

Texas Law Review

Volume 83, Number 5, April 2005

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

Seth Barrett Tillman^{*}

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

—U.S. Constitution, Article I, Section 7, Clause 3

The sweeping nature of this obviously ill-considered provision

—Professor Stanley Corwin's annotated Constitution (1964)

The Court, on the day succeeding the [oral] argument, delivered an unanimous opinion, that the [Eleventh] amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.

—*Hollingsworth v. Virginia* (1798)

All this, of course, leaves us entirely in the dark as to how or why the Court thought it had evaded the clear language of Article I, Section 7, Clause 3. . . .

^{*} Harvard Law School, J.D., cum laude (2000); University of Chicago, A.B., honors (1984). This Article was written while clerking for the Honorable Mark E. Fuller (M.D. Ala.) and the Honorable William J. Martini (D.N.J.) and during my tenure at Sills Cummis Epstein & Gross P.C. I thank Paul Axel-Lute, Laura Bedard, Margaret Hutchison, Erin Kellen, Erin Kidwell, Seth Kronemer, Brian Sansouci, Susan Wilkinson, and Nora Rotter Tillman. I received useful guidance from Betty K. Koed, Professor J.R. Pole, Iram Hafeez, and Noah McCormack. I owe especial gratitude to Harry Evans, Clerk of the Senate, Parliament of Australia, and Laurence B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Parliament of Western Australia. Many others helped in countless ways. Needless to say, I take full responsibility for any errors, misstatements, or misplaced hyperbole. I should like to assure the reader that I never intended any disrespect towards James Madison, St. George Tucker, Joseph Story, or Professors Adair, Black, and Corwin. Would that you or I were in such company: *Risum teneatis amici*.

I have elsewhere suggested that this case is inadequately reasoned. Now an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason *even projectable*, ought not to be followed beyond its own facts.

—Charles L. Black, Jr., Yale Law Journal (1978) (emphasis added)

I.	Ghosts of Jurisprudence Past	1266
II.	The Mystery of <i>Hollingsworth v. Virginia</i>	1271
A.	The Facts and Procedural Posture of <i>Hollingsworth</i>	1271
B.	The Post-1798 Interpretations of <i>Hollingsworth</i>	1276
1.	The Presentment School.	1277
2.	The Signature School.....	1279
3.	The Approbation School.....	1281
4.	The Article V is Justiciable School.....	1283
5.	The Court Adopted the “Reasoning” of Justice Chase School	1285
C.	<i>Hollingsworth v. Virginia</i> : Without Mystery.....	1293
1.	A Proceduralist’s Vision of <i>Hollingsworth</i>	1293
2.	An Historicist’s Vision of <i>Hollingsworth</i>	1298
3.	A Dictionary’s View of <i>Hollingsworth</i>	1302
4.	An Exacting Literalist’s View of <i>Hollingsworth</i>	1306
D.	Is It Significant That <i>Hollingsworth</i> May Have Been Misread for 200 Years?	1306
III.	The Prevailing View of Article I, Section 7, Clause 3	1311
A.	The Interpretive Mystery of Article I, Section 7, Clause 3	1317
B.	A Proposed Solution: Article I, Section 7, Clause 3—Without Mystery	1321
C.	Challenges to the Condition Precedent Interpretation of the ORV Clause	1329
IV.	Summary.....	1364
V.	Some Parting Thoughts.....	1367

I. Ghosts of Jurisprudence Past

Pity the poor constitutional clause that lies forgotten. It has no defenders; it has no supporters; it has no friends. Not even an enemy with which to contend. It plays no role in political debate, past or present; between liberal and conservative; between populist and countermajoritarian. It is rarely read, and if read its text is not easily understood. Nay—its would-be interpreters claim that there is nothing of substance to understand. Indeed, bench,¹ bar,² and academy³—with unaccustomed unanimity—say the clause was unnecessary, redundant, residual, even ill-considered.⁴ How very sad.

