National University of Ireland, Maynooth

From the SelectedWorks of Seth Barrett Tillman

December 15, 2010

United States Senate Document -- The Constitution of the United States of America: Analysis and Interpretation (Supp. 2010), citing Tillman's A Textualist Defense

Seth Barrett Tillman

Available at: https://works.bepress.com/seth_barrett_tillman/274/

This publication supplements Senate Document 108–17, The Constitution of the United States of America: Analysis and Interpretation—it should be inserted into the pocket on the inside back cover of that volume

111TH CONGRESS 2d Session } SENATE { DOCUMENT No. 111–39

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2010 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 2010

PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
LIBRARY OF CONGRESS

KENNETH R. THOMAS
EDITOR-IN-CHIEF

LARRY M. EIG
MANAGING EDITOR

JOHNNY H. KILLIAN
EDITOR EMERITUS

U.S. GOVERNMENT PRINTING OFFICE
66–017 WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

ISBN 978-0-16-088829-8

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

ARTICLE I

Section 2. House of Representatives

[Pp. 148-49, substitute for entire section:]

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[1] Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause – that it was designed to authorize delegation of lawmaking power to a single House, subject to

[1] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301-302, 304-305; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 889, at 335 (1833).

presentment, veto, and possible two-House veto override.[2] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, have been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[4] in which the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[5]

---

[2] Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

[3] S. REP. NO. 1335, 54th Congress, 2d Sess.; 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

[4] 3 U.S. (3 Dall.) 378 (1798).

[5] Although *Hollingsworth* did not necessarily so hold (*see* Tillman, *supra*), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment").

ARTICLE V

AMENDMENT OF THE CONSTITUTION

Proposing a Constitutional Amendment

– Proposals by Congress

[P. 941, substitute for n.20:]

In *Hollingsworth v.Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court' s brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. *See* Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), for extensive analysis of what Hollingsworth's delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth*, "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth*, "the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . .").