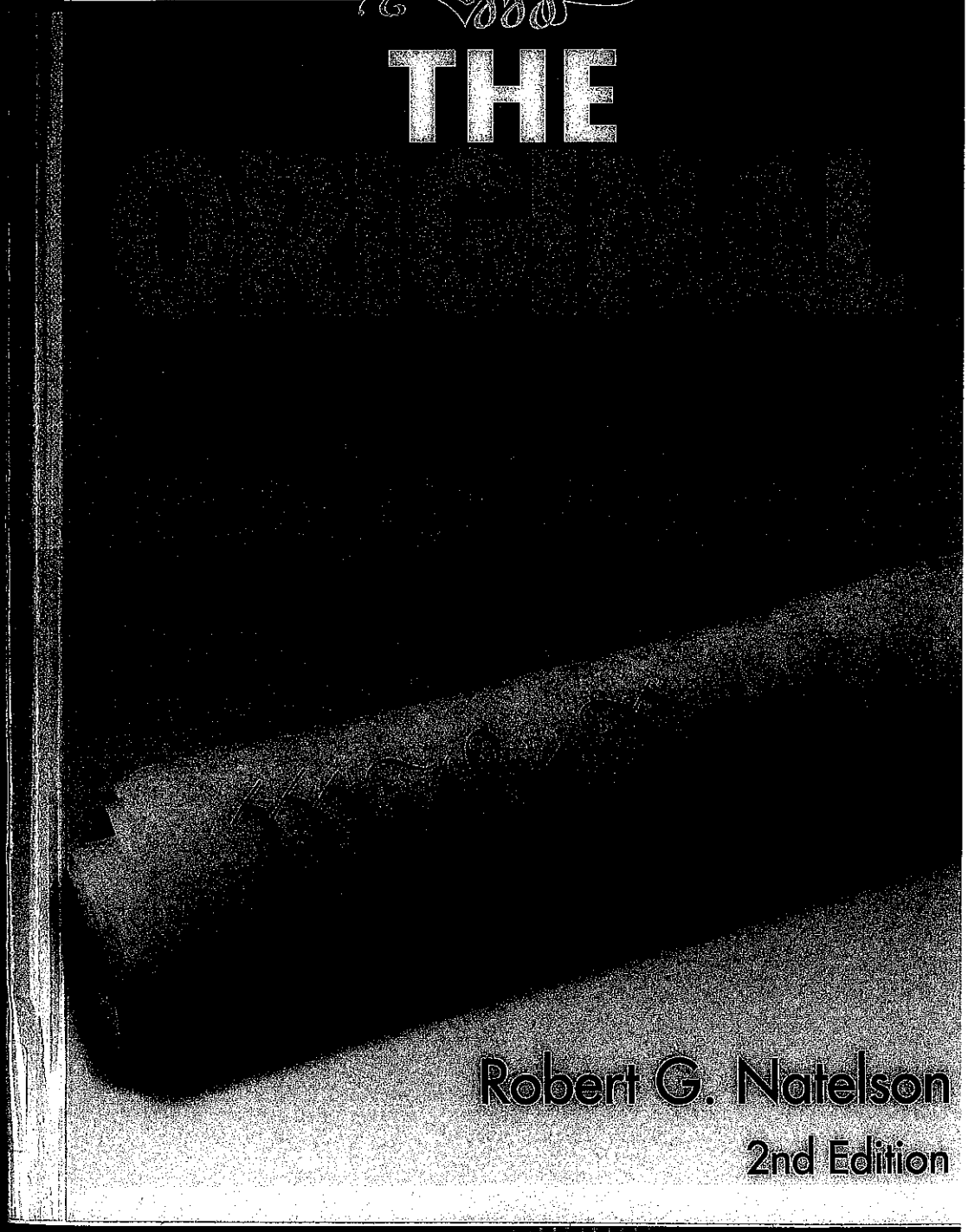
April 15, 2011

Extract from Robert G. Natelson, The Original Constitution: What It Actually Said and Meant (2d ed. 2011), citing Tillman & Tillman's A Fragment on Shall and May, and Tillman's A Textualist Defense of Article I, Section 7, Clause 3

