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Constitutional Originalism

A Debate

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required by both House and Senate. If there were any doubt about its
breadth 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? 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 presi-
dent’s veto), and it says nothing about presidential involvement. This
poses the question of whether for the amendment process Article V
dispenses the seeming clarity in Article I about presidential involve-
ment. 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 Arti-

To come to grips with at least some of these kinds of questions, Meese
drew “a jurisprudence of original intention.” 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. 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, 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 indi-
viduals. The question then arises of just what might be meant by the inten-
tion of a multimenber 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 inten-
tions are attributed in the case of both legislation and the Constitution
are suffused with individual human actors. There may be serious eviden-
tiary problems in figuring out what was in the minds of individual partici-
ants. And these may be compounded by historiographical problems and
questions about whether those trained in the law are suited for the histori-
cal digging that may be required. Those are serious methodological prob-
lems, but if they could somehow be overcome, we would still have what I
call a summing problem, whether and how we might appropriately move
15. Ibid., 154 (noting that a number of justices have found that the Founders’ original intent was to use the words “delegation” in the context of the famous Federalist No. 10.]


17. 291 U.S. 98 (1934).

18. U.S. Const. art. 1, § 10, cl. 1.

19. 293 U.S. at 442-44.


22. The original notion of a living constitution, 598.

23. Ibid., 104.

24. Ibid., 105.

25. Ibid., 100.


28. See Barnes, Restoring the Lost Constitution, 138.

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

30. U.S. Const. art. 1, § 3, cl. 5.


32. U.S. Const. art. 1, § 2, cl. 3.


34. U.S. Const. art. 1, § 7, cl. 3.


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