A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution

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A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution

Gregory E. Maggs*

This Article explains how dictionaries published in the Founding Era may provide evidence of the original meaning of the Constitution. In addition, the Article identifies and discusses six potential problems with relying on definitions from these dictionaries, and cautions that these potential problems must be considered when using Founding Era dictionaries either to make claims about the Constitution’s original meaning or to evaluate claims about original meaning made by others. Finally, the Article includes an Appendix describing nine English language dictionaries and four legal dictionaries from the Founding Era that the Supreme Court has cited in constitutional cases, and indicates where free versions of these dictionaries can be found online.

TABLE OF CONTENTS

INTRODUCTION ................................................. 359
I. THEORY OF USING DICTIONARIES AS EVIDENCE OF THE ORIGINAL MEANING .................................... 362
   A. DEFINITIONS OF ORIGINAL MEANING ............... 362
   B. Original Meanings of the Constitution and Dictionaries from the Founding Era .................. 364
II. POTENTIAL GROUNDS FOR IMPEACHING CLAIMS ABOUT THE ORIGINAL MEANING OF THE CONSTITUTION THAT RELY ON DICTIONARY DEFINITIONS .................. 367
   A. Insufficiency ........................................ 367

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B. Incompleteness ........................................ 369
C. Inapplicability .......................................... 372
D. Inconsistency ........................................... 376
E. Imprecision ............................................. 377
F. Incorrectness ........................................... 379

CONCLUSION .................................................. 381

APPENDIX: COMMONLY AVAILABLE AND REGULARLY CITED ENGLISH LANGUAGE AND LEGAL DICTIONARIES FROM THE FOUNDING ERA ........................................ 382

INTRODUCTION

Judges, lawyers, and law professors regularly cite dictionaries from the Founding Era as evidence of the original meaning of the Constitution. For example, in recent Terms, members of the Supreme Court have quoted dictionaries from the late 1700s in efforts to discern the original meaning of the word “regulate” in the Commerce Clause,1 the words “privileges” and “immunities” in the Privileges or Immunities Clause,2 the word “art” in the Patents Clause,3 the word “speech” in the First Amendment,4 and the word “arms” in the Second Amendment.5 Similarly, during the past five years, in more than 100 law review articles making claims about the original meaning of the Constitution,6 legal scholars have cited various editions of Samuel Johnson’s A Dictionary of the English Language, one of the most authoritative eighteenth-century dictionaries.7

Consulting dictionaries from the Founding Era is not a novel aid to interpretation invented by lawyers and judges solely for the purpose of discerning the original meaning of the Constitution. Outside the field of constitutional law, historians regularly use centuries-old

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6 I found more than 100 law review articles by searching Westlaw’s JLR database for “‘samuel johnson’ /10 dictionary /20 (175! 176! 176! 177! 178! 179!) & date(>1/1/2008).”
7 For one edition of this influential dictionary, see SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al., 10th ed. 1792), available at http://books.google.com/books?id=j-UlAAABAAJ. This source does not contain page numbers but entries are listed alphabetically. Note that words beginning with the letters I and J are mixed together, as are words beginning with the letters U and V.
dictionaries to determine the meaning of words in historic texts. For example, Professor Enzo Pesciarelli employed the 1755 edition of Johnson’s *A Dictionary of the English Language* to verify what Adam Smith meant when he used the term “adventurer” in *The Wealth of Nations*, which was published in 1776.8 Scholar Philip D. Morgan looked up the definition of “concubine” in the same dictionary to understand what Madison Hemings meant when he chose this word to describe his mother, Sally Hemings, in writing about her relationship with Thomas Jefferson.9

Yet despite the frequency of their citation, the subject of historic dictionaries is not generally taught in law school and has not received much attention from legal scholars. Accordingly, many judges, lawyers, law clerks, law professors, and law students may not know very much about the theory behind using dictionaries from the Founding Era or about the most common pitfalls in relying on them when making claims about the original meaning of the Constitution. Although a few scholars have written articles addressing judicial reliance on modern and historic dictionaries,10 these articles generally do not provide concrete guidance to writers who wish to use dictionaries to bolster arguments about the original meaning of the Constitution, or to readers seeking to evaluate such claims made by others. Judicial decisions also have not addressed this topic sufficiently.11 This brief Article seeks to fulfill this limited, but I believe important, function.

In Part I of this Article, I address two preliminary matters. First, I define the term “original meaning” of the Constitution to include

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11 “The [Supreme] Court . . . has never expressly delineated the proper role and use of the dictionary in American jurisprudence. The few concepts that the Court has developed over time appear to be followed inconsistently and irregularly.” Kirchmeier & Thumma, *Scaling the Lexicon Fortress*, supra note 10, at 82.
three possible original meanings: the original intent of the Framers, the original understanding of those who ratified the Constitution, and the original objective (or public) meaning of the Constitution. Second, I explain with examples how dictionaries from the Founding Era are usually cited as evidence of the original objective meaning of the Constitution but how the same dictionaries in fact might provide evidence of each of these three meanings.

In Part II, I then identify and explain, with examples, six common potential grounds for impeaching claims about the original meaning of the Constitution that rely on dictionaries from the Founding Era. For ease of discussion, I have labeled these grounds (1) insufficiency, (2) incompleteness, (3) inapplicability, (4) inconsistency, (5) imprecision, and (6) incorrectness. I do not suggest that one or more of these problems will weaken every attempt to use dictionaries from the late 1700s to help establish the original meaning of the Constitution. I do, however, recommend that anyone relying on dictionaries to make claims about original meaning—and anyone assessing such claims by others—should take these grounds into account, and also give practical advice for avoiding or minimizing each of these potential problems.

I conclude by predicting that nearly all judicial opinions and scholarly works attempting to discern the original meaning of the Constitution soon will refer to these dictionaries as commonly as they now cite the Federalist Papers, the records of the Federal Constitutional Convention, and other readily available sources of the original meaning of the Constitution. In the Appendix to this Article, I then describe the most commonly cited English language and legal dictionaries from the Founding Era. Once viewable only in the libraries of great universities, various editions of these books are now available for free in scanned, searchable, digital formats on Google Books (for which I provide Universal Resource Locators).12

Finally, an important disclaimer is in order. In this brief Article, I do not consider and make no claim about whether or to what extent judges should or should not follow the original meaning of the Constitution when deciding constitutional issues. I also do not take sides on the question of which original meaning—the original intent, the origi-

12 Google Books is a free website that contains scanned and searchable copies of millions of books, especially those for which the copyright has expired. See About Google Books, GOOGLE BOOKS, http://books.google.com/intl/en/googlebooks/about/index.html (last visited Feb. 13, 2014). Note that books are more easily searched using the Google Chrome browser than the Internet Explorer browser.
nal understanding, or the original objective meaning—is most significant for construing the Constitution. These are important questions that others have discussed at great length and with considerable ability and controversy. I do not address them because I believe that readers of this Article may be interested in knowing the original meaning of the Constitution as a historical matter regardless of their views on whether courts should or must follow one or another original meaning. To that end, readers may want to know the strengths and weaknesses of relying on dictionaries from the Founding Era. (In separate works, I have attempted to provide guides to other sources of the original meaning of the Constitution.)

I. THEORY OF USING DICTIONARIES AS EVIDENCE OF THE ORIGINAL MEANING

A. Definitions of Original Meaning

The Constitution has at least three distinct types of original meaning. One original meaning—the “original intent of the Framers”—is the meaning that the deputies to the federal Constitutional Convention in Philadelphia in the summer of 1787 collectively intended the Constitution to have. The most common method of determining the original intent is to look at what the deputies said about the Constitution during debates at the Constitutional Convention. We know a fair amount about the deputies’ debates because nine of them took notes that have survived, and these notes have been carefully organized and published.