Seth Barrett Tillman

THE



Robert G. Natelson

2nd Edition

THE ORIGINAL CONSTITUTION

774) (most of which
nary Writings of John
000).

up to it by members
Ramsey, The History
ohen, ed.1990 repr.)
ss and Termination
as Chairman of the
d in absence of the
list and the sister of
ry pamphleteers.

the Constitution,
Seclorum (1985)
928).

ve of American
tified, one might
My article, *The*
State L. Rev. 415
political thought.
John Dickinson:
reated in John J.

blic trust. *The*
2004) collects
iew of Special
ary Law of the
ding principles
expected to
ssons from the
)is not about
man Emperor

n rebutting
Thomas G.

West's Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America 1997). My article, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 Ky. L. J. 353 (2003), examines two of the Founders' core principles often overlooked in modern discussions of the Constitution.

CHAPTER 2 INTERPRETING THE CONSTITUTION

For over twenty years, most constitutional scholars believed the Founders did not consider the subjective understanding of the makers of legal documents when interpreting those documents. This led some scholars to reject original understanding as a tool of constitutional interpretation. However, I corrected the record in The Founders' Hermeneutic: The Real Original Understanding of Original Intent, 68 Ohio St. L.J. 1239 (2007). This was the first article to relate fully how legal instruments were construed during the Founding Era.

Understanding the Founders requires some general knowledge of the Greco-Roman classical tradition. A good source is Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment (1994).

Understanding the Founders also requires considering changes in the English language. [For an example of one such change see Nora Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 Am. J. Leg. Hist. 453 (2010)]. The reader should have several eighteenth-century dictionaries on hand; some have become available on the Internet. Do not fall into the trap of relying only on Samuel Johnson's famous dictionary: Although highly useful, its definitions can be idiosyncratic and archaic and need to be cross-checked.

The Founding-Era rules of construction are listed in T. Branch, Principia Legis et Aequitatis (1753) (available in the Gale database, *Eighteenth Century Collections Online*) (by subscription only). A useful, if sometimes difficult, modern article discussing the Founders' use of interpretive rules is Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519 (2003).

Randy E. Barnett, *Underlying Principles*, 24 Const. Comm. 405 (2007) contains a short discussion of how originalists and "living constitutionists" apply the Framers' underlying principles in different ways.

Readers wishing to wander in the thicket of competing modern theories of constitutional interpretation are welcome to sample Interpreting the Constitution: The Debate over Original Intent (Jack N. Rakove ed., 1990), which is a collection of views.

Chapter 3 The Role of the States

On federalism, see Raoul Berger, Federalism: The Founders' Design (1987). For a view (contrary to mine) in favor of the compact theory, see Kevin R.C. Gutzman, *Edmund Randolph and Virginia Constitutionalism*, 66 Rev. of Politics 469 (2004).

My article, *The Enumerated Powers of States*, 3 Nev. L. J. 469 (2003) collects most of the ratification-era representations by the Constitution's advocates as to the powers that would remain outside the federal sphere. (For an additional source, see the listing in the *Pennsylvania Gazette*, Dec. 26, 1787, reprinted in 2 Documentary History, p. 650.) My other articles explaining the Constitution's rules of federalism include *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117 (2009); *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807 (2002); and *Statutory Retroactivity: The Founders' View*, 39 Idaho L. Rev. 489 (2003) (discussing the Ex Post Facto Clauses and the Fifth Amendment).

On the difference between "treaties" and "compacts," see David E. Engdahl, *Characterization of InterstateArrangements: When is a Compact not a Compact?*, 64 Mich. L. Rev. 63 (1965).

There is wide scholarly debate about whether the federal judicial power allowed a private party to sue an unconsenting state. The discussion in the text is based principally on my own independent look at the evidence, including the often-overlooked interpretive resolutions of New York and Rhode Island.

Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002) is one of the newer and better articles on the subject, and one can find other citations in its footnotes.

Chapter 4 The House, the Senate, and the Vice President

For an article suggesting that Congress could delegate some responsibilities to just one house, 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*, 83 Tex. L. Rev. 1265 (2005).