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

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*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.*

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* Professor of Law and Interim Dean, The George Washington University Law School. I would like to thank the Law School for a generous research grant that helped me to complete this Article. I benefited greatly from comments that I received at the Fourth Annual Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference held at the University of San Diego Law School in February 2013.

This is the fourth in a series of articles I have written on sources of the original meaning of the Constitution. The three other articles are: *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007) [hereinafter Maggs, *Guide to Federalist Papers*]; *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707 (2012) [hereinafter Maggs, *Guide to the Federal Convention*]; and *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457 [hereinafter Maggs, *Guide to the State Ratifying Conventions*].

## 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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1 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

2 McDonald v. City of Chi., 130 S. Ct. 3020, 3063–64 & n.2 (2010) (Thomas, J., concurring in part and concurring in the judgment).

3 Bilski v. Kappos, 130 S. Ct. 3218, 3243 & n.27 (2010) (Stevens, J., concurring in the judgment).

4 Citizens United v. FEC, 558 U.S. 310, 428 n.55 (2010) (Stevens, J., concurring in part and dissenting in part).

5 District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (Scalia, J.).

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-UIAAAAQAAJ. 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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8 *See* Enzo Pesciarelli, *Smith, Bentham, and the Development of Contrasting Ideas on Entrepreneurship*, 21 HIST. POL. ECON. 521, 522–23 (1989).

9 *See* Philip D. Morgan, *Interracial Sex in the Chesapeake and the British Atlantic World, c. 1700–1820*, *in* SALLY HEMINGS & THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE 52, 75 (Jan Ellen Lewis & Peter S. Onuf eds., 1999).

10 *See, e.g.*, Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010) [hereinafter Kirchmeier & Thumma, *Scaling the Lexicon Fortress*]; Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG 51 (2001); *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440 (1994); Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2192 (2003).

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/indexhtml (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.)[13]

## 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.[14] 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.[15] 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.[16]

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.

15 *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 800–01 (1995) (making conclusions about what the "Framers intended" based in part on comments of Alexander Hamilton regarding the Constitutional Convention).

16 *See* Maggs, *Guide to the Federal Convention*, *supra* note *, at 1737–39.

of 1787 understood the Constitution to have.[17] 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.[18] As a result, the ratifiers—except for the few who had participated in the Constitutional Convention[19]—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.[20] 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.[21]

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.[22] 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.[23] 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.[24]

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17 *See, e.g.*, Alden v. Maine, 527 U.S. 706, 716–19 (1999) (discussing evidence of the "original understanding" of the ratifiers of the Constitution).

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).

22 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100–09 (2004) (describing this kind of meaning).

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*, 68 U. CHI. L. REV. 101, 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."[25] 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.[26] 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."[27]

Writers have debated which type of original meaning should control interpretation of the Constitution.[28] 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.[29] Put another way, they are attempting to discover the meaning of the words as they were commonly used and commonly

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25 U.S. CONST. art. III, § 2.

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.").

27 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Philadelphia, J. B. Lippincott Co., 2d ed. 1891), *quoted in Atascadero*, 473 U.S. at 267.

28 *See* Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 500–02 (2009) (identifying differing views on the issue of which original meaning should control interpretation of the Constitution).

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,[30] 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."[31] 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*,[32] Justice Thomas consulted dictionaries to determine what he called the "established meaning" of the terms "privileges" and "immunities."[33] 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.[34] But on this point, three caveats deserve mention. First, consulting dictionaries is generally much easier. Canvassing multiple sources, inferring meaning

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30 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (Scalia, J.) (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 106 (1978) (4th ed. 1773); 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1989) (1828)).

31 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

32 McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

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

34 *See* Barnett, *supra* note 24, at 111–25.

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 below), dictionaries from this period remain an important historic source that should not be ignored. Third, dictionaries in many cases may provide 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 original 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 ratifiers. 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 example, 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, author 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 ratifiers of the Constitution. Using dictionaries from the Founding Era to establish the original intent of the Framers or the original understanding of the ratifiers, rather than the original objective meaning of the Constitution, is not problematic in theory. But because the practice is potentially confusing, authors citing dictionaries for this pur-

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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.").

37 THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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.*

40 *See, e.g.*, James L. Weis, Comment, *Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961, 963 (1988) ("Judges should admit that dictionaries provide possible meanings, not dispositive resolutions.").

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."[41] 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.[42] 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*,[43] 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.[44] 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.[45] 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."[46] 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*.[47]

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41 *State*, MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 1151 (9th ed. 1985).

