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Extract from Robert W. Bennett's Originalism and The Living American Constitution, in Robert W. Bennett & Lawrence Solum, Constitutional Originalism: A Debate (2011), citing Tillman's A Textualist Defense

Seth Barrett Tillman, *None*

Constitutional Originalism

A Debate

Robert W. Bennett and Lawrence B. Solum

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required by both House and Senate. If there were any doubt about its broad sweep, the one explicit exception for adjournment might seem to settle the matter. For why make a special point of one exception if others are possible?[35] But Article V of the Constitution deals with congressional action in proposing constitutional amendments, requiring a two-thirds vote of "both Houses" (the same vote necessary to override the president's veto!), and it says nothing about presidential involvement. This poses the question of whether for the amendment process Article V dissipates the seeming clarity in Article I about presidential involvement. To put the point another way, taken alone Article I seems clear about the amendment process, but when it is placed in a context that includes Article V, a different possibility comes into focus.[36]

To come to grips with at least some of these kinds of questions, Meese urged "a jurisprudence of original intention."[37] As we have seen, concern with the intention of legislation or of an enacting legislature had long played a central role in legislative interpretation, and it still does.[38] As we have also seen, concern with intention had early been imported into the constitutional setting. But the notion of intention had largely been accepted as if its meaning for a statute or the Constitution were clear,[39] and that was to change. There is now a growing literature, long overdue, on just what was meant by intention in the context of some written law.

The Summing Problem

The word *intention* is most commonly used to refer to mental states of individuals. The question then arises of just what might be meant by the intention of a multimember body that adopts a text through a process of voting. To be sure, the problem need not be seen as akin to ascribing a state of mind to a mountain. All the bodies, processes, and products to which intentions are attributed in the case of both legislation and the Constitution are suffused with individual human actors. There may be serious evidentiary problems in figuring out what was in the minds of individual participants. And these may be compounded by historiographical problems and questions about whether those trained in the law are suited for the historical digging that may be required.[40] Those are serious methodological problems, but if they could somehow be overcome, we would still have what I call a *summing problem*, whether and how we might appropriately move

14. O'Neill, *Originalism*, 14.

15. Ibid., 12–28. Something of an embarrassment to originalists has been Chief Justice Taney's originalist language in his opinion in the infamous *Dred Scott* decision. Dred Scott v. Sandford, 60 U.S. 393, 426 (1857). For an example see O'Neill, *Originalism*, 23.

16. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press 1982).

17. 290 U.S. 398 (1934).

18. U.S. Const. art. I, § 10, cl. 1.

19. 290 U.S. at 442–43.

20. Brest, "The Misconceived Quest."

21. "At various points in American history, originalism was not a terribly self-conscious theory of constitutional interpretation." Whittington, "The New Originalism," 599.

22. Rehnquist, "The Notion of a Living Constitution," 698.

23. Ibid., 694.

24. Ibid., 695.

25. Ibid., 700.

26. See, e.g., Edwin Meese, "Speech before the American Bar Association (July 9, 1985)", in Calabresi, *Originalism*, 47. As Henry Monaghan put it in the early eighties "For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition." Monaghan, "Our Perfect Constitution," *New York University Law Review* 56 (1981): 383–84 (emphasis in original).

27. Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999), 94; see Caleb Nelson, "Originalism and Interpretive Conventions," *University of Chicago Law Review* 70 (2003): 561–62; Gary Lawson and Guy Seidman, "Originalism as a Legal Enterprise," *Constitutional Commentary* 23 (2006): 54–55. Sometimes recognition of the point is not so clear, as many originalists routinely invoke the "text" of the document as if to suggest that it is self-defining. See, e.g., Antonin Scalia, "Response," in *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 129, 132. At one point, Justice Scalia recognizes the problem but then dismisses it by suggesting that "broader social purposes that a statute is designed, or could be designed, to serve" will simply be obvious. Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation*, 3, 23.

28. See Barnett, *Restoring the Lost Constitution*, 108.

29. See U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend XVII, cl.1.

30. U.S. Const. art. II, § 1, cl. 5.

31. See Keith Pratt and Richard Rutt, *Korea: A Historical and Cultural Dictionary* (Richmond, UK, Curzon Press 1999), 2.

32. U.S. Const. art. I, § 2, cl. 3.

33. See United States Department of Commerce v. Montana, 503 U.S. 442, 447–49 (1992).

34. U.S. Const. art. I, § 7, cl. 3.

35. For a very different interpretation, see Seth Barrett Tillman, "A Textualist Defense of Article I, Section 7, Clause 3: Why *Hollingsworth v. Virginia* Was Rightly Decided, and Why *INS v. Chadha* Was Wrongly Reasoned," *Texas Law Review* 83 (2005): 1265–1372.

36. See Hollingsworth v. Virginia, 3 U.S. 378, 381 (1798); Bruce Ackerman, "The Living Constitution," *Harvard Law Review* 120 (2007): 1759 ("the Founders . . . excluded the presidency from any role in constitutional revision").

37. Meese, "Speech before the American Bar Association," 52.

38. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) ("in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling") (Rehnquist, J.). Justice Scalia is one of the few