Another type of original meaning—the original understanding of the ratifiers—is the collective meaning that the delegates who participated in the thirteen state ratifying conventions beginning in the fall

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13 See supra note * (listing these guides).
14 This paragraph and the following two paragraphs are adapted from very similar paragraphs in previous guides that I have written in my series of guides to the original meaning. See Maggs, Guide to the Federal Convention, supra note *, at 1729–30; Maggs, Guide to the Federalist Papers, supra note *, at 805–07; Maggs, Guide to the State Ratifying Conventions, supra note *, at 461–63; see also Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 229–31 (1988) (describing the original intent, original understanding, and original textual meaning as separate original meanings of the Constitution). I repeat the points previously made for the convenience of readers.
of 1787 understood the Constitution to have. The original understanding of the Constitution so defined may differ from the original intent of the Framers because the Constitutional Convention met in secret and its records did not become public until many years after the ratification of the Constitution. As a result, the ratifiers—except for the few who had participated in the Constitutional Convention—could not know exactly what the Framers intended and they may have attached different meanings to the Constitution. One way of determining the original understanding of the ratifiers is to look at what they said at the state ratifying conventions. Another key method of discerning the original understanding is to consider the arguments made for and against ratification by Federalists and Anti-Federalists, on the theory that these arguments may have influenced the ratifiers.

A third important type of original meaning—the “original objective meaning” (also known as the “original public meaning”)—is the reasonable meaning of the text of the Constitution at the time of its adoption. This meaning is not necessarily what the Framers subjectively intended the Constitution to have or what participants at the ratification debates actually understood it to have, but instead what a reasonable person of the era would have thought it had. It is a hypothetical meaning that someone reading the Constitution around 1787 to 1789 might have understood the document to mean. This meaning can be discerned from contemporaneous texts of all kinds, including but not limited to dictionaries from the Founding Era.

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18 See, e.g., Maggs, Guide to the Federal Convention, supra note *, at 1723.
19 One or more of the delegates to the Constitutional Convention participated in each of the state ratifying conventions, except for Rhode Island, which did not send any delegates to the Constitutional Convention. See Maggs, Guide to the State Ratifying Conventions, supra note *, at 481.
20 See id. at 482.
21 See Maggs, Guide to the Federalist Papers, supra note *, at 821–23. Judge Lawrence Silberman, for example, has cited the Federalist Papers as key evidence of the original understanding because they “were available to the state ratifying conventions.” In re Sealed Case, 838 F.2d 476, 492 (D.C. Cir. 1988), rev’d sub nom. Morrison v. Olson, 487 U.S. 654 (1988).
23 See Maggs, Guide to the Federalist Papers, supra note *, at 806.
24 See, e.g., RANDY E. BARNETT, THE ORIGINAL MEANING OF THE COMMERCE CLAUSE 111–25 (2001) (using this methodology to determine whether the word “commerce” in the Commerce Clause refers specifically to the exchange of goods or more broadly to any gainful activity).
The original intent, original understanding, and original public meaning of terms in the Constitution are often the same or very similar. Sometimes, however, these three types of original meaning may differ from one another. A well-known example concerns Article III, Section 2, which says that federal courts have subject matter jurisdiction in cases “between a State . . . and foreign States, Citizens or Subjects.” According to the Supreme Court, the original objective meaning of this clause might have been that citizens of one state may sue another state in federal court. But some historic evidence suggests that the Framers did not intend, and the ratifiers did not understand, that citizens of one state could sue another state in federal court. At the Virginia ratifying convention, John Marshall urged his fellow delegates to read the clause in a more limited way, saying, “I hope that no gentleman will think that a state will be called at the bar of the federal court . . . . The intent is, to enable states to recover claims of individuals residing in other states.”

Writers have debated which type of original meaning should control interpretation of the Constitution. Resolution of this issue is beyond the scope of this Article. Important here is understanding that different types of original meaning exist and knowing how these different meanings are defined. The following Section explains how dictionaries from the Founding Era might provide some evidence of each of these meanings.

B. Original Meanings of the Constitution and Dictionaries from the Founding Era

When writers consult dictionaries from the Founding Era for the definition of words used in the Constitution, they are usually seeking evidence of the original objective meaning (or “public meaning”) of these words. Put another way, they are attempting to discover the meaning of the words as they were commonly used and commonly

26 See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 261 (1985) (“The clauses by their terms permitted federal jurisdiction over any suit between a State and a noncitizen or a State and an alien, and in particular over suits in which the plaintiff was the noncitizen or alien and the defendant was the State.”).
29 See infra notes 30–33 and accompanying text.
understood; they are not attempting to prove what the Framers subjectively intended the Constitution to mean or what the Constitution’s ratifiers subjectively understood it to mean. Their assumption, usually unstated, is that the dictionaries that they cite accurately provide information about this objective meaning. The assumption may be faulty in some cases, for reasons addressed at length below, but that is a separate question from what type of original meaning dictionaries typically provide.

Writers do not always expressly say that they are looking for the “objective meaning” of the Constitution when they cite dictionaries from the Founding Era, but their words and the context often reveal that they are not looking for a subjective intention or understanding. For example, Justice Scalia, who has recently cited period dictionaries in constitutional cases, has explained that “[w]hat [he] look[s] for in the Constitution is . . . the original meaning of the text, not what the original draftsmen intended.” By the phrase “original meaning of the text,” Justice Scalia is referring to the original objective meaning of the Constitution rather than some subjective meaning. Likewise, in his separate opinion in *McDonald v. City of Chicago*, Justice Thomas consulted dictionaries to determine what he called the “established meaning” of the terms “privileges” and “immunities.” Justice Thomas did not use the word “objective,” but he was definitely looking for the objective meaning of the words rather than some subjective meaning.

Dictionaries are certainly not the only source of the original objective meaning of the Constitution. As an alternative to consulting dictionaries, scholars might look at a variety of texts from the Founding Era; for example, they could survey books, newspapers, and other legal documents to discern independently how terms found in the Constitution were typically used in the late 1700s. But on this point, three caveats deserve mention. First, consulting dictionaries is generally much easier. Canvassing multiple sources, inferring meaning

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33 *Id.* at 3063–64 & n.2 (2010) (Thomas, J., concurring).

from context, expressing the meaning accurately and concisely, and
documenting all the research would be very burdensome; it would be
like doing all the research necessary to create a dictionary definition.
Second, even if researchers look at other sources, they also should
consult Founding Era dictionaries. Despite their flaws (discussed be-
low), dictionaries from this period remain an important historic source
that should not be ignored. Third, dictionaries in many cases may pro-
vide reassurance that researchers have not gone astray in their own
efforts to discern the original meaning of terms in the Constitution by
looking at other texts.35

Although dictionaries are mostly cited for evidence of the origi-
nal objective meaning of words in the Constitution, dictionaries also
might provide some assistance to writers attempting to discern the
original intent of the Framers or the original understanding of the ra-
tifiers. Dictionaries serve this role when researchers use them to look
up not the words in the Constitution but instead the words spoken or
written by the Framers and ratifiers about the Constitution.36 For ex-
ample, in The Federalist No. 78, Alexander Hamilton wrote that
courts could strike down federal statutes if they are “contrary to the
manifest tenor of the Constitution.”37 Interpreting this passage, au-
thor Paul Taylor consulted Samuel Johnson’s Dictionary to determine
the meaning of the word “manifest” as Hamilton used it.38 “Manifest”
is not a word used in the Constitution; Taylor consulted the dictionary
to clarify the expressed understanding of one of the Framers and ra-
tifiers of the Constitution. Using dictionaries from the Founding Era
to establish the original intent of the Framers or the original under-
standing of the ratifiers, rather than the original objective meaning of
the Constitution, is not problematic in theory. But because the prac-
tice is potentially confusing, authors citing dictionaries for this pur-

35 One commonly discussed possible example of inferring too much about the original
meaning from the usage in historic texts involves Professor William W. Crosskey’s efforts to
discern the meaning of Congress’s power to regulate “Commerce . . . among the several States.”
U.S. Const. art. I, § 8, cl. 3. Crosskey concluded that the term “among” might mean “within”
one state (and not between states) because he found a historic newspaper article describing how
someone died from poison “among some clam soup.” 1 William Winslow Crosskey, Politics and
the Constitution in the History of the United States 1278 n.106 (1953).
36 See Eugene Kontorovich, Discretion, Delegation, and Defining in the Constitution’s Law
of Nations Clause, 106 NW. U. L. REV. 1675, 1691 (2012) (“[D]ictionaries are a powerful tool for
illuminating public meaning, but . . . they are also relevant to the drafters’ intent.”).
38 Paul Taylor, Congress’s Power to Regulate the Federal Judiciary: What the First Congress
and the First Federal Courts Can Teach Today’s Congress and Courts, 37 PEPP. L. REV. 847, 920
& n.341 (2010).
pose generally should state their assumptions\(^{39}\) and explain their reasoning.

