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From the SelectedWorks of Seth Barrett Tillman

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Extract from Wikipedia Entry for "Hollingsworth v. Virginia," citing Tillman's A Textualist Defense

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Available at: https://works.bepress.com/seth_barrett_tillman/193/

See http://en.wikipedia.org/wiki/Hollingsworth_v_Virginia
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Hollingsworth v. Virginia

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Alternative theory about the case

In 2005, an article in the *Texas Law Review*[3] by Seth B. Tillman theorized that it may be incorrect to interpret *Hollingsworth* as holding that constitutional amendment resolutions need not be presented to the President for possible veto.[14] This notwithstanding that the Court -- in decisions issued in the twentieth century -- itself has adopted that interpretation of its prior decision in *Hollingsworth*.[8][14] Tillman did not suggest that *Hollingsworth* was wrongly decided, but only that its scope (as originally understood) might have been narrower than commonly thought today.

Tillman noted that Justice Chase's statement was not his official opinion, but merely a remark from the bench at oral argument, and therefore the failure of the other justices to contradict him should not elevate the status of Chase's remark to an official opinion by either him or by the Court.[3] Moreover, Tillman argued that there were several other grounds potentially explaining the Court's decision, including: that the proposed Eleventh Amendment was in fact delivered to George Washington, he declined to sign it, and Washington's non-signature did not amount to a pocket vetobecause Congress remained in session.[3] If this latter explanation explains the Court's obscure language in its opinion, then the Court only decided that on the particular facts actually before it the Eleventh Amendment was valid.

Other explanations for the *Hollingsworth* holding are also possible. For example, Tillman also noted Chase's specific language at oral argument. Chase took the position that President played no role in regard to the "proposition ... or adoption" of amendments. But the Court's actual opinion only used the "adoption" language, not the "proposition" language used by Chase at oral argument. This might lead to the conclusion that the Court was of the view that once 3/4 of the states had ratified a proposed amendment (i.e., how the amendment was "adopted"), then it was part of the Constitution without respect to potential defects in how an amendment (such as the Eleventh Amendment) was proposed.

During oral argument in *Hollingsworth*, U.S. Attorney General Lee advanced two independent arguments in support of the validity of the Eleventh Amendment (leaving aside his discussion of the issue of whether or not the amendment only had prospective effect). He argued that it was valid because presentment to the president was not necessary. Lee also argued that "the amendment was in due form" because it was enacted using the same procedures which were used in enacting the Bill of Rights. 3 U.S. 381.

Lee did not advance the alternative theory that the Eleventh Amendment was valid because George Washington declined to veto it.[1] If the Court adopted this position in *Hollingsworth*,

which was one of the theories presented in the 2005 *Texas Law Review* article, then the Court silently based its decision in regard to a matter of law (not fact) on arguments which were not presented to it by one of the parties. On the other hand, Lee's "due form" argument is consistent with the text of the Court's decision. And once Chase had opened discussion distinguishing the proposition of amendments (by Congress) and their adoption (by the States), the parties were on notice that these issues were important to the Court. The parties had an opportunity to speak to these issues at oral argument. If they chose to neglect them, the Court could still address them, and arguably the Court did so in it decision.

Historian David E. Kyvig has argued that the Supreme Court in *Hollingsworth*adopted the position put forward by Attorney General Lee, although Kyvig published that argument several years prior to the 2005 article in the *Texas Law Review*.[15]Kyvig suggests that the Court adopted Lee's position. However, Kyvig does not explain which of Lee's specific arguments were adopted by the Court or how the language in the Court's opinion explains the primary issue in the case: the scope of Article V and the scope of Article I, Section 7, Clause 3 and the interplay (if any) between the two provisions.

See also

- List of United States Supreme Court cases, volume 3

References

1. ^ Jump up to:[a b c d e f g] *Hollingsworth v. Virginia*, 3 U.S. 378 (1798) (opinion full text)
2. ^ Jump up to:[a b c d] Marcus, Maeva. *Suits Against States*, pp. 274-289 (Columbia U. Press 1994).
3. ^ Jump up to:[a b c d] Tillman, Seth. "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*, Vol. 83, pg 1265, 1300 n. 78 (2005).