42 JOHNSON, *supra* note 7 (entry for "state").

43 Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (2013).

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*,[48] Justice Thomas relied on several dictionaries from the Founding Era to determine the meaning of "commerce" in the Commerce Clause.[49] 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.[50]

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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48 United States v. Lopez, 514 U.S. 549 (1995).

49 *See id.* at 585–86 (Thomas, J., concurring).

50 *See id.* at 585–89.

For example, in *McCulloch v. Maryland*,[51] 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,"[52] but Chief Justice Marshall held that the word actually meant "convenient" or "useful."[53] 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."[54] 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.[55] 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.[56] Samuel Johnson's *Dictionary* was explicitly a prescriptive dictionary. Johnson wanted to choose definitions that would preserve the purity of the language.[57] 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.[58]

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51 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

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-

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Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's Notes, Aug. 29, 1787) (statement of John Dickenson).

59 *See* Aprill, *supra* note 10, at 286.

60 *See id.* at 289–90.

61 Ellen Aprill observes that *Webster's Second New International Dictionary*, published in 1934, has 600,000 entries, the most of any dictionary. *See id.*, at 295. In contrast, Noah Webster's dictionary of 1828 had 70,000 entries and Samuel Johnson's dictionary of 1755 had only 42,000 entries. *See* JONATHON GREEN, CHASING THE SUN: DICTIONARY MAKERS AND THE DICTIONARIES THEY MADE 317 (1996); HENRY HITCHINGS, DEFINING THE WORLD: THE EXTRAORDINARY STORY OF DR JOHNSON'S DICTIONARY 3 (2005).

62 *See* Aprill, *supra* note 10, at 294.

63 U.S. CONST. art. I, § 9, cl. 4.

64 *See* BLACK'S LAW DICTIONARY 238, 1596 (9th ed. 2009).

65 JOHNSON, *supra* note 7 (entry for "capitation").

sions based just on the definitions given. Consider this example: in *National Federation of Independent Business v. Sebelius*,[66] a key issue was whether the word "regulate" in the Commerce Clause could mean "create" or "compel to exist."[67] In concluding that it could not, the joint dissenting opinion emphasized that dictionaries from the Founding Era did not include anything like this definition.[68] 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.[69]

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,[70] 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."[71]

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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66 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

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.

71 *See* 1 JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775), *available at* http://books.google.com/books?id=LDNAAAAAYAAJ (entry for "capitation").

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.[72] 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.[73] 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."[74] Although all of these definitions may be accurate—

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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

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75 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE, AS WELL AS FOR GENTLEMEN OF THE PROFESSION 230 (London, A. Strathan & W. Woodfall 1792), *available at* http://books.google.com/books?id=LoxRAAAAYAAJ.

76 *See supra* notes 66–69 and accompanying text.

77 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 n.1 (2012).

78 U.S. CONST. art. II, § 3 (emphasis added).

79 1 R. BURN & J. BURN, *supra* note 75, at 202.

act of considering; regard; notice"[80]—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."[81] Johnson's *Dictionary* indicates that the word "oblige" can mean either "to compel to something" or "to please."[82] 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*.[83] 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."[84] The question was whether the Confrontation Clause was violated when a tape-recorded statement to the police was played before the jury.[85] To decide this question, the Court had to consider whether the person who made the statement on the recording was a "witness."[86] Justice Scalia wrote the following: "[The Confrontation Clause] applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'"[87] Justice Scalia then focused the rest of his opinion on what constitutes "testimony."[88] In this instance, Justice

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").

83 Crawford v. Washington, 541 U.S. 36 (2004).

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.[89]

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.[90] In addition, Justice Scalia's opinion does not recognize that the term "witness" does not necessarily have anything to do with "testimony."[91] For example, the third noun definition indicates that "witness" can include a person "who knows or sees any thing" without necessarily testifying about it.[92] 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.

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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.

94 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) (citing 2 ASH, *supra* note 71; R. BURN & J. BURN, *supra* note 75, at 281; 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, C. Bathurst et al., 16th ed. 1777); GILES JACOB, A NEW LAW DICTIONARY (London, W. Strahan & W. Woodfall, 10th ed. 1782); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J. F. & C. Rivington et al., 7th ed. 1785); 2 WEBSTER, *supra* note 30).

95 Williams v. Illinois, 132 S. Ct. 2221 (2012).

96 *Id.* at 2259 (quoting 2 WEBSTER, *supra* note 30).