II. **Potential Grounds for Impeaching Claims about the Original Meaning of the Constitution that rely on Dictionary Definitions**

The meaning of the Constitution is often a controversial subject. When lawyers, judges, or other authors make claims about the original meaning, others may disagree with their conclusions. If they have relied on Founding Era dictionaries, those holding opposing views might attempt to impeach their claims by challenging the dictionaries as valid and reliable sources. Below are six key potential grounds that have been asserted for impeaching claims about the original meaning of the Constitution that rely on dictionary definitions. Each of these grounds rests on real difficulties associated with attempting to use dictionaries. But none of these grounds is so strong that it should prevent all reliance on dictionaries. My advice is that authors using dictionaries from the Founding Era to make claims about the original meaning of the Constitution should consider carefully whether any of these grounds for impeachment might apply and then take specific steps, suggested below, to make their claims stronger.

A. **Insufficiency**

The most persistent ground for criticizing judicial opinions and scholarly articles that rely on dictionaries from the Founding Era is that dictionary definitions, even if they are completely accurate, are insufficient by themselves to decide many constitutional issues.\(^{40}\) Even faithful originalists who are committed to ascertaining the original objective meaning of the Constitution should acknowledge the validity of this point in many cases. For example, a late eighteenth-century dictionary cannot resolve the meaning of a term in the Constitution if the Constitution does not use the term in accordance with its ordinary meaning. This situation may occur when the Constitution redefines a term to give it a special meaning. We now know, for in-

\(^{39}\) In this example, Taylor apparently assumed (1) that Hamilton’s understanding of judicial review was relevant in determining the original meaning of the Constitution; (2) that in expressing his view on the subject, Hamilton used the word “manifest” according to its objective meaning; and (3) that the cited dictionary definition provides evidence of this objective meaning. See id.

stance, that when the Constitution uses the term “state,” it is referring to something that might be properly defined as “one of the constituent units of a nation having a federal government.” But at the time of the Founding, this specific meaning was generally unknown to lexicographers because the Constitution had not yet created our federal system and defined the role of the states within the system. Johnson’s *A Dictionary of the English Language* defines the noun “state” to mean “[a] republick; a government not monarchial,” without addressing the possibility that states assembled together might form a larger nation. Simply citing Johnson’s definition might not properly answer a question about the meaning of the term “state” in the Constitution.

Although the insufficiency criticism rests on valid premises, it is largely a straw man. I could find no clear example of any author, on or off the bench, who has seriously asserted that it would be acceptable to decide an important constitutional issue solely by citing a dictionary. On the contrary, writers who cite dictionaries from the Founding Era are usually aware that dictionaries can show the objective meaning of words but do not necessarily decide legal questions. For example, in *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit recently had to determine the meaning of the word “recess” in a case challenging a recess appointment purportedly made by the President under his authority in Article II, Section 2. The Court observed that the definition of “recess” in Samuel Johnson’s *Dictionary*—“remission and suspension of any procedure”—suggested that the term recess could refer to all breaks taken by Congress. The court concluded, however, that as used in the Constitution, the term recess was narrower. It said: “In context, ‘the Recess’ refers to a specific state of the legislature, so sources other than general dictionaries are more helpful in elucidating the term’s original public meaning.” The court ultimately concluded that the term “Recess” was “limited to intersession recesses” and did not have the broad definition found in Johnson’s *Dictionary*.

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42 Johnson, *supra* note 7 (entry for “state”).
44 U.S. Const. art. II, § 2, cl. 3 (“The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).
45 *Noel Canning*, 705 F.3d at 505 (citing 2 *Samuel Johnson, A Dictionary of the English Language* 1650 (1755)).
46 *Id.*
47 *Id.* at 506.
In the Noel Canning case, the court declined to follow the dictionary definition. But even when judges or scholars conclude that a term in the Constitution means what a historic dictionary defines it to mean, they usually do not rely solely on the dictionary definition. For example, in United States v. Lopez, Justice Thomas relied on several dictionaries from the Founding Era to determine the meaning of “commerce” in the Commerce Clause. Although Justice Thomas ultimately concluded the Constitution used the term commerce in accordance with the dictionary definitions, he did not rely solely on these dictionaries. He also consulted numerous other sources that confirmed his interpretation, including the Federalist Papers, the writings of anti-Federalists, debates at the state ratifying conventions, and other provisions in the Constitution.

To avoid the “insufficiency” criticism, writers who cite a definition in a dictionary from the Founding Era as evidence of the original meaning of the Constitution should take several actions. They first should recognize that although period dictionaries may provide the objective meaning of words at the time of the Framing, these meanings are not controlling if the Constitution used the words in a novel or specialized manner. Authors next should consider context and other sources to determine whether this is the case, following the example of the court in Noel Canning and of Justice Thomas in Lopez. No simple formula exists for this step. Writers should articulate their reasoning and make it as strong as possible. If analysis does not indicate that the Constitution redefined the term at issue or used it in a nonstandard way, then the dictionary definition may supply some evidence upon which claims about the original meaning may rest.

B. Incompleteness

A second potential ground for impeaching claims about the original meaning of a term in the Constitution that rely on dictionaries from the Founding Era is that the definitions of words in these dictionaries are incomplete. They are incomplete in the sense that they may not capture all of the different meanings that a particular word could have had when the Constitution was written. They may include some of the most common meanings, but not those used in a particular constitutional provision.

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49 See id. at 585–86 (Thomas, J., concurring).
50 See id. at 585–89.
For example, in *McCulloch v. Maryland*, Chief Justice Marshall had to determine the meaning of the word “necessary” in the Necessary and Proper Clause. Counsel for Maryland argued that the word meant “indispensable,” but Chief Justice Marshall held that the word actually meant “convenient” or “useful.” If Marshall was correct (as many assume), then famous dictionaries like Johnson’s *Dictionary* are apparently incomplete. Although his *Dictionary* includes a definition similar to the one that Maryland urged, it does not contain the one settled on by Chief Justice Marshall. Johnson’s *Dictionary* lists these three meanings: “1. Needful; indispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by an inevitable consequence.” The first of these definitions is like the one that Maryland urged. The definition that Marshall interpreted the word “necessary” to have does not appear.

Professor Ellen Aprill has explained that definitions in older dictionaries may be incomplete in their inclusion of meanings for two important reasons. First, older dictionaries are usually prescriptive rather than descriptive. A descriptive dictionary strives to explain how words actually are used; a prescriptive dictionary, by contrast, seeks to inform its users about the proper way to use words. Samuel Johnson’s *Dictionary* was explicitly a prescriptive dictionary. Johnson wanted to choose definitions that would preserve the purity of the language. A prescriptive dictionary, accordingly, may omit usages that the lexicographer for whatever reason considers improper. In my view, however, this potential difficulty seems more theoretical than practical in efforts to discern the objective meaning of the Constitution. The Constitution was written very carefully by authors of great learning; it seems unlikely that their diction would differ very much from what lexicographers of the time recommended. We also know from the records of the Constitutional Convention that the Framers consulted outside sources to determine the definitions of at least some terms in the Constitution to make sure they were using them correctly.

