests Marshall meant something of substantive significance and was not merely referring to the drafting differences between constitutions and statutes. In *Deveaux*, Marshall said "A constitution, from its nature, deals in generals, not in detail . . . Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles."<sup>30</sup>

Jack Rakove, in *Original Meanings*, says the Committee on Detail, which drafted the original text of the Constitution, "generally followed" the advice given it by Edmond Randolph:

In the draught of a fundamental constitution two things deserve attention:

1. To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events; and

---

24. JACK RAKOVE, *ORIGINAL MEANINGS* 362 (1996) (quoting James Madison). Rakove acknowledges that Madison appears to have contradicted himself on the questions of how best to determine original intent and its relevance to constitutional interpretation. *See id.* at 339-365.

25. THE FEDERALIST NO. 1 (Alexander Hamilton).

26. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

27. *Id.* at 407.

28. CHARLES F. HOBSON, *supra* note 15 at 119.

29. 9 U.S. (5 Cranch) 61 (1809).

30. *Id.* at 87.

2. To use simple and precise language, and general propositions, according to the example of the constitutions of the several states (for the construction of a constitution necessarily differs from that of law).<sup>31</sup>

Again, Marshall would appear to agree. In his *Defense of McCulloch*, writing as a Friend of the Constitution, he writes: "No one of the circumstances which might seem to justify rather a strict construction (as opposed to what Hobson calls a "fair construction") (as suggested by Hampden, Marshall's critic in this debate) apply to a constitution . . . ."<sup>32</sup>

Marshall continues that a Constitution is not a contract between enemies; not a zero-sum situation; not a contract with a single object. Rather, it is constitutive of a government and a people. In his words Marshall said: "The powers of government are conferred for their own benefit. . . and to be exercised for their good." It is intended to be a general system for all future times, to be adopted by those who administer it, to all future occasions."<sup>33</sup> Thus, it seems clear that Marshall saw the Constitution as fundamentally different from a statute, and as being adaptable in future applications depending upon changed circumstances.

C. *"Provisions neither restricted to insignificance nor extended to objects not contemplated by its framers"*<sup>34</sup>

The key words are those italicized. The Constitution is to be interpreted in light of the objects contemplated by the framers. This is what Clinton calls "the mischief rule," if I understand him correctly.

So what was the mischief to be addressed, the objects contemplated by the framers? Rakove, again in *Original Meanings*, says that the experimental democratic experiences that emanated from both the Articles of Confederation and the eleven state constitutions adopted in the relatively brief period between the end of the American Revolution and the creation of the Constitution were "the greatest influence in the debates of 1787-88."<sup>35</sup> Hobson goes a step further and refers to the relevance and weight Marshall gives to this period as a "bias" of Marshall, himself.<sup>36</sup>

If there was "mischief," and it was to be remedied, the constitutional system must be such that government has the requisite energy to do the job. As the earlier quote indicates, Marshall was sure the national government had the authority, power, or energy

31. RAKOVE, *supra* note 24, at 342.

32. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 170 (Gerald Gunther ed., 1969).

33. *Id.*

34. *Ogden*, 25 U.S. (12 Wheat.) at 332.

35. RAKOVE, *supra* note 24, at 21.

36. See HOBSON, *supra* note 15, at 207.



to conquer the continent. And William Novick in his recent book, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996), makes a compelling case that the states also had plenty of energy in their police power to deal with private economic power.

Professor Clinton, however, asserts that the Constitution should be understood as binding, not liberating, and that rather than accommodate, or even contemplate change, it was meant to confine or limit it!<sup>37</sup> It seems to me, though, that the immediately preceding comments about “energy” and “police powers” of the states rebut those assertions. Further, the text of the Preamble of the Constitution expressly speaks in terms of liberation and future generations. I’ll leave this point without saying more and await Sandy Olken’s article on the meaning and relevance of the Preamble.<sup>38</sup>

This analysis reinforces the point made in Part Four below. The institutional structure was and is a complex human construct. The concern was with power—both governmental and private economic power—how to harness it to do good and to limit it from doing ill.<sup>39</sup> That is what separation of powers, federalism, republicanism, majority rule, juries, and judicial review, among other essential constitutional features, have always been about and why they remain such contentious concepts.

