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THE ORIGINAL CONSTITUTION

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The Original 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 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).

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 the difference between "treaties" and "compacts," see David E. Engdahl, Characterization of Interstate Arrangements: 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