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52 *Id.* at 413.
53 *Id.*
54 JOHNSON, supra note 7 (entry for “necessary”).
55 See Aprill, supra note 10, at 284.
56 See id.
57 See id.
58 John Dickenson of Delaware examined the meaning of “ex post facto” in Blackstone’s Commentaries. See 2 *The Records of the Federal Convention of 1787*, at 448–49 (Max
Second, the lexicographers writing dictionaries in the 1700s could not and did not engage in a systematic attempt to discern all of the meanings of words. According to Aprill, the editors of the greatest dictionaries of the modern era pore over texts from all genres in an attempt to discern how words are actually used.59 They create a file for each word giving as many different actual examples of its usage as possible.60 During the Founding Era, when resources were fewer, word files were less complete than they are today. One indication of this is that the great dictionaries of the twentieth century are much longer than their predecessors.61 In addition, space constraints always have limited the number of terms that could be included in any dictionary.62

This second problem is potentially more serious. Although the best dictionaries of the Founding Era certainly defined all or nearly all of the words used in the Constitution, they may not have recorded all of the possible meanings of these words. For example, consider Article I, Section 9 of the Constitution, which contains the following restriction on taxes: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”63 The term “capitation” refers to a poll tax that is uniform and equal for every taxpayer (i.e., a tax on heads).64 However, Samuel Johnson’s Dictionary defines “capitation” only as “numeration by heads.”65 That definition does not fit the meaning of the Constitution because it does not say anything about taxes. The dictionary, in other words, lists one meaning but not all of the meanings.

For these reasons, authors who cite a Founding Era dictionary to establish the original meaning of a term in the Constitution should recognize that the term might have a meaning that does not appear in a dictionary. They accordingly must be careful about drawing conclu-
sions based just on the definitions given. Consider this example: in *National Federation of Independent Business v. Sebelius*, a key issue was whether the word “regulate” in the Commerce Clause could mean “create” or “compel to exist.” In concluding that it could not, the joint dissenting opinion emphasized that dictionaries from the Founding Era did not include anything like this definition. That is true, but the lack of a definition in a dictionary is not conclusive proof that the word did not have that meaning because dictionaries often are not complete and do not include all definitions. The absence of a definition indicating that “regulate” might mean “create” at most affords some evidence that the word was not commonly used to mean “create.” The lack of a definition by itself was not dispositive and, quite properly, the joint dissenting opinion did not treat it as such.

Although incompleteness may be a problem in some cases, this risk should not be exaggerated. If the goal is to discern the original objective meaning of the words in the Constitution—the meaning that a reasonable person of the Founding Era would have understood the term to have—it seems unlikely (although not impossible) that such a meaning would not be listed in any dictionary. If the lexicographers did not know the meaning or did not think it important enough to include, a hypothetical reasonable person of the Era probably would not either. For example, although Johnson’s *Dictionary* does not contain a definition of “capitation” that refers to taxes, such a definition does appear in John Ash’s *New and Complete Dictionary of the English Language* of 1775, which says that a capitation may be either a “numeration of the people by the head” or “a poll tax.”

In sum, no dictionary of the Founding Era was entirely complete in defining words. For this reason, authors should consult as many dictionaries as reasonably possible to increase the chances of finding

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67 *Id.* at 2586 (addressing whether “the power to ‘regulate’ something include[s] the power to create it”); *id.* at 2644 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[O]ne does not regulate commerce that does not exist by compelling its existence.”).
68 *See id.* at 2644 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (summarizing the dictionary definitions by saying: “[Regulate] can mean to direct the manner of something but not to direct that something come into being.”).
69 *See id.* (noting that, in addition to the lack of a dictionary definition, “[t]here is no instance in which this Court or Congress (or anyone else, to our knowledge) has used ‘regulate’ in that peculiar fashion”).
70 *See supra* note 65 and accompanying text.
the correct definition. A good place to start would be the numerous dictionaries listed in the Appendix because they are easily available online. Authors also should not give excessive weight to the absence of a meaning listed in a dictionary. The absence provides some evidence that the word at issue did not commonly have the missing meaning, but the lack of a particular definition cannot by itself prove anything.

C. Inapplicability

A claim about the original meaning of a term that relies on a dictionary definition also may be impeached on the ground that the cited definition is inapplicable. A dictionary definition may be inapplicable to a particular term in the Constitution for several reasons. First, the definition might come from the wrong kind of dictionary. A definition from an English language dictionary may be inapplicable to a constitutional term that has a specialized legal meaning, and, vice versa, a definition from a legal dictionary may be inapplicable to a constitutional term used in a non-specialized way. Second, even if the proper kind of dictionary is consulted, if the dictionary contains multiple definitions for the same word, some of these meanings ascribed to the word may not apply to the word as it is used in the particular context of the Constitution. Third, dictionary definitions do not always capture the correct meaning of words that form a part of a phrase or compound, such as “Vice President” or “declare war.”

These problems present theoretical issues which have no simple solution. In actual practice, however, the problems can usually be addressed or avoided—people are generally able to use contextual cues to eliminate most inapplicable definitions, whether using historic or modern dictionaries. Consider first the issue of English language dictionaries versus legal dictionaries, both of which existed in the Founding Era and are described in the Appendix. Sometimes words and phrases have a specialized legal meaning not found in ordinary dictionaries. Article III, Section 3 prohibits “Corruption of Blood” as a punishment for treason. Johnson’s Dictionary defines “corruption” as follows: “1. The principles by which bodies tend to the separation of their parts. 2. Wickedness; perversion of principles. 3. Putrescence. 4. Matter or pus in a fore. 5. The means by which anything is vitiated; depravation.” Although all of these definitions may be accurate—

72 See infra notes 74–80 and accompanying text.
73 U.S. Const. art. III, § 3, cl. 2.
74 Johnson, supra note 7 (entry for “corruption”).
correct possible meanings of the term in ordinary English—none of them is the applicable definition for the word “corruption” in Article III. To find the applicable definition, it is necessary to look in a legal dictionary. For instance, in their *New Law Dictionary* from 1792, Richard and John Burn define the “corruption of blood” as a penalty occurring when:

[A] person is attainted of treason or felony, in which case his blood is so far stained or corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble, and he can neither inherit lands as heir to an ancestor, nor have an heir . . . .75

This is the meaning applicable to the term in the Constitution.

How does someone interpreting the Constitution know whether to look in an English language dictionary or specialized legal dictionary? One approach is to look first to see if the term at issue is defined in a legal dictionary. If the term does not appear in the legal dictionary, then the term likely was used in the ordinary sense. The joint dissenting opinion took this approach in *Sebelius* when, as described above, the authors were searching for the original public meaning of the verb “regulate.”76 The dissenters noted: “The most authoritative legal dictionaries of the founding era lack any definition for ‘regulate’ or ‘regulation,’ suggesting that the term bears its ordinary meaning (rather than some specialized legal meaning) in the constitutional text.”77

This approach is not foolproof. Just because a word may have a specialized legal meaning does not necessarily indicate that the specialized legal meaning was used in the Constitution. For example, Article II, Section 3 says that the President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”78 The word “consideration,” as all lawyers know, has a specialized legal meaning in some contexts. In the 1790s, as today, “[c]onsideration in contracts” was “something given in exchange, something that is mutual and reciprocal.”79 In Article II, however, the word “consideration” is used according to its ordinary meaning—“the

76 See supra notes 66–69 and accompanying text.
78 U.S. CONST. art. II, § 3 (emphasis added).
act of considering; regard; notice”—and not its legal meaning. Accordingly, the only safe approach is to consider both English language and legal dictionaries from the Founding Era when determining the meaning of a word.

