The John Marshall Law Review

Volume 33 | Issue 4 Article 24

Summer 2000

The Marshall Court and the European Court of Justice, 33 J. Marshall L. Rev. 1197 (2000)

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THE MARSHALL COURT AND THE EUROPEAN COURT OF JUSTICE

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Professor Johnson provides a fresh perspective that promises to deepen our understanding of the traditional view that Chief Justice John Marshall enhanced the power of the Supreme Court while facilitating the growth of federal power in relation to that of the states. Perhaps unconventionally for a historian, he seeks to illuminate the workings of a past institution by looking at those of a modern institution, the European Court of Justice. Scholars should be instinctively cautious about adopting a comparative approach. With their fondness for the unique and particular, historians should be especially so, particularly when the two institutions are so widely separated in space and time. As a sound historian, Johnson is sensitive to the potential pitfalls of comparative history. He shows appropriate caution by not overdrawing comparisons between the Marshall Court and the European Court and by not reading too much significance into the parallels between the two. Johnson is not the first scholar to compare the American and European courts, as he points out. Previous studies, while mentioning the Marshall Court in passing, have principally focused on the European Court and the modern Supreme Court as the points of comparison and have taken a social science approach that examines the workings of a central court in a modern federal system. Johnson's focus, he explains, "is not upon the European Court of Justice, but rather upon the Marshall Court, and what the experience of the European Court tells us about the Marshall era."[1]

Notwithstanding a vast temporal separation, a comparison of the Marshall and European Courts seems especially apposite given their institutional settings at the beginning stages of developing federal systems. American federalism and European unity began in the wake of wars that disrupted prewar economies that were similarly dependent on international commerce. Both the newly independent American states and the post-war European states faced similar challenges posed by the collapse of

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1. Herbert A. Johnson, *Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice*, 33 J. MARSHALL L. REV. 1063 (2000).

their commercial and economic systems and by their vulnerability to rival superpowers. Both experienced the same incentives toward eliminating internal trade barriers and had much to gain by pooling resources into a closer economic union. One apparently striking difference is that the European Union is based on a series of international treaties that, along with multilingual Community legislation and judicial decisions, constitute the law of the European Community. The United States Constitution, by contrast, is a single document with one official language that has been subject to fewer amendments over a much longer period. Somewhat mitigating this difference, however, is that the European treaties have become "constitutionalized" as foundational documents that operate something like our Constitution. Moreover, the "open-textured" provisions, the vague and undefined terms that are found in the European treaties and call forth judicial interpretation, have their counterparts in the United States Constitution.

Johnson's ensuing analysis turns up some interesting commonalities between the two courts, for example, their similar approaches to interpretation, their willingness to leave constitutional questions "open-ended," their reliance on the principle of supremacy to facilitate centralized control of the economy, and their determination to protect and extend their jurisdictional turf. Johnson's larger aim is not simply to point out similarities but, as he says, to gain new insights into the history of the Marshall Court. The net result of this comparative exercise, I believe, is to reinforce the orthodox view that the Marshall Court was a nationalizing and centralizing institution, that it promoted the growth of federal powers and restricted state powers while shrewdly exploiting its jurisdiction to build up its own institutional strength. In one sense, Johnson does question orthodoxy by de-emphasizing the role of Marshall, stripping away at the heroic image created by Beveridge and other biographers. He shifts attention away from the strong and forceful personality of the great Chief himself to institutional dynamics as a way of explaining the achievements of the Marshall Court. Central courts in federal unions, particularly those operating at the outset of their establishment, appear to "enjoy unique advantages in shaping the constitutional and legal foundations of those emerging central governments[.]"[2] Thus Marshall happened to be in the right place at the right time; in a real sense, greatness was thrust upon him. This calls to mind Holmes's famous comment delivered during the centennial of Marshall's appointment in 1901: "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and

2. *Id.*

part of his greatness consists in his being *there*."[3] Without gainsaying Marshall's greatness, Holmes asked us to "remember also that there fell to Marshall perhaps the greatest place that ever was filled by a judge[.]"[4]

Johnson devotes the longest section of his paper to a discussion of judicial interpretation. Borrowing the terms "contextual" and "teleological" or "purposive" that describe the prevailing modes of judicial interpretation on the European Court, Johnson appears to argue that Marshall Court decisions relied on a purposive interpretative strategy to a greater degree than has previously been recognized. He also seems to employ these terms somewhat in opposition to each other, the one being text-based, the other being non-text-based. But the commentators on the European Court on whom Johnson relies do not sharply distinguish between these modes of interpretation and treat them together as largely supplanting two other methods, the literal and historical. The literal, which looks to the natural and ordinary meaning of words, is of limited utility for the European Court because of the multilingual nature of Community law and because of the generality of the language of the Treaties, the "open-textured" nature of many of its provisions and in Community legislation.[5] The latter reason might seem to apply with equal force to the United States Constitution as well, but the Marshall Court appears to have relied on literal construction to a much greater extent than does the European Court and used it to great effect, not only in ordinary statutory construction but in expounding the Constitution as well. Indeed, perhaps the most striking aspect of Marshall's approach to constitutional interpretation was the degree to which he was able to assimilate it to the methods and techniques of statutory construction.