The structure can be thought of as a picture puzzle where if one piece is changed the picture is changed. I think John Kenneth Galbraith’s phrase “countervailing powers” captures my point. There is a delicate balance within each component of the structure and between the components of the overall structure. The balance is between the constraining features (to protect liberty and property) and the liberating features (to facilitate the pursuit of happiness).

---

37. Clinton, *supra* note 2, at 959-688.

38. Samuel R. Olken, *The Constitution as an Article of Faith: Chief Justice John Marshall and the Preamble* (manuscript in progress) (arguing in part, that for Marshall, the Preamble embodied several fundamental tenets of a constitutional democracy, including popular sovereignty; respect for individual liberty; limited governmental authority and recognition of the importance of change consistent with broad notions of social justice). Professor Olken asserts that Marshall, at times, relied upon the Preamble to interpret the interstices of the Constitution and that his frequent references—both direct and indirect—to the Preamble in his constitutional opinions demonstrated not only his implicit faith in the United States as an experiment in constitutional democracy but also his perception that the framers intended the Constitution to function in a practical sense in a democratic republic.)

39. For the significance of James Madison’s recognition of the importance of regulating private economic power, see generally Walter J. Kendall, *The Republican Revival Debate - Private Economic Power, the Forgotten Factor*, 16 U. DAYTON L. REV. 363 (1991).

### III. THE SIGNIFICANCE OF INSTITUTIONAL STRUCTURE

Assuming Professor Clinton is correct that the proper understanding of Marshall's view of the role of the Court was essentially "departmental,"<sup>40</sup> what did the institutional structure it was a part of look like? Among the most significant features of the governmental systems in 1789 that protected the rights of the people and made its decisions reflective of the will of the people were the written Constitution itself and federalism. There was also public opinion formed, in part at least, by a free press, manifested in elections, and aggregated in the legislative process; impeachment; the amendment process; and, most importantly, the jury. That is because juries regularly asserted and exercised the powers to determine both the facts and the law, and thereby were an absolute check on governmental action focused on an individual.

I suggest that these institutions have diminished in their effectiveness as checks on specific instances of governmental excess and abuse. Despite recent revitalization of states' rights, federalism is not what it was. Administrative agencies have immunized much public policy from control by the people. The impeachment and amendment processes are seldom used. And the press isn't what it used to be. Again, most importantly, the role of the jury has been eroded dramatically. To limit, if not eliminate juries as the ultimate check, a series of innovations have been introduced beginning as far back as Lord Mansfield's tenure on the English bench. These include "special pleading, special verdicts, compulsory nonsuits, (binding) instructions in law and evidence to juries, and the setting aside of verdicts for decisions that were contrary to law or to the evidence (as determined by the judge)."<sup>41</sup> Assessment of the current role of the jury has to also consider the elimination of the requirement of unanimous twelve person juries in many circumstances.

I am suggesting this all has resulted in a sufficient change in the institutional arrangement of the governmental system to support, if not require, more active judicial review along the lines suggested by Justice Jackson in *Carolene Products*' footnote 4.<sup>42</sup>

### IV. LINGUISTIC UNCERTAINTY AND CONSTITUTIONAL INTERPRETATION

The quote from *Ogden v. Saunders* upon which Professor Clinton relies states that the intention of the Constitution "must

---

40. See MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY—THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* 67 (and the authorities cited in the footnotes) (1996).

41. See generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 40-41 (and the authorities cited in the footnotes) (1985).

42. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

be collected from its words."<sup>43</sup> I want to focus on the word "words."

Professor Clinton says linguistic uncertainty as a cause for interpretation was unknown to John Marshall and his contemporaries. He goes so far as to assert that there is a "true" meaning of the text, making those who see linguistic uncertainty guilty of "sophistry."<sup>44</sup> In denying the reality of linguistic uncertainty, or at least its relevance, Professor Clinton cites Grotius' chapter on "Interpretation." Yet, in that chapter, Grotius himself refers to words admitting of several interpretations, to conspicuous obscurity in some words, and to the fact that many words have several meanings.<sup>45</sup>

James Madison, in *The Federalist No. 31*, addresses the reality and significance of the obscurities inherent in "the institutions of man." Specifically, he acknowledges that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." He specifies "three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of idea, (a)ny one of (which) must produce a certain degree of obscurity."<sup>46</sup>

Charles Hobson, in *The Great Chief Justice*, would appear to agree with Madison. Citing several John Marshall opinions, he says: "Judicial power as exercised in expounding written law was largely founded on the imprecision, obscurity, and ambiguity of language that inevitably characterized even the most carefully drawn statute or other legal instrument."<sup>47</sup>

Let me go further and offer some very preliminary thoughts based on a reading of Roman Jakobson's essay, *The Speech Event and the Functions of Language*. Jakobson sets out six factors of any verbal communication. The (1) ADDRESSER sends a (2) MESSAGE to the (3) ADDRESSEE. To be operative the message requires a (4) CONTEXT. There must be a (5) CODE common to both addresser and addressee, and a (6) CONTACT or physical or psychological way to stay in touch.<sup>48</sup>

Is it possible that the many legal theories of interpretation proposed during the last fifteen or twenty years correspond to an emphasis on different factors or parts of verbal communication? I want to most tentatively propose that there is something to be said for the following alignment:

|  |               |
|--|---------------|
| <i>Interpretive theory focuses on particular</i> | <i>Factor</i> |
| Phenomenologists                                 | Addresser     |

43. *Ogden*, 25 U.S. (12 Wheat.) at 332.

44. Clinton, *supra* note 2 at 949.

45. GROTIUS, *supra* note 5, Book 2, Ch. 16, para. 1-12.

46. JAMES MADISON, THE FEDERALIST NO. 37.

47. HOBSON, *supra* note 15, at 192.

48. ROMAN JAKOBSON, ON LANGUAGE 69-79 (Linda R. Waugh and Monique Monville-Burston eds., 1990).

|                   |           |
|-------------------|-----------|
| Deconstruction    | Message   |
| Law and Economics | Addressee |
| Marxists          | Context   |
| Structuralists    | Code      |
| McLuhan           | Contact   |

In any event, to the extent Professor Clinton's analysis and others' depends on the absence or illegitimacy of linguistic uncertainty, he is and they are out of step with both historic and contemporary theory and fact. On a more positive note, perhaps there is some common ground. Professor Clinton's "mischief rule" and his references to Aristotle's practical reason<sup>49</sup> sound similar to Karl Llewellyn's situation sense<sup>50</sup> and flexible enough to accommodate Jakobson's multi-factor view of language.

#### V. THREE BRANCHES OF THE NATIONAL GOVERNMENT IN A SYSTEM OF CHECKS AND BALANCES

I have two additional but related thoughts in response to two threads in several of the presentations and comments at this symposium. First, the Supreme Court is not autonomous, even if the law otherwise is or should be. The Supreme Court at least is *the* third branch of government. The members of the Court are partisans, not just savants, to use the categories proposed by Professor White. Partisans, according to Professor White, may be inevitable, but they are corrupt in the eighteenth-century sense. Madison, on the other hand, was equally judgmental in a sense, but saw that partisanship or faction, if properly channeled by the structures and system of government, actually contributed to social, political, and economic progress.<sup>51</sup>

Second, almost without exception, the speakers have referred to the tri-part and federal system as "separation of powers." This label tends to reinforce a formalist or "departmental" understanding of the role of each branch or level of government. Yet plainly the Constitution is a system of checks and balances. Madison dismissed parchment barriers in *The Federalist No. 48* and emphasized that each branch had real power and authority to check and balance the other.<sup>52</sup> This Madisonian view supports a functionalist and dynamic understanding of the role of each branch and level of government.

These two additional points, that the Court is a governing institution and the system is one of dynamic checks and balances,

49. NICOMACHEAN ETHICS 6.5.1140a 25-31.

50. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

51. JAMES MADISON, THE FEDERALIST NO. 10.

52. JAMES MADISON, THE FEDERALIST NO. 48.

further undercut the argument of Clinton and most of the other speakers that the founders and Chief Justice Marshall had and practiced a cramped view of judicial review. The revisionists may persist, but they can succeed only by ignoring both Madison and Marshall.