Discussion of this difficulty leads immediately to the question of how to determine which of multiple possible definitions is applicable to a particular word in the Constitution. In some cases, this is easy because the inapplicable meanings would be absurd. For example, Article I, Section 9, Clause 6, contains this prohibition: “[N]or shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.” Johnson’s Dictionary indicates that the word “oblige” can mean either “to compel to something” or “to please.” Here it is easy to surmise which of the two definitions is applicable. The Constitution must be saying that no vessel shall “be compelled” to pay duties because obviously none but the most civic-minded would “be pleased” to pay duties.

In other cases, deciding which one of multiple definitions is applicable can be more challenging. There is no simple rule like choosing the first definition because it is the most common; different editors had their own views on how to list and order definitions. An example of this difficulty appears in Crawford v. Washington. In that case, the Supreme Court was required to interpret the Sixth Amendment’s Confrontation Clause, which says: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The question was whether the Confrontation Clause was violated when a tape-recorded statement to the police was played before the jury. To decide this question, the Court had to consider whether the person who made the statement on the recording was a “witness.” Justice Scalia wrote the following: “[The Confrontation Clause] applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” Justice Scalia then focused the rest of his opinion on what constitutes “testimony.” In this instance, Justice

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80 Johnson, supra note 7 (definition of “consideration”).
81 U.S. Const. art. I, § 9, cl. 6 (emphasis added).
82 Johnson, supra note 7 (definition of “oblige”).
84 U.S. Const. amend. VI; see also Crawford, 541 U.S. at 38.
85 See Crawford, 541 U.S. at 38.
86 See id. at 51.
87 Id. (quoting 2 Webster, supra note 30).
88 See id. at 51–69.
Scalia chose one of many meanings listed by Webster in his definition of “witness.” These definitions included the following:

WIT’NESS, n. [Sax. witnesse] 1. Testimony; attestation of a fact or event. 2. That which furnishes evidence or proof. 3. A person who knows or sees any thing; one personally present. 4. One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity by his testimony. 5. One who gives testimony.

* * *

WIT’NESS, v.i. 1. To bear testimony. 2. To give evidence.

In Crawford, Justice Scalia based his definition of the noun “witness” in the Confrontation Clause on the first meaning given for “witness” when it is used as an intransitive verb. Justice Scalia did not explain why he did not select one of the five meanings listed for “witness” when used as a noun. In addition, Justice Scalia’s opinion does not recognize that the term “witness” does not necessarily have anything to do with “testimony.” For example, the third noun definition indicates that “witness” can include a person “who knows or sees any thing” without necessarily testifying about it. That meaning would give very different content to the Confrontation Clause. Justice Scalia may have selected the correct meaning of “witness” in Crawford, but the dictionary citation itself does not make the correctness of the selection apparent.

The issue of selecting the correct meaning does not arise often, but it should not be ignored. No perfect method exists for determining which of multiple dictionary definitions provides the applicable meaning of a term in the Constitution. In almost all cases, guidance from outside the dictionary may be necessary to confirm a selection. It might be that particular definitions would not make sense in the particular context, or that other extrinsic sources may give more weight to one particular meaning than to other meanings. But a dictionary itself cannot reveal which of multiple meanings is the correct meaning. This is an inherent limitation on all dictionaries. The best advice is that authors should consider all of the possible meanings listed in a dictionary and state expressly the reasons that they are choosing one meaning over others.

89 2 Webster, supra note 30 (entries for “witness”).
90 See Crawford, 541 U.S. at 51 (citing 2 Webster, supra note 30).
91 See id.
92 See 2 Webster, supra note 30 (entries for “witness”).
D. Inconsistency

Another potential problem with the use of dictionaries is that judges and scholars do not always use them consistently when they are attempting to discern the meaning of words in the Constitution.93 For example, a court might rely on various dictionaries in one case and others in another case. The judicial opinions in Sebelius cited seven different historic dictionaries,94 while the opinion in Williams v. Illinois,95 decided just one week earlier, quoted only one of these dictionaries.96 The Supreme Court apparently has not established any standard for deciding when to look at dictionaries or which dictionaries to consult. This problem has an analogue in the field of statutory interpretation, where selective and inconsistent citation of legislative history documents has been criticized. Justice Scalia has said: “Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”97 In other words, judges look for what supports their position and overlook contrary evidence. If this characterization applies equally to reliance on dictionaries from the Founding Era, it would certainly lessen the credibility of opinions that rest on them.

Although this kind of inconsistency is a problem, the solution is not necessarily to give up citing dictionaries from the Founding Era or to dismiss all citations by others. Indeed, ignoring evidence from dictionaries seems just as bad as selectively citing this evidence. Instead, striving for more consistency may ameliorate the problem. The idea that historical accounts might be tainted by selectivity in looking at sources is nothing new, but we still have respected historians. To make their use of dictionaries from the Founding Era more convincing, judges, litigants, and scholars should follow a few simple rules. If they look up dictionary definitions for one disputed word, they should

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93 Professor Aprill asserts, based on a study of federal cases, that judges are “selective and inconsistent in when and how they use dictionary definitions.” Aprill, supra note 10, at 281.
96 Id. at 2259 (quoting 2 Webster, supra note 30).
look up the definitions for all disputed words. When looking up words, they should check all the relevant dictionaries from the Founding Era. Although this was once difficult, with the internet it has become much easier. After looking up the words, they should consider all of the relevant definitions in these dictionaries. Finally, they should explain the choices that they make, such as why they rely on certain definitions and not others.

E. Imprecision

Even if dictionary definitions are not incorrect or inappropriate, sometimes they are imprecise. Imprecision may hinder the use of dictionaries by courts because judges often are asked to decide borderline cases. Imprecision exists because lexicographers must choose broad definitions that cover several possible meanings rather than providing the definition of every specific meaning. They also sometimes must trade specificity for understandability. Some dictionaries, like the *Oxford English Dictionary*, have sought to make its definitions most accessible to generalists; other dictionaries, like Merriam-Webster’s *Third New International Dictionary*, reportedly have sought precision even though its definitions may not be readily understandable by casual readers.

In *Bilski v. Kappos*, the Supreme Court held that, under the Patents Act, a patent could not be issued for the invention of a method of hedging risk in the field of commodities trading in the energy market. Justice Stevens wrote a concurrence in the judgment in which he addressed the question of whether issuing the patent would exceed what is permitted under the Constitution’s Patents Clause. The Patents Clause empowers Congress “To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.” Consulting a period dictionary, Justice Stevens wrote:

It appears, however, that regardless of how one construes the term “useful arts,” business methods are not included . . . .

Noah Webster’s first American dictionary defined the term “art” as the “disposition or modification of things by human skill, to answer the purpose intended,” and differentiated be-

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98 See Aprill, supra note 10, at 293.
99 Id. at 293–94.
101 Id. at 3236 (Stevens, J., concurring in the judgment).
102 U.S. Const. art. I, § 8, cl. 8.
between “useful or mechanic” arts, on the one hand, and “lib-
eral or polite” arts, on the other.103

Following this quotation, Justice Stevens concluded that the in-
vention of a business method cannot promote the “useful arts” be-
cause the definition of “arts” refers to the disposition of “things” and
a business method by itself does not create useful things.104 In his
opinion, Justice Stevens may have reached the correct interpretation
of the Patents Clause, but it is open to question whether the word
“thing” in the dictionary definition is sufficiently precise to justify his
conclusion.

Part of the solution to the problem of imprecision, like most of
the other possible problems identified above, is to consider definitions
from multiple dictionaries and to look for confirmation from other
extrinsic sources. In some cases, though, definitions may be insuffi-
ciently detailed to supply valid and reliable answers about the original
meaning of particular terms in the Constitution.