The European Court also largely eschews reliance on historical materials as a guide to intention. The same was true of the Marshall Court, which refused to allow what it called "extrinsic" evidence to influence its interpretation of the Contract Clause —for example, the absence of complaints about bankruptcy laws at the time the Constitution was ratified.[6] Marshall did occasionally appeal to the "history of the times" and cited *The Federalist*, but always in a way that was illustrative rather than dispositive of the question of meaning.

According to the commentators on the European Court, the

3. Oliver Wendell Holmes, John Marshall, in Collected Legal Papers 267-68 (1920).

4. *Id.* at 267-68, 270.

5. L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 302-22 (4th ed. 1994); STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 143-49 (1993).

6. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

contextual and teleological approaches have had to be increasingly employed because resort to plain meaning does not provide a satisfactory resolution of the issue. These two approaches are typically used in the same opinion and indeed blend almost imperceptibly into one another. This merging of the two methods is reflected in this passage from an opinion by that court: "Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole[.]"[7] A passage from another opinion, which Johnson quotes as an example of contextual reasoning, reflects the same intermingling of interpretative methods: "To determine in a particular case the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions."[8] It would probably not be too difficult to find an equivalent expression in a Marshall Court opinion. For example, in *United States v. Fisher*, Marshall says, "It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole."[9] In any event, the Marshall Court resorted to contextual and purposive reasoning, though perhaps these terms have not heretofore been applied to its interpretative methods. The Chief Justice well understood that the meaning of a particular clause or phrase was not always self-evident, that it could not be divorced from its context and had to be interpreted by reference to the subject, nature, and purpose of the law or Constitution.

Marshall's preferred rule of construction was "to adhere to the letter of the statute, taking the whole together." A law, he said, "was the best expositor of itself," every part of which was "to be taken into view, for the purposes of discovering the mind of the legislature."[10] In constitutional exposition no less than in statutory construction, Marshall was adroit in using a written instrument as its own dictionary. He eschewed clause-bound textualism in favor of a broader technique that attempted to read the contested word or phrase by comparing or contrasting it to identical or similar words or phrases elsewhere in the Constitution. Akhil Reed Amar calls this technique "intratextualism," citing as a classic example Marshall's analysis of the word "necessary" in *McCulloch*. Amar enthusiastically endorses "intratextualism" as a valuable legacy from the Marshall

7. WEATHERILL & BEAUMONT, *supra* note 5, at 148 (quoting Case c-213/89, CILFIT v. Italian Ministry of Health, 1982 E.C.R. 3415, 3430 (1990)).

8. Johnson, *supra* note 1 at 1078 (quoting Case 22/70, Re The European Road Transport Agreement: E.C. Commission v. E.C. Council, [1971] C.M.L.R. 335, 336-39 (1971)).

9. 6 U.S. (2 Cranch) 358, 386 (1805).

10. Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 52 (1804).

Court, one that can be usefully employed by the modern-day constitutional interpreter. Intratextualism, says Amar, also involves using the Constitution as a concordance, in which the interpreter places similar but non-contiguous clauses together in an effort to discern a deep thematic connection or larger harmony. An example is *Martin v. Hunter's Lessee*, where Justice Story invoked the phrase "the people" in the Preamble and in the Tenth Amendment –that is, at the beginning and at the end of the Constitution– in a way that suggests a deep underlying constitutional principle of popular sovereignty.[11] This variety of intratextualism appears to approximate the teleological or purposive construction favored by the European Court.

It may be helpful to see the literal, contextual, and purposive as forming a continuum within the broader category of textualism. The literal focuses on the particular clause or phrase in question, the contextual on the context (that is, the placement of the clause or phrase within the Constitution or Treaties), and the purposive on the grand design or scheme of the Treaties or Constitution that is spelled out in the preamble and in various articles. All of these modes of interpretation are more or less anchored to the text. Marshall made use of all three (and perhaps a historical argument as well) in *McCulloch v. Maryland*. The difference between the European Court and the Marshall Court on the matter of interpretation seems to be one of emphasis and degree. Both employ "textualist" or "intratextualist" approaches, though with the European Court the contextual and purposive usually assumes primacy over the literal. With the Marshall Court it is the other way around. This difference is neatly illustrated by two passages from opinions given by these respective courts. In the first, the European Court observes: "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme, and the wording of those provisions."[12] Contrast this with Marshall, who in *Brown v. Maryland* (1827) said:

> In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connexion with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.[13]

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11. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 758-63, 792-93 (1999).

12. BROWN & KENNEDY, *supra* note 5, at 304 (quoting Case 26/62, Van Gend en Loos v. Nederlandse administratie der belastingen, 1963 E.C.R. 1 at 12, [1963] C.M.L.R. 105 (1963)).

13. 25 U.S. (12 Wheat.) 419, 437 (1827).

Despite this difference of emphasis, the interpretative objective is the same: to determine whether the contested word or phrase is to be understood in a more restrictive or more enlarged sense than the common understanding. What seems beyond doubt is that the Marshall Court used close textual analysis and the European Court has used contextual and teleological construction to the same effect: to support an expansive reading of federal powers and of the restrictions on state powers