1. See, e.g., *INS v. Chadha*, 462 U.S. 919, 946–47 (1983) (“During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that [presentment under Article I, Section 7, Clause 2] might easily be evaded by the simple expedient of calling a proposed law a ‘resolution’ or ‘vote’ rather than a ‘bill.’ As a consequence, Art. I, § 7, cl. 3 was added.”) (citations omitted). *But cf.* THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961) (noting that “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”).

2. See, e.g., LINDA R. MONK, THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION 46 (2003) (stating that the Orders, Resolutions, and Votes Clause “ensures that the

How especially so because in the moment of its conception, it spoke to many, although perhaps not to all, Americans. It spoke to the *old*, to those who remembered (or imagined that they remembered) England⁵ and the Rights of Englishmen for which they organized and petitioned, and later—when they were satisfied that peaceful means could not succeed—fought a revolution. It spoke to those who served (and those who had aspired to serve) in the pre-Revolutionary colonial assemblies, to their voters, and to their more numerous constituents. George Washington, Roger Sherman, and Patrick Henry,⁶ and thousands of now forgotten loyal subjects and revolutionary patriots who served in colonial assemblies under royal governors at a time of royal charters and letters patent—they would have understood Article I, Section 7, Clause 3.

president participates in the legislative process, whether or not the law in question is labeled a bill or resolution”).

3. See, e.g., DAVID HUTCHISON, *THE FOUNDATIONS OF THE CONSTITUTION* 74 (1975) (arguing that the purpose of the Orders, Resolutions, and Votes Clause was to prevent Congress from circumventing the President’s veto as already described in Article I, Section 7, Clause 2).

4. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 88-39, at 135 (1st Sess. 1964) [hereinafter ANALYSIS AND INTERPRETATION] (annotation of Professor Corwin) (decrying “[t]he sweeping nature of this obviously ill-considered provision”); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 342 n.68 (1997) (calling the Orders, Resolutions, and Votes Clause the “Residual Presentment Clause”); L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending “Bill” a Year*, 18 PEPP. L. REV. 43, 48–50 (1990) (finding the Orders, Resolutions, and Votes Clause “otiose” absent a presidential line item veto—a procedural mechanism itself lacking any textual support). *But see* Knowlton v. Moore, 178 U.S. 41, 87 (1900) (noting the “elementary canon of construction which requires that effect be given to each word of the Constitution”); Gopalan v. State of Madras, [1950] A.I.R. 27, 35 (S.C.) (Kania, C.J.) (“Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning.”).

5. I acknowledge that this view may not have been universal. See RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 7 (1917) (“It is said that when plans were being made in Boston for celebrating the accession of William and Mary [in 1689], it was decided not to fly the English flag in honor of the occasion, for the very simple reason that not a single one could be found.”).

6. George Washington was born in 1732 and served in the House of Burgesses from 1758–1765. CHARLES W. MEISTER, *THE FOUNDING FATHERS* 313, 318 (1987). Roger Sherman was born in 1721 and served in the Connecticut Assembly from 1755–1756, 1758–1761, and 1764–1766. *Id.* at 292, 296; see also Richard D. Brown, *The Founding Fathers of 1776 and 1787: A Collective View*, 33 WM. & MARY Q. (3d ser.) 465, 474–76 (1976) (reporting that Sherman was the second oldest delegate at the Federal Convention). *But see infra* note 12 (explaining Connecticut exceptionalism). Patrick Henry was born in 1736 and served in the House of Burgesses in 1765. Henry, Patrick (1736–1799), *Biographical Directory of the United States Congress*, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000511> (last visited Jan. 10, 2005).

Still there were other men, younger men, ambitious men. When still a youth, Thomas Jefferson,⁷ it is said, stood in the hall just outside of the House of Burgesses and listened to Henry's speeches so that at a later, suitable time he would be able to participate in the politics of colonial life.⁸ And that was the limit of his (or any young Virginian's) political horizon because no one then (except Franklin perhaps)⁹ imagined that Virginia (or any other colony in British North America) would later become an independent nation, only to be shortly thereafter incorporated into a vast continental American empire. Jefferson's political star began to wax at the time immediately before the Revolution. And during the Revolution, the colonial governors,¹⁰ charters, and assemblies passed away, never to return to these shores. Ancient charters were replaced with state constitutions having democratic credentials even where they were not actually popularly ratified. Sovereignty was recognized as vested in the people. And the struggles over the control, election, agenda, timing, authentication, and procedures¹¹ of colonial parliaments—issues that were the warp and woof of the Revolution—were rapidly becoming objects of antiquarian interest, only remembered by Americans long in the tooth. Still, if anyone of Jefferson's years would have understood Article I, Section 7, Clause 3, it would have been he. Jefferson's *Manual of Parliamentary Practice* was an intellectual achievement of the first order. It is still read and used today throughout Commonwealth nations and relied on as a restatement of British