F. Incorrectness

Finally, reliance on a particular definition in a Founding Era dic-
tionary may be impeached on grounds that the definition is incor-
rect—that is to say, the definition does not reflect the ordinary
meaning of the word at the time. Incorrectness in dictionary defini-
tions has three principal causes.

First, mistakes happen. Creating a dictionary is difficult work
that requires detailed knowledge about a great many things. The lexi-
cographer has very limited time to spend on any individual word, and
it is easy to make a mistake, especially with difficult words.105 For
example, Samuel Johnson famously erred in defining the word “pas-
tern” to be “the knee of a horse.”106 The word in fact refers to a lower
part of a horse’s leg.107 Johnson’s famous biographer, James Boswell,
records: “A lady once asked [Dr. Johnson] how he came to define
Pastern the knee of a horse: instead of making an elaborate defence,
as she expected, he at once answered, ‘Ignorance, Madam, pure ignorance.’”

Second, Founding Era dictionaries may contain definitions that were already obsolete by the late 1780s. Johnson identified many obsolete words from the folio edition of his Dictionary when he prepared it in an octavo. Only some of the words that were eliminated had previously been identified as being obsolete. For example, the 1755 folio edition contained an obsolete definition of the preposition “until,” a word that appears eight times in the Constitution. Johnson took the meaning “unto” out of his octavo edition definition of “until,” but that definition appears in other dictionaries. This problem, however, should not be exaggerated. Words often retain their meanings for hundreds of years. The Supreme Court, for instance, concluded in District of Columbia v. Heller, that the “18th-century meaning” of “arms” in the Second Amendment “is no different from the meaning today.”

Third, legal dictionaries tend to rely on court opinions, but court opinions themselves often rely on other sources to define the words. Sometimes precision can be lost in transmitting the meanings from one source to another.

There is no definitive list of erroneous or inaccurate definitions from dictionaries from the Founding Era, and judges and legal scholars are ill-equipped to identify errors on their own. After all, they consult dictionaries from the Founding Era precisely because they do not know for sure the historical meaning of a term. Yet, the problem can be addressed. Looking at multiple dictionaries may help reduce the likelihood of being misled by an erroneous definition. In addition, looking at other sources, especially the sources upon which dictionaries rely, may help to eliminate errors. For example, once a definition is selected, it could be checked to see whether it makes sense when applied to words used in other documents. What judges should not do

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110 Id.
111 See id. at 4.
112 Compare JOHNSON, supra note 7 (defining “until” in its preposition form to mean “to”), with 2 ASH, supra note 94 (defining “untill” to mean both “to” and “unto”).
114 Id. at 581.
115 See Aprill, supra 10, at 310.
is accept unquestioningly any definition from a dictionary without exerting efforts to ascertain whether the definition was accurate at the time it was included in the dictionary.

CONCLUSION

Judges, practicing attorneys, and legal scholars often cite dictionaries from the Founding Era as evidence of the original meaning of the Constitution. This practice is likely to grow because it has become very easy to view these dictionaries for free on the internet. Yet, citing dictionaries is controversial. Few jurists, lawyers, professors, or law students have received much training or guidance on dictionaries that are more than 200 years old. In addition, claims made about the original meaning of the Constitution that rest in whole or in part on dictionary definitions are subject to impeachment on a number of different grounds.116

This Article has sought to address this situation. It argues neither for nor against using dictionaries to make claims about the original meaning of the Constitution. Instead, it seeks to describe and consider, in a critical manner, the theories behind citing Founding Era dictionaries as a source of the original meaning. It further considers six important possible grounds for impeaching claims about the original meaning of the Constitution that rely on Founding Era dictionaries. My advice is that anyone relying on Founding Era dictionaries or evaluating the reliance on them by others should take into account the considerations on both sides.

Looking at period dictionaries does not prevent anyone from looking at other sources to discern the original meaning of the Constitution. Writers attempting to discern the original meaning of the Constitution should consult numerous different kinds of texts. Dictionaries from the Founding Era are just one type of text (although not the only one) that researchers might consider in attempting to discern the original meaning. A dictionary can supply additional information. A definition may not be controlling, but a large discrepancy between what the dictionary says and the claimed meaning for a word may be seen as flashing cautionary yellow lights. Likewise, a dictionary that provides a meaning consistent with a claimed definition may reduce doubts about whether the meaning is plausible.

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116 See supra Part II.
APPENDIX: COMMONLY AVAILABLE AND REGULARLY CITED ENGLISH LANGUAGE AND LEGAL DICTIONARIES FROM THE FOUNDING ERA

This Appendix describes nine English language dictionaries and four legal dictionaries from the Founding Era. The dictionaries are listed in alphabetical order by the last name of the author. I have selected these dictionaries for inclusion here for two reasons. First, they are the dictionaries cited in Supreme Court opinions. Second, the full text of each of these dictionaries is available online, for free, from Google Books. The internet Universal Resource Locators (URLs) for the dictionaries are included in the footnotes below. Please note that these dictionaries are best viewed using the Google Chrome browser. Other dictionaries from the same period, which are not described here, may also contain useful information. As explained above, in general, the more dictionaries consulted, the more persuasive and reliable is the evidence found.

English Language Dictionaries from the Founding Era

1. JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775)

The Reverend John Ash, a Baptist minister educated at Bristol Baptist College, lived in England from about 1724 until 1779. Although he later received an honorary LL.D. from a university in Scotland, he was not trained as a lexicographer. His two-volume dictionary relied heavily on earlier dictionaries by Nathan Bailey and Samuel Johnson (both of which are discussed below). Ash’s dictionary contains two features that distinguish it from competing works, but neither of these features contributes much to the interpretation of the Constitution. First, the dictionary contains many specialized, obsolete, provincial, and vulgar words not found in other

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117 See, e.g., supra notes 1–5.
121 Taylor, supra note 120, at 4, 11.
122 Id. at 12.
sources. Ash writes in the “advertisement” at the beginning of his dictionary:

The plan of this Work is extensive beyond any thing that has yet been attempted of the kind in the English Language. It was intended to introduce not only all the . . . common words . . . but all proper names of men and women, heathen gods and goddesses, heroes, princes, poets, historians, wise men and philosophers of special note, whether ancient or modern . . . .

Second, this dictionary was also one of the first to include marks for stressed syllables. Justices of the Supreme Court have cited this dictionary in a few cases without commenting on perceived strengths or weaknesses of it as a source of the original meaning of the Constitution.


This dictionary was first published in 1721 and may have been the bestselling dictionary of the eighteenth century. The author of the first three editions was Nathan Bailey, an English schoolmaster who became a professional lexicographer. Bailey’s efforts were joined in 1755, and later taken over entirely, by Joseph Nicol Scott, a clergyman and physician, who extensively revised the dictionary and ultimately compiled twenty-seven additional editions. Sidney I. Landau, an editor of the Cambridge University Press, has praised Bailey for his efforts to include common words and to define words as they were actually used. Samuel Johnson apparently relied on Bailey’s definitions when he prepared his dictionary; in turn, Scott relied on and perhaps plagiarized Johnson’s dictionary in preparing subsequent edi-

123 Id.
124 1 Ash, supra note 119, at A2.
125 Taylor, supra note 120, at 12.
129 See id. at 44.
130 See Green, supra note 61, at 234–36.
131 See Landau, supra note 128, at 47.
132 See id.
tions. The work is not very useful for looking up specialized legal terms in the Constitution; for example, it does not contain definitions for words like “impeachment” or “misdemeanor.” Members of the Supreme Court have cited the dictionary in several opinions, apparently preferring the 26th edition published in 1789.