97 Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

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.[98] 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.[99]

In *Bilski v. Kappos*,[100] 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.[101] 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."[102] 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-

98 *See* Aprill, *supra* note 10, at 293.

99 *Id.* at 293–94.

100 Bilski v. Kappos, 130 S. Ct. 3218 (2010).

101 *Id.* at 3236 (Stevens, J., concurring in the judgment).

102 U.S. CONST. art. I, § 8, cl. 8.

> tween "useful or mechanic" arts, on the one hand, and "liberal or polite" arts, on the other.[103]

Following this quotation, Justice Stevens concluded that the invention of a business method cannot promote the "useful arts" because 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 insufficiently 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 dictionary may be impeached on grounds that the definition is incorrect—that is to say, the definition does not reflect the ordinary meaning of the word at the time. Incorrectness in dictionary definitions has three principal causes.

First, mistakes happen. Creating a dictionary is difficult work that requires detailed knowledge about a great many things. The lexicographer 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 "pastern" 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,

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103 *See Bilski*, 130 S Ct. at 3243 (Stevens, J., concurring in the judgment) (quoting 1 WEBSTER, *supra* note 30 (emphasis added)).

104 *Id.* at 3244–45.

105 *See* Aprill, *supra* note 10, at 293.

106 *See* JOHNSON, *supra* note 7 (definition of "pastern").

107 *Pastern*, MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 41, at 861 (defining "pastern" as "a part of the foot of an equine extending from the fetlock to the top of the hoof").

as she expected, he at once answered, 'Ignorance, Madam, pure ignorance.'"[108]

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.[109] Only some of the words that were eliminated had previously been identified as being obsolete.[110] For example, the 1755 folio edition contained an obsolete definition of the preposition "until," a word that appears eight times in the Constitution.[111] Johnson took the meaning "unto" out of his octavo edition definition of "until," but that definition appears in other dictionaries.[112] 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*,[113] that the "18th-century meaning" of "arms" in the Second Amendment "is no different from the meaning today."[114]

Third, legal dictionaries tend to rely on court opinions, but court opinions themselves often rely on other sources to define the words.[115] 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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108 1 JAMES BOSWELL, LIFE OF JOHNSON 340 (New York, Harper & Brothers, George Birkbeck Hill ed., 1891).

109 Isamu Hayakawa, *Obsolete Words and Meanings in Johnson's Dictionary*, 18 LANG. & CULTURE BULL. . 1, 3–4 (2008) (Japan), *available at* http://leo.aichi-u.ac.jp/~goken/bulletin/pdfs/NO18/01HayakawaIpdf.

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").

113 District of Columbia v. Heller, 554 U.S. 570 (2008).

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.[117] Second, the full text of each of these dictionaries is available online, for free, from Google Books.[118] 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)[119]

The Reverend John Ash, a Baptist minister educated at Bristol Baptist College, lived in England from about 1724 until 1779.[120] Although he later received an honorary LL.D. from a university in Scotland, he was not trained as a lexicographer.[121] His two-volume dictionary relied heavily on earlier dictionaries by Nathan Bailey and Samuel Johnson (both of which are discussed below).[122] 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.

118 GOOGLE BOOKS, http://books.google.com (last visited Feb. 13, 2014).

119 JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775), *available at* http://books.google.com/books?id=LDNAAAAAYAAJ (vol. 1), *and* http://books.google.com/books?id=WTFAAAAAYAAJ (vol. 2).

120 *See* 3 THE BIOGRAPHICAL DICTIONARY OF THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE 761 (London, Longman, Brown, Green & Longmans 1844); G.H. Taylor, *The Reverend John Ash, LL.D., 1724–1779*, 20 BAPTIST Q. 4, 4 (1963).

121 *Taylor, supra* note 120, at 4, 11.

122 *Id.* at 12.

sources.[123] 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 . . . .[124]

Second, this dictionary was also one of the first to include marks for stressed syllables.[125] 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.[126]

### 2. NATHAN BAILEY, THE NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (4th ed. 1756)[127]

This dictionary was first published in 1721 and may have been the bestselling dictionary of the eighteenth century.[128] The author of the first three editions was Nathan Bailey, an English schoolmaster who became a professional lexicographer.[129] 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.[130] 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.[131] Samuel Johnson apparently relied on Bailey's definitions when he prepared his dictionary;[132] in turn, Scott relied on and perhaps plagiarized Johnson's dictionary in preparing subsequent edi-

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123 *Id.*

124 1 ASH, *supra* note 119, at A2.