7. Thomas Jefferson was born in 1743 and served in the House of Burgesses from 1769–1775. Jefferson, Thomas (1743–1826), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000069> (last visited Jan. 10, 2005).

8. See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 191–92 (1943) (recording that the May 30–31, 1765 debate in the House of Burgesses in which Patrick Henry allegedly “uttered the well-known words about Caesar having his Brutus, and Charles I, his Cromwell” and “May George III profit by their example” was observed by “Thomas Jefferson and John Tyler, who at the ages of eighteen and twenty-three respectively were standing in the door-way listening . . .”). Clarke, although generally reliable, is mistaken here—Tyler was eighteen and Jefferson twenty-three at the time. The Political Graveyard: Index to Politicians: Tyler, at <http://politicalgraveyard.com/bio/tyler.htm#REY113LFC> (last visited Jan. 10, 2005).

9. Cf. WALTER ISAACSON, BENJAMIN FRANKLIN 295 (2003) (stating that Franklin “had juggled hope and despair that a breach [from England] could be avoided” for ten years prior to 1775).

10. For instance, the preamble of the New Hampshire Constitution of 1776 states:

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation
Therefore, for the preservation of peace and good order . . . we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain And that we shall rejoice if such a reconciliation between us and our parent State can be effectuated

2 BEN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1279 (Washington, Government Printing Office 2d ed. 1878).

11. See generally CLARKE, *supra* note 8 (discussing various aspects of parliamentary procedure and privilege in the British New World colonial assemblies prior to 1776).

parliamentary practice at the close of the eighteenth century. But Jefferson's *Manual* nowhere explains the import of Clause 3. So even if Jefferson understood the purpose of this clause, it is possible that many of his peers did not.

And yet there were other men, younger than Jefferson. There was young Madison and young Marshall.¹² Young? Today, we only think of

12. Madison was born in 1751 and did not serve his *colony's* legislature. He did, however, serve in the First General Assembly of Virginia, which met in 1776, and he was subsequently elected to the Executive Council in 1778. See Madison, James (1751–1836), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000043> (last visited Jan. 10, 2005). Although he saw additional “legislative” service in the Articles Congress, this was not a law-making body in any traditional sense.

Marshall was born in 1755 and, like Madison, did not serve in the *colonial* legislature. He did, however, serve in the post-independence legislature in 1780 and between 1782 and 1788. Again, like Madison, Marshall served on the legislature's Executive Council from 1782–1795. Marshall, John (1755–1835), Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000157> (last visited Jan. 10, 2005).

During the colonial period, most governors were appointed by the Crown. See Letter from Professor Forrest McDonald to Seth Barrett Tillman (Jan. 13, 2004, but mistakenly dated Dec. 13, 2004) (on file with the Texas Law Review) (explaining that only nine of thirteen colonial governors were Crown appointments, that Rhode Island and Connecticut governors were appointed by the freeholders, and that Pennsylvania and Delaware governors were appointed by the proprietors, the Penn family); accord DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 354–55 (1964) (indicating that the governors of the “proprietary provinces” were appointed by the proprietors “subject to the Crown's approval”). The popularly elected assemblies (or, more often, the popularly elected lower houses) were in open competition with royal governors for political power. With the departure of the colonial governors, at least during the Revolution, this competition decreased markedly. This friction decreased to a large extent under the early revolutionary constitutions because either: (1) the Governors were appointed by their legislatures and so were dependent on them; or (2) both the assemblies and the Governors were elected by the same public. See HARLOW, *supra* note 5, at 79. I am not suggesting that Madison and Marshall were unaware of this conflict, but rather that their age precluded their having had directly experienced the conflict from the point of view of sitting legislators and legislative officers institutionally responsible for the successful passage of a legislative program.