3. **Barclay’s Universal English Dictionary (1792)**

This dictionary was first published in 1774. The Reverend James Barclay, the original editor, was a clergyman in Edmonton, England and a schoolmaster. He did not claim comprehensiveness in definitions but expressed hope that his book would serve a didactic purpose. Aimed at least in part for use in schools, the book contains several introductory essays on grammar, spelling, history, and other subjects. Perhaps most interesting to modern lawyers are the pages describing the British Courts of Justice as they existed at the time of publication. Barclay also claimed to be one of the first lexicographers to identify synonyms. Some entries contain substantive expositions more suitable for an encyclopedia than a dictionary; for example, the entry for “Richard I” is a biographical summary that runs nearly seven columns. Justice Thomas has cited this dictionary.

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133 See Green, supra note 61, at 235.
134 See Bailey, supra note 127 (defining “impeachable” and “misdemeanor” in non-legal senses but not defining impeachment or misdemeanor); see also U.S. Const. art. II, § 4 (using the terms “impeachment” and “misdemeanor”).
139 See Barclay’s, supra note 136, at A4 (expressing the hope that the dictionary will allow that the “Master may advance one step farther with his pupils.”).
140 See id. at xlv–xlvii.
141 See id. at A3.
142 See id. (entry for “Richard I”).

Eighteen editions of this dictionary were printed between 1735 and 1781. The dictionary was begun by Reverend Thomas Dyche, an English minister and school teacher, and completed a few years after Dyche’s death by William Pardon. The dictionary describes Pardon as a “Gent.,” but further information is unknown. Later editions were revised by unknown authors. The dictionary proclaims that it is “[p]eculiarly calculated for the USE and IMPROVEMENT Of such as are unacquainted with the LEARNED LANGUAGES.” Aimed at less scholarly readers, the dictionary does not contain etymologies. The original version of the dictionary had wordy definitions, almost encyclopedic in nature, but these definitions were tightened up in later editions. The dictionary does not appear to have many specialized legal terms; for example, it has an entry for the word “legislator” but not “legislation.” Members of the Supreme Court have cited this dictionary in a few cases.

5. **Samuel Johnson, A Dictionary of the English Language (10th ed. 1792)**

This dictionary is the most famous and most cited of all the lexicographic works of the seventeenth century. Samuel Johnson under-
took its compilation in 1746 when he was thirty-eight. At the time, he was a failed school teacher and an impecunious freelance writer for magazines, specializing in news about Parliament. He was thinking about going into law, but undertook the work of writing a dictionary after a group of booksellers offered him 1500 guineas for the project, a sum he needed to keep debt collectors at bay. He had no training as a lexicographer, but completed what turned out to be one of the greatest works of the English language. The original edition contains 42,000 headwords, the definitions of which Johnson prepared himself. He documented the entries with 116,000 quotations, many taken from Bacon, Milton, Pope, Shakespeare, Spenser, and other notable English literary figures. His definitions are extremely well-written and reveal much about his personality. Johnson included both legal terms, which he distinguished from ordinary English terms with the designation “[in law.].” A good example is his entry for “equity”: “E’QUITY. s. [equité, French.] 1. Justice; right; honesty. Tillotson. 2. Impartiality. Hooker. 3. [In law.] The rules of decision observed by the Court of Chancery.” Members of the Supreme Court appear to have cited this dictionary more often than any other dictionary from the Founding Era. Their opinions rely on various editions without indicating why some might be preferable to others.


This dictionary is notable because it was the first dictionary published in the United States. It was initially prepared by William Perry, et al., 10th ed. 1792), available at http://books.google.com/books?id=j-U1IAAAQAAJ.

157 See Green, supra note 61, at 263.
158 See id.
159 See id. at 262–64.
160 See id. at 262.
161 See Hitchings, supra note 61, at 3.
162 See Green, supra note 61, at 266.
163 See, e.g., Johnson, supra note 7 (entries from “gangrene” to “garnish,” citing all of these authors and others on a single page).
164 See Green, supra note 61, at 267.
165 Johnson, supra note 7 (entry for “equity”).
168 See Green, supra note 61 at 287.
Perry, a Scottish school teacher who was dissatisfied with the pronunciation prescribed in other dictionaries. The American Edition was printed in Massachusetts and was dedicated to the American Academy of Arts and Sciences. According to the title page, the dictionary was “intended to fix a standard for the pronunciation of the English language, conformably to the present practice of polite speakers in Great Britain and the United States.” The dictionary was especially popular in America, and is said to have influenced New England pronunciation. The definitions in general appear to be shorter than those in other dictionaries of the same period. Justice Thomas has cited this dictionary in one case.

7. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1790) (2 volumes)

Thomas Sheridan, an actor and stage manager, published the first edition of this dictionary in 1780. An expert on elocution, he sought to revise spelling and include an accurate guide to pronunciation. Previous dictionaries attempted to show how to pronounce words by adding accent marks and diacritics to the headword of each entry. Sheridan invented the modern style of dictionaries of spelling headwords in an ordinary manner and then following them with a phonetic spelling, which Sheridan explained in considerable depth at the start of the first volume of his dictionary. For example, the entry for Monday in William Perry’s pronouncing dictionary begins with “Món’dåy,” while the corresponding entry in Sheridan’s dictionary

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170 See id.
171 See Sturiale, supra note 169, at 183.
175 See id.; see also 1 SHERIDAN, supra note 174, title page (“Calculated solely for the Purposes of teaching Propriety of Pronunciation, and Justness of Delivery, in that Tongue, by the Organs of Speech.”).
176 See, e.g., JOHNSON, supra note 156.
177 See LANDAU, supra note 128, at 57.
178 See 1 SHERIDAN, supra note 174, at i-liv.
179 Perry, supra note 167 (entry for “Monday”).
begins with “MONDAY, műn’- dá.”\(^{181}\) Sheridan and Samuel Johnson had been friends, but became rivals when Sheridan produced his own dictionary. They soon traded insults: “Johnson, said Sheridan, had ‘gigantic fame—in these days of little men.’ ‘Sherry,’ remarked the doctor [i.e., Johnson], ‘is dull, naturally dull, but it must have taken him a great deal of pains to become what we now see him. Such an excess of stupidity is not in nature.’”\(^{182}\) The Supreme Court has cited the sixth edition of this dictionary.\(^{183}\)


John Walker was an English actor and teacher and a friend of Samuel Johnson and Edmund Burke.\(^{184}\) He produced both a rhyming dictionary and this pronouncing dictionary.\(^{185}\) His definitions of the meaning of words do not appear to be particularly special; the hallmark of the dictionary is its improvements of Sheridan’s work on pronunciation. Walker praised Thomas Sheridan for dividing words into syllables and showing how vowels were pronounced.\(^{186}\) But Walker’s method of indicating how to say words and the accuracy of the individual descriptions is considered superior.\(^{187}\) It is not clear that eighteenth-century pronunciation affects constitutional interpretation, but Sidney Landau believes that Walker’s recommendations with respect to pronunciation continue to affect the legal profession. He writes:

> I have been struck by the unusual and emphatic pronunciation of the second syllable of *juror* when uttered by lawyers or judges . . . The same measured kind of . . . pronunciation [is] heard for the last syllable of *defendant* . . . . I wonder whether they are not uttered, by way of many intermediaries,

\(^{181}\) 2 Sheridan, supra note 174 (entry for “Monday”). Sheridan explains that “ù is pronounced like the “u” in “bush” and that “á is pronounced like the “a” in “hate.” See 1 Sheridan, supra note 174, at ii.

\(^{182}\) Green, supra note 61, at 288.


\(^{185}\) See John Walker, 28 Encyclopedia Britannica 272 (11th ed. 1911).

\(^{186}\) See id.