125 Taylor, *supra* note 120, at 12.

126 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 537 (1952).

127 NATHAN BAILEY, THE NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, T. Waller, 4th ed. 1756), *available at* http://books.google.com/books/?id=HXQSAAAAIAAJ.

128 *See* SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 44, 46 (1984) (estimating that Bailey's dictionary was more popular than Samuel Johnson's).

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.[133] 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."[134] Members of the Supreme Court have cited the dictionary in several opinions, apparently preferring the 26th edition published in 1789.[135]

### 3. BARCLAY'S UNIVERSAL ENGLISH DICTIONARY (1792)[136]

This dictionary was first published in 1774.[137] The Reverend James Barclay, the original editor, was a clergyman in Edmonton, England and a schoolmaster.[138] He did not claim comprehensiveness in definitions but expressed hope that his book would serve a didactic purpose.[139] 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.[140] Barclay also claimed to be one of the first lexicographers to identify synonyms.[141] 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.[142] Justice Thomas has cited this dictionary.[143]

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133 *See* GREEN, *supra* note 61, at 235.

134 *See* BAILEY, *supra* note 127 (defining "impeachable" and "misdemean" in non-legal senses but not defining impeachment or misdemeanor); *see also* U.S. CONST. art. II, § 4 (using the terms "impeachment" and "misdemeanors").

135 *See, e.g.*, Utah v. Evans, 536 U.S. 452, 475 (2002) (citing the twenty-sixth edition published in 1789); *id.* at 492 (Thomas, J., concurring in part and dissenting in part) (same); INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (same); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 637 (1997) (Thomas, J., dissenting) (same); United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

136 JAMES BARCLAY, COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J.F. & C. Rivington et al. 1792) [hereinafter BARCLAY's], *available at* http://books.google.com/books/?id=yeUIAAAAQAAJ.

137 M.K.C. MacMahon, *Barclay, James*, *in* 3 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 768–69 (H.C.G. Matthew & Brian Harrison eds. 2004).

138 *See* NICHOLAS HANS, NEW TRENDS IN EDUCATION IN THE EIGHTEENTH CENTURY 112 (Cox & Wyman Ltd., 2d ed. 1966).

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 xliv–xlvii.

141 *See id.* at A3.

142 *See id.* (entry for "Richard I").

143 *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 637–38 n.20 (1997) (Thomas, J., dissenting).

### 4. THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781)[144]

Eighteen editions of this dictionary were printed between 1735 and 1781.[145] 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.[146] The dictionary describes Pardon as a "Gent.,"[147] but further information is unknown.[148] Later editions were revised by unknown authors.[149] The dictionary proclaims that it is "[p]eculiarly calculated for the USE and IMPROVEMENT Of such as are unacquainted with the LEARNED LANGUAGES."[150] Aimed at less scholarly readers,[151] the dictionary does not contain etymologies.[152] The original version of the dictionary had wordy definitions, almost encyclopedic in nature, but these definitions were tightened up in later editions.[153] The dictionary does not appear to have many specialized legal terms; for example, it has an entry for the word "legislator" but not "legislation."[154] Members of the Supreme Court have cited this dictionary in a few cases.[155]

### 5. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792)[156]

This dictionary is the most famous and most cited of all the lexicographic works of the seventeenth century. Samuel Johnson under-

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144 THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Toplis & Bunney, 18th ed. 1781), *available at* http://books.google.com/books?id=xOcIAAAAQAAJ.

145 *See id.* cover page; DeWitt T. Starnes & Gertrude E. Noyes, *Thomas Dyche and William Pardon's* A New General English Dictionary *(1735)*, *in* 2 LEXICOGRAPHY: CRITICAL CONCEPTS 15 (R.R.K. Hartman ed., 2003).

146 *See* DYCHE & PARDON, *supra* note 144, cover page; Starnes & Noyes, *supra* note 145, at 15.

147 *See* DYCHE & PARDON, *supra* note 144, cover page.

148 *See* Starnes & Noyes, *supra* note 145, at 16.

149 *See id.* at 24.

150 DYCHE & PARDON, *supra* note 144, cover page.

151 *See* GREEN, *supra* note 61, at 238.

152 *See* Starnes & Noyes, *supra* note 145, at 17.

153 *See id.* at 24.

154 *See* DYCHE & PARDON, *supra* note 144 (entry for "legislator"); *see also* U.S. CONST. art. I, § 8, cl. 17 (using the term "legislation").