Clearly a forceful argument could be made on behalf of Connecticut and Rhode Island exceptionalism. Both states were exceptional in two distinct ways: (1) during the colonial period, they functioned absent royal and proprietary governors; and (2) after the Revolution, their colonial charters survived at a time when other states drafted new state constitutions having popular credentials. However, the survival of these two colonial charters was in a significant sense only a formal matter. The substance of the charters did not survive the Revolution: judicial appeals could no longer be taken from Connecticut and Rhode Island courts to the Privy Council in Britain. The transatlantic aspect, the British aspect, of the charters died with the opening salvos of the Revolution. See, e.g., MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 5 (2004) (demonstrating that in the colonial period Rhode Island litigants could appeal judicial decisions to the Privy Council). Those who served in these colonies' legislatures would have tailored their local statutes to the details of the transatlantic legal constitution. Those who were too young to personally serve in the colonial legislature or in transatlantic litigation—those whose politics began with independence—might not have fully appreciated this process in all its details and complexity, particularly as “the transatlantic constitution [following 1776] faded slowly but incompletely from view.” *Id.* at 196. Although,

them as old men—after they had captured the great political prizes¹³ made available by the Revolution and after they had shaped their offices with the policies for which they are justly remembered. But in 1787, Madison and Marshall were comparatively young men—a full generation younger than Washington, Sherman, and Henry. And unlike the latter three and Jefferson too, Madison and Marshall never served in their colony’s assembly before the Revolution. They could not say “je me souviens.” For them, the struggles over parliamentary supremacy, procedure, and privilege were not objects of personal memory, however distant, but were shrouded in the mists of history.

Unfortunately for us, at least in this regard, it was Madison¹⁴ and Marshall who were to become our official interpreters of the Constitution of 1787 and not the older generation who understood the Orders, Resolutions, and Votes Clause (the “ORV Clause”), its purposes, and its meaning. And that is the source of our two hundred year tale of woe.

Although the purpose of this Article is to recapture the original public meaning of the ORV Clause, before turning to that effort we must first reexamine a long moribund and misunderstood eighteenth century Supreme Court case that has all but obscured our intellectual vision. Part II reexamines that case in detail in order to remove the intellectual bramble from our path. Having cleared the path, Part III lays out the “new” view, or what I would argue was, in fact, the original public meaning as understood by the well-informed public. Part IV summarizes the main findings discussed in this Article, and Part V offers suggestions as to what a future authentically American constitutional jurisprudence might look like following the close of the Madisonian epoch.

legislative procedure and legal institutions varied among the colonies, there were also significant common themes.

13. See JETHRO K. LIEBERMAN, *THE ENDURING CONSTITUTION: A BICENTENNIAL PERSPECTIVE* 44–45 (1987) (finding that the fifty-five Convention delegates went on to hold fifty-three federal offices).

14. It is almost established wisdom among academic lawyers that Madison was the primary early interpreter of the Constitution because he was one of the coauthors of *The Federalist Papers* and because his record of the debates of the Philadelphia Convention is considered the most detailed and accurate. See, e.g., Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 611 (1999) (“James Madison’s *The Federalist No. 10* is the ur-text of American constitutional theory . . .”); Marci Hamilton, *The Ten Commandments and American Law: Why Some Christians’ Claims to Legal Hegemony Are Not Consistent with the Historical Record*, FINDLAW, at <http://writ.news.findlaw.com/hamilton/20030911.html> (Sept. 11, 2003) (referring to “James Madison, leader of the Constitutional Convention, and drafter of the First Amendment . . .”).

The author of this Article has indicated in another place that a lack of critical distance from *The Federalist Papers* is a defect of our modern American jurisprudence. The author hopes to make clear in the remainder of this Article that our modern jurisprudence’s lack of critical distance from Madison’s record of the Philadelphia Convention expresses a similar professional myopia. See generally Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003).