AN ?ASSEMBLAGE? OF OPINIONS: HOW THE COUNTERPOINT OF THE ROBERTS COURT?S SECOND AMENDMENT CASES FIXED INADVERTENCIES IN JOHN MARSHALL'S TREASON DOCTRINE

51 Rutgers L. Rec. 200 (2024) | WestLaw | LexisNexis | PDF **INTRODUCTION: "ASSEMBLAGE"**

A word not defined elsewhere in a source takes its meaning from the context in which it is used.5[1] But when the context of a word changes, so does its meaning. Chief Justice John G. Roberts reasoned on behalf of the Court in King v. Burwell (the second Obamacare case) that ?oftentimes the meaning?or ambiguity?of certain words or phrases may only become evident when placed in context.?[2]

In this context, the Constitution's Treason Clause plainly provides only two types of treason?levying of war and aiding of the enemy.[3] It states: ?Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.?[4] Because treason is the sole crime that was viewed with such importance, so as to be included in America's Constitution, its meaning is uniquely and particularly important.[5] Thus, its definition must be precise and specific. And this must be the case for all applications thereof.

When, however, Chief Justice John Marshall addressed the functions of treason, pursuant to Article III of the U.S. Constitution, he inserted a curious word into the mix, which no Court addressing treason has analyzed since??assemblage.? In its context, he wrote, ?[t]o constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose.?[6 But Marshall's term of art, ?an assemblage of persons,? is not within the text of the Treason Clause. This, thus, presents the question as to what effect, if any, Marshall's surplusage had on treason charges for levying war.

This article, therefore, addresses if and when treason is committed by one party?acting alone?whether the Treason Clause permits such prosecution and whether John Marshall's ?assemblage? in his treason opinions poses an obstacle thereto. While other avenues of federal charges remain, treason is seldom used.[7] Marshall's concept of the ?assemblage of persons? suggests a parallel as to the criminal procedure common law concept of conspiracy, wherein ?two or more persons,? via joint efforts, commit an act that is unlawful or leads to an unlawful result.[8] Conspiracy is, thus, what could be called a ?plus one? crime. In light of Marshall's interpretation, evidently, treason can also. But because that is not what Article III, Section 3 states, what follows is an analysis of the landmark cases for the Treason Clause and Second Amendment??look[ing] at the cases from the bottom up rather than the top down.?[9]

That analysis reveals that the Roberts Court's interpretation of the Second Amendment has changed the focus from militia dependent to individual dependent.[10 Dual analysis of these discrete aspects of the Constitution reveals a complementary nature in which the contemporaneous individual interpretations of the Second Amendment surmounted Marshall's textual deviations to the Treason Clause. This article posits that the elements of treason inadvertently changed under the Marshall Court but fortuitously found course-correction with the Roberts Court's twenty-first century individualization of the Second Amendment.

[1 See generally Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 375 (1816) (Story, J., writing, ?[l]anguage is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis. . . The language of the framers of the constitution . . . assumes, as a postulate, that wherever power is given it will be used or at least used, as far as the interests of the American people require it, if not from the natural proneness of man to the exercise of power, at least from a sense of duty, and the obligation of an oath.?); Holloway v. United States, 526 U.S. 1, 15?16 (1999) (Scalia, J. dissenting) (?It is so utterly clear in normal usage that [the word ?intent' does not include conditional intent, that only an accepted convention in the criminal law could give the word a different meaning?); United States v. Santos, 553 U.S. 507, 532 (2008) (Alito, J., dissenting) (?[when a word has more than one meaning, the meaning that is intended is often made clear by the context in which the word is

used.?); Tyler v. Cain, 533 U.S. 656, 662 (2001) (Thomas, J., writing, ?We do not, however, construe the meaning of statutory terms in a vacuum.?); Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 408 (2011) (Thomas, J., writing on behalf of the Court, ?we must consider the provision's ?entire text,' read as an ?integrated whole.'?).

[2 King v. Burwell, 576 U.S. 473, 486 (2015). [3 U.S. CONST. art. III, § 3. [4 Id.

[5 See Morissette v. United States, 342 U.S. 246, 265 (1952) (?[T]reason?the one crime deemed grave enough for definition in our Constitution itself?requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy.?).

[6 Bollman, 8 U.S. at 75 (emphasis added); Burr, 25 F. Cas. at 89 (emphasis added).

[7 See generally B. Mitchell Simpson, III, Treason and Terror: A Toxic Brew, 23 ROGER WILLIAMS U. L. REV. 1, 17 (2018) (surmising ?[e]ven though the Constitution prevents Congress from expanding the definition of treason by labeling other acts as treason, Congress may decide that other acts that could have been reasonably considered treasonous are felonies, and provide severe penalties for committing them.?). Professor Simpson also encourages, ?[t]he modern state representing contemporary society not only has the right, but also the duty to enforce the loyalty of its members and those who enjoy its protection . . . Treason is still a valid legal tool and it should be used.?. Id. at 53.

[8 HENRY CAMPBELL BLACK, M.A., A DICTIONARY OF LAW: DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN; INCLUDING THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, AND COMMERCIAL LAW; WITH A COLLECTION OF LEGAL MAXIMS AND NUMEROUS SELECT TITLES FROM THE CIVIL LAW AND OTHER FOREIGN SYSTEMS 257 (1st ed. 1891) (?In criminal law a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.?).

[9 Adam Liptak, supra note 4.

[10 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022). View the Entire Article