155 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing the 16th edition published in 1777); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 538 (1952) (Frankfurter, J., concurring) (same).

156 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C.

took its compilation in 1746 when he was thirty-eight.[157] At the time, he was a failed school teacher and an impecunious freelance writer for magazines, specializing in news about Parliament.[158] 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.[159] He had no training as a lexicographer,[160] 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.[161] He documented the entries with 116,000 quotations,[162] many taken from Bacon, Milton, Pope, Shakespeare, Spenser, and other notable English literary figures.[163] His definitions are extremely well-written and reveal much about his personality.[164] 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."[165] 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.[166]

### 6. WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1788)[167]

This dictionary is notable because it was the first dictionary published in the United States.[168] It was initially prepared by William

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Rivington et al., 10th ed. 1792), *available at* http://books.google.com/books?id=j-UIAAAAQAAJ.

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").

166 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 428 n.55 (2010) (Stevens, J., concurring in part and dissenting in part) (citing the 4th edition published in 1773); Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting) (citing the 6th edition published in 1785).

167 WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester, 1st Am. ed. 1788), *available at* http://books.google.com/books?id=OpkRAAAAIAAJ.

168 *See* GREEN, *supra* note 61 at 287.

Perry, a Scottish school teacher who was dissatisfied with the pronunciation prescribed in other dictionaries.[169] The American Edition was printed in Massachusetts and was dedicated to the American Academy of Arts and Sciences.[170] 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."[171] The dictionary was especially popular in America, and is said to have influenced New England pronunciation.[172] 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.[173]

### 7. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1790) (2 volumes)[174]

Thomas Sheridan, an actor and stage manager, published the first edition of this dictionary in 1780.[175] An expert on elocution, he sought to revise spelling and include an accurate guide to pronunciation.[176] Previous dictionaries attempted to show how to pronounce words by adding accent marks and diacritics to the headword of each entry.[177] Sheridan invented the modern style of dictionaries of spelling headwords in an ordinary manner and then following them with a phonetic spelling,[178] which Sheridan explained in considerable depth at the start of the first volume of his dictionary.[179] For example, the entry for Monday in William Perry's pronouncing dictionary begins with "Món'dāy,"[180] while the corresponding entry in Sheridan's dictionary

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169 *See* Massimo Sturiale, *Prescriptivism and 18th-Century Bilingual Dictionaries: William Perry's* The Standard French and English Pronouncing Dictionary *(1795)*, *in* PERSPECTIVES ON PRESCRIPTIVISM 181, 183–84 (Joan C. Beal et al. eds., 2008).

170 *See* PERRY, *supra* note 167, title page.

171 *See id.*

172 *See* Sturiale, *supra* note 169, at 183.

173 *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3063 n.2 (2010) (Thomas, J., concurring) (citing PERRY, *supra* note 167).

174 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly, 3d ed. 1790), *available at* http://books.google.com/books?id=pBFJAAAAcAAJ (vol. 1), *and* http://books.google.com/books?id=pJoRAAAAIAAJ (vol. 2).

175 Thomas Sheridan, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/540058/Thomas-Sheridan (last visited Jan. 17, 2014).

176 *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.").

177 *See, e.g.*, JOHNSON, *supra* note 156.

178 *See* LANDAU, *supra* note 128, at 57.

179 *See* 1 SHERIDAN, *supra* note 174, at i–liv.

180 PERRY, *supra* note 167 (entry for "Monday").

begins with "MONDAY, mún'- 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]

### 8. JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (1791)[184]

John Walker was an English actor and teacher and a friend of Samuel Johnson and Edmund Burke.[185] He produced both a rhyming dictionary and this pronouncing dictionary.[186] 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.[187] But Walker's method of indicating how to say words and the accuracy of the individual descriptions is considered superior.[188] 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,

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181 2 SHERIDAN, *supra* note 174 (entry for "Monday"). Sheridan explains that "ú 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.

183 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 584 (2008) (citing the 6th edition published in 1796); Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (same).

184 JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (London, G.G.J. & J. Robinson, & T. Cadell, 1791), *available at* http://books.google.com/books?id=DaURAAAAIAAJ.

185 *See John Walker*, 28 ENCYCLOPEDIA BRITANNICA 272 (11th ed. 1911).

186 *See id.*

187 WALKER, *supra* note 184, preface.

188 TETSURO HAYASHI, THE THEORY OF ENGLISH LEXICOGRAPHY 1530–1791, at 127–28 (1978).

in obedience to Walker's admonitions in 1791 against the "slurring" of unaccented syllables.[189]

The Supreme Court has cited Walker's dictionary in several cases.[190]

### 9. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)[191]

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

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189 LANDAU, *supra* note 128, at 58–59.