\(^{187}\) Walker, supra note 184, preface.

in obedience to Walker’s admonitions in 1791 against the “slurring” of unaccented syllables.\textsuperscript{189}

The Supreme Court has cited Walker’s dictionary in several cases.\textsuperscript{190}

9. \textit{Noah Webster, An American Dictionary of the English Language} (1828)\textsuperscript{191}

Noah Webster was born in Connecticut in 1758.\textsuperscript{192} He graduated from Yale, having studied Latin, Greek, and Hebrew.\textsuperscript{193} Although he had hoped to become an attorney, he found employment instead as a school teacher.\textsuperscript{194} He gained early fame by producing \textit{The American Spelling Book}, a textbook used in schools that reformed traditional British orthography.\textsuperscript{195} It remained in print for a century and its total sales topped 80 million copies.\textsuperscript{196} Webster completed his first, modestly sized dictionary, \textit{A Compendious Dictionary of the English Language}, in 1806.\textsuperscript{197} He then turned to his greatest work, \textit{An American Dictionary of the English Language}, which he completed in 1828.\textsuperscript{198} His goals were to standardize American English usage and to simplify spelling.\textsuperscript{199} The dictionary was far larger than competing works, including over 70,000 words.\textsuperscript{200} The initial edition was not a financial success,\textsuperscript{201} but in time, the quality of the work became appreciated. The Supreme Court cites this dictionary often as evidence of the original meaning of the Constitution.\textsuperscript{202} The Court’s unstated justification

\begin{footnotes}
\item[189] Landau, supra note 128, at 58–59.
\item[192] See Green, supra note 61, at 308.
\item[193] See id. at 307–08.
\item[194] See id. at 308.
\item[195] See Landau, supra note 128, at 59.
\item[196] See Green, supra note 61, at 309.
\item[197] See id. at 312.
\item[198] See id. at 318.
\item[199] See id.
\item[200] See id. at 317.
\item[201] See Landau, supra note 128, at 61.
\end{footnotes}
is perhaps that the dictionary may reflect better the ways in which Americans used and understood the words in the Constitution. For example, the dictionary contains these definitions of “congress” that are special to America:

2. The assembly of delegates of the several British colonies in America, which united to resist the claims of Great Britain in 1774. 3. The assembly of delegates of the several United States, after the declaration of independence, in 1776, and until the adoption of the present constitution. 4. The assembly of senators and representatives of the several states of North America, according to the present constitution, or political compact, by which they are united in a federal republic.203

This justification for citing Webster’s dictionary, however, is subject to some question, given that Webster wanted to shape usage and not just reflect it. In addition, the dictionary was published decades after the Founding Era, and the usage of particular words may have changed.

Legal Dictionaries from the Founding Era

1. Richard Burn & John Burn, A New Law Dictionary (1792)204

Richard Burn was born in 1709.205 He was an English clergyman and chancellor of the diocese of Carlisle, well-known for his highly regarded treatise on ecclesiastical law.206 This law dictionary was edited and published after Richard Burn’s death by his son, John Burn.207 The dictionary has received negative reviews. “The Titles are brief,” one critic wrote, “and for the most part unsatisfactory.”208 The alleged shortcomings, however, are not readily apparent. For example, the definition of “affinity” is “relation by marriage, as consanguinity is relation by blood,”209 which is very similar to short modern

203 Webster, supra note 191, at 179 (1830 abridged edition) (entry for “congress”).
206 See id.
207 John D. Cowley, A Bibliography of Abridgments, Digests, Dictionaries and Indexes of English Law to the Year 1800, at xci (1932) (noting that one critic questioned whether Richard Burn had wanted the dictionary to be published).
209 R. Burn & J. Burn, supra note 204, at 25.
definitions of the term. This law dictionary is occasionally cited by members of the Supreme Court.\footnote{See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 n.1 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).}


Timothy Cunningham lived in London at Gray’s Inn and wrote a large number of law books, especially on commercial law.\footnote{See A.M. Clerke & J.A. Marchand, Cunningham, Timothy, in 14 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 699 (H.C.G. Matthew & Brian Harrison eds. 2004).} His law dictionary is like an encyclopedia or treatise, with many substantive explanations rather than just definitions. He competed with Giles Jacob’s law dictionary (discussed below), but his book was not as successful.\footnote{See id. at 270–74.} Some of the definitions appear insufficiently detailed to provide help interpreting the Constitution. For example, the dictionary defines “ex post facto” as “a term used in the law, signifying something done after another thing that was committed before.”\footnote{1 CUNNINGHAM, supra note 211 (entry for “ex post facto”).} This definition would not provide much aid in determining questions such as whether the prohibitions on ex post facto laws\footnote{See U.S. CONST. art. I, §§ 9, 10.} apply to both civil and criminal legislation. The first edition was published in 1764 and the third and final edition was published in 1783.\footnote{See Clerke & Marchand, supra note 212.}


Giles Jacob was born in 1686.\footnote{Gary L. McDowell, The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation, 44 AM. J. LEGAL HIST. 257, 261 n.29 (2000).} He was a prolific author, heavily influenced by Locke.\footnote{Id. at 270–74.} Although Alexander Pope denigrated the quality of Jacob’s work,\footnote{See Matthew Kilburn, Jacob, Giles, in 29 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 546–47 (H.C.G. Matthew & Brian Harrison eds. 2004).} his law dictionary was very successful. Jacob asserted that two-thirds of the material in the first edition, pub-

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\item[212] See A.M. Clerke & J.A. Marchand, Cunningham, Timothy, in 14 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 699 (H.C.G. Matthew & Brian Harrison eds. 2004).
\item[213] See id.
\item[214] 1 CUNNINGHAM, supra note 211 (entry for “ex post facto”).
\item[215] See U.S. CONST. art. I, §§ 9, 10.
\item[216] See Clerke & Marchand, supra note 212.
\item[217] GILES JACOB, A NEW LAW DICTIONARY (The Savoy, Henry Lintot, 6th ed. 1750), available at http://books.google.com/books?id=zdED1S0lCoAC.
\item[219] Id. at 270–74.
\item[220] See Matthew Kilburn, Jacob, Giles, in 29 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 546–47 (H.C.G. Matthew & Brian Harrison eds. 2004). Pope wrote the couplet, “Jacob, the Scourge of Grammar, mark with awe, Nor less revere him, Blunderbuss of Law.” See id. Pope may have seen Jacob “as a dunce because of his devotion to a culture of litigation that Pope deplored as uncivilized.” Id.
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lished in 1729, was entirely new. The printing, spelling, and diction, however, are very old-fashioned, making the dictionary both quaint and somewhat difficult to use. For example, the exclamation “oyez” is spelled as “O Yes” and is defined as follows: “O Yes, (From the Fr. Oyez, i.e. Audite, hear ye) Is well known to be used by Cryers in our Courts &c. to injoin Silence and Attention, when they make Proclamation of any Thing.” In addition to defining terms, Jacob also sought to provide a summary or “abridgment” of the law. The entry on “usury,” for instance, occupies three columns and discusses substantive rules prevailing in England. Subsequent editions were published after Jacob’s death. Members of the Supreme Court have cited various editions of this dictionary.

4. **Thomas Potts, A Compendious Law Dictionary (1803)**

Thomas Potts, born in 1778, was an English solicitor who was affiliated with Skinners’ Hall and Serjeants’ Inn in London and who compiled several reference books. His law dictionary, first published in 1803, was less comprehensive, but more accessible than the competing dictionaries. Potts aimed his dictionary, according to its preface, at country gentlemen, merchants, and professional men. It contains definitions of many commercial terms. These definitions are, in general, easily understandable to lay readers, but do not attempt to explain the applicable legal rules. For example, the dictionary defines a “bill of lading” as “a memorandum, signed by masters of ships, acknowledging the receipt of merchant goods, &c. Of this there are usu-

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221 Cowley, supra note 207, at xc.
222 Jacob, supra note 217 (entry for “O Yes”).
223 Cowley, supra note 207, at xc.
224 See Jacob, supra note 217 (entry for “usury”).
225 Cowley, supra note 207, at xci.
229 See id.
230 Potts, supra note 227, at iv.
ally three parts; one kept by the consignor, one sent to the consignee, and one kept by the captain.” 231 Justice Thomas has cited this dictionary. 232

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231 Id. at 65.