190 *See, e.g.*, Austin v. United States, 509 U.S. 602, 614 n.7 (1993); Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting); Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting).

191 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828), *available at* https://archive.org/stream/americandictiona01websrich#page/n7/mode/2up. An abridged version of the original 1828 edition was published in 1830 and is available on Google Books. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse, 3d ed. 1830), *available at* http://books.google.com/books/?id=9ZUVAAAAYAAJ.

192 *See* GREEN, *supra* note 61, at 308.

193 *See id.* at 307–08.

194 *See id.* at 308.

195 *See* LANDAU, *supra* note 128, at 59.

196 *See* GREEN, *supra* note 61, at 309.

197 *See id.* at 312.

198 *See id.* at 318.

199 *See id.*

200 *See id.* at 317.

201 *See* LANDAU, *supra* note 128, at 61.

202 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The search term "webster /5 dictionary /5 1828" yields twenty-seven cases in Westlaw's SCT database.

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

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203 WEBSTER, *supra* note 191, at 179 (1830 abridged edition) (entry for "congress").

204 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (London, A. Strahan & W. Woodfall 1792), *available at* http://books.google.com/books?id=LoxRAAAAYAAJ.

205 *See* Norma Landau, *Burn, Richard, in* 8 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 879 (H.C.G. Matthew & Brian Harrison eds. 2004).

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).

208 J.G. MARVIN, LEGAL BIBLIOGRAPHY, OR A THESAURUS OF AMERICAN, ENGLISH, IRISH, AND SCOTCH LAW BOOKS 163 (Philadelphia, T. & J. W. Johnson 1847).

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.[210]

### 2. TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1764) (two volumes)[211]

Timothy Cunningham lived in London at Gray's Inn and wrote a large number of law books, especially on commercial law.[212] 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.[213] 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."[214] This definition would not provide much aid in determining questions such as whether the prohibitions on ex post facto laws[215] apply to both civil and criminal legislation. The first edition was published in 1764 and the third and final edition was published in 1783.[216]

### 3. GILES JACOB, A NEW LAW DICTIONARY (6th ed. 1750)[217]

Giles Jacob was born in 1686.[218] He was a prolific author, heavily influenced by Locke.[219] Although Alexander Pope denigrated the quality of Jacob's work,[220] his law dictionary was very successful. Jacob asserted that two-thirds of the material in the first edition, pub-

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210 *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).

211 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, S. Crowder et al. 1764) (two volumes), *available at* http://books.google.com/books?id=Y580AQAAMAAJ (vol. 1), *and* http://books.google.com/books?id=spc0AQAAMAAJ (vol.2).

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).

213 *See id.*

214 1 CUNNINGHAM, *supra* note 211 (entry for "ex post facto").

215 *See* U.S. CONST. art. I, §§ 9, 10.

216 *See* Clerke & Marchand, *supra* note 212.

217 GILES JACOB, A NEW LAW DICTIONARY (The Savoy, Henry Lintot, 6th ed. 1750), *available at* http://books.google.com/books?id=zdED1S0lCoAC.

218 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).

219 *Id.* at 270–74.

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.*

lished in 1729, was entirely new.[221] 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."[222] In addition to defining terms, Jacob also sought to provide a summary or "abridgment" of the law.[223] The entry on "usury," for instance, occupies three columns and discusses substantive rules prevailing in England.[224] Subsequent editions were published after Jacob's death.[225] Members of the Supreme Court have cited various editions of this dictionary.[226]

### 4. THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY (1803)[227]

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.[228] His law dictionary, first published in 1803,[229] 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.[230] 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.

226 *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) (citing the 10th edition published in 1782); Rothgery v. Gillespie Cnty., 554 U.S. 191, 221 (2008) (Thomas, J., dissenting) (citing the edition published in 1811).

227 THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY (London, T. Ostell 1803), *available at* http://books.google.com/books?id=4rQ3AQAAMAAJ.

228 *See* G. Le G. Norgate & Elizabeth Baigent, *Potts, Thomas*, *in* 45 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 44–45 (H.C.G. Matthew & Brian Harrison eds. 2004).

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]

231 *Id.* at 65.

232 United States v. Hubbell, 530 U.S. 27, 50 (2000) (Thomas